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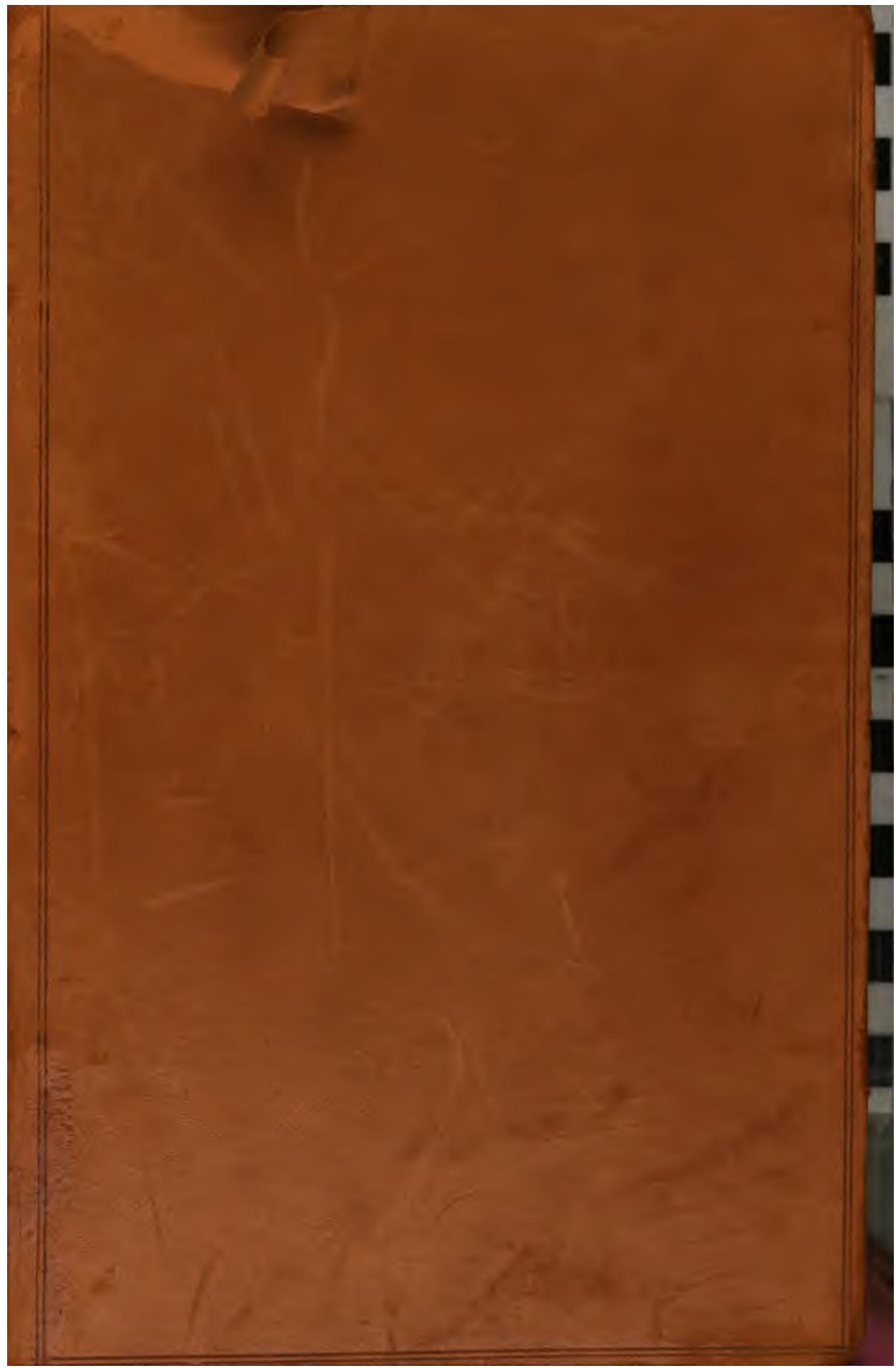
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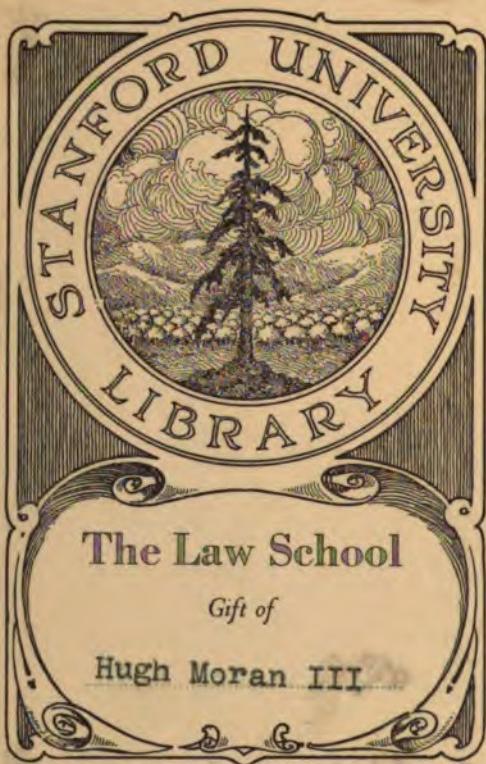
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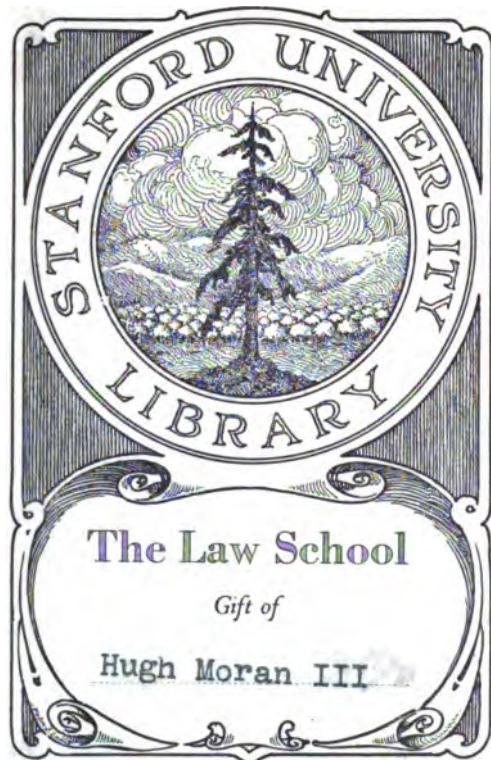


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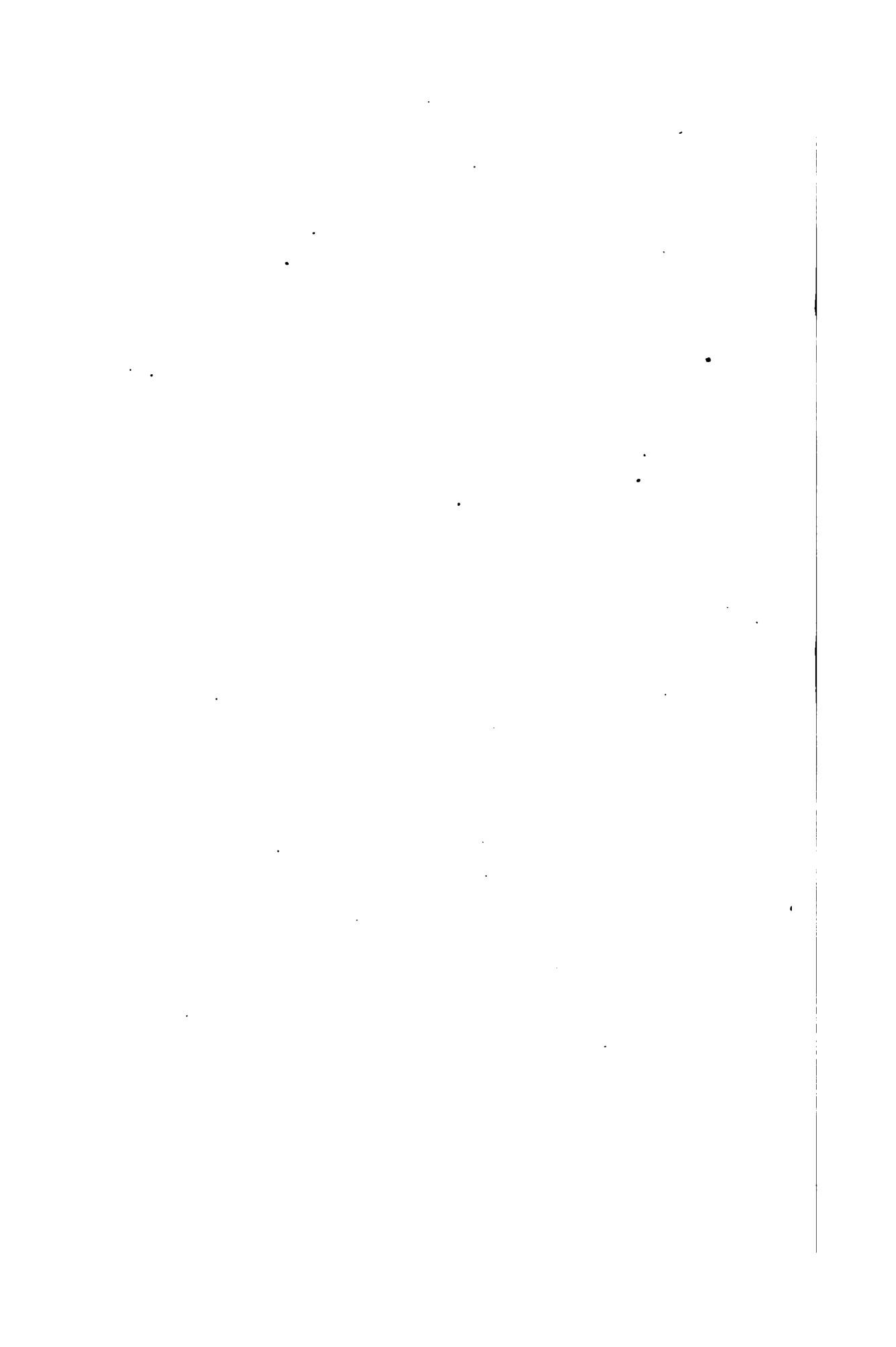
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THE
LAW OF CONTRACTS.

BY

THEOPHILUS PARSONS, LL.D.,

AUTHOR OF TREATISES ON THE ELEMENTS OF MERCHANTILE LAW, ON THE LAW OF SHIPPING AND
ADMIRALTY, ON MARINE INSURANCE, ON PARTNERSHIP, ON NOTES AND BILLS,
AND ON THE LAWS OF BUSINESS FOR BUSINESS MEN.

VOLUME II.

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WITH ADDITIONS BY

WILLIAM V. KELLEN.

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PART I.

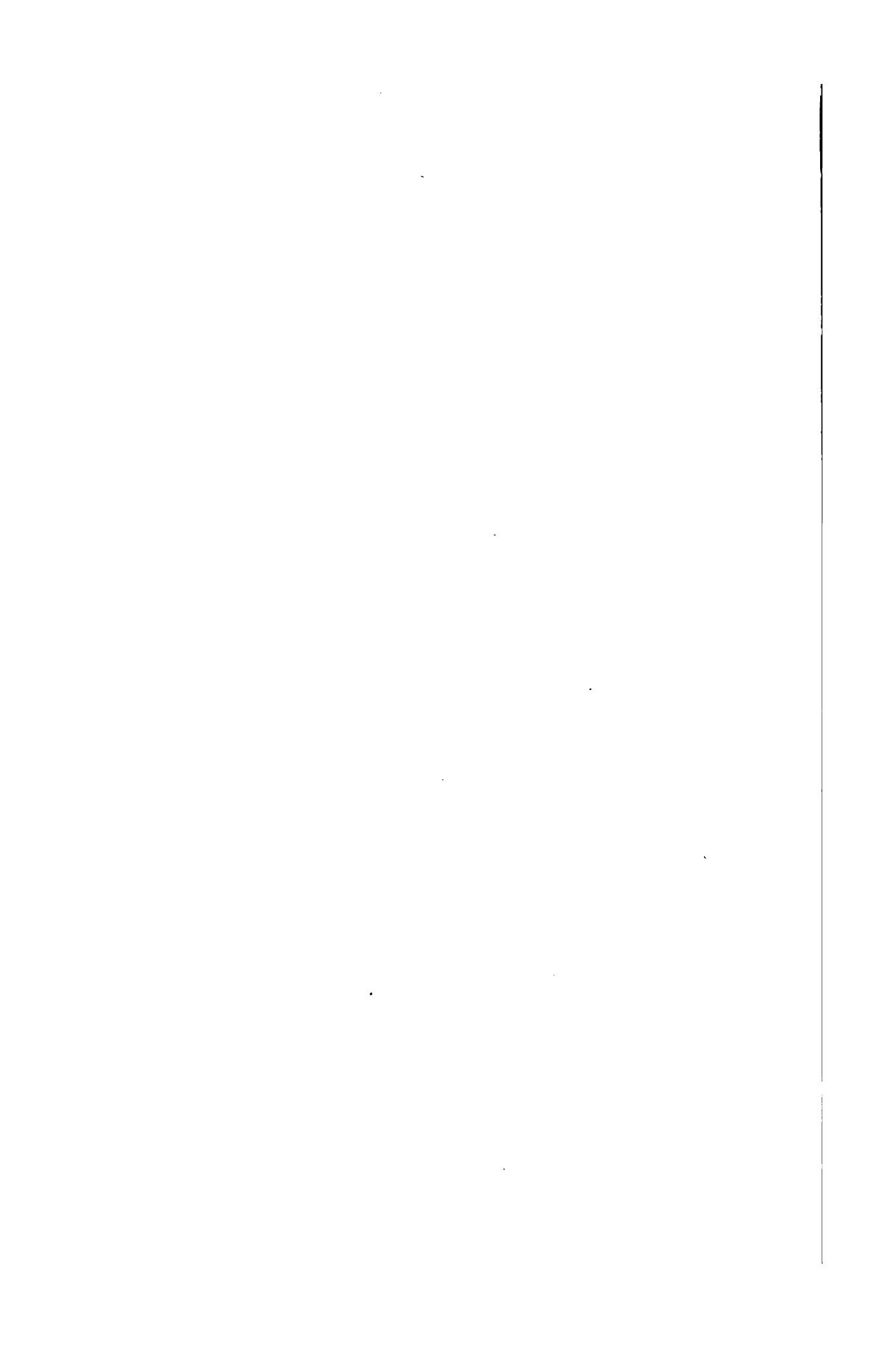
THE LAW OF CONTRACTS

CONSIDERED IN REFERENCE TO

THE OBLIGATIONS

ASSUMED BY

THE PARTIES — CONTINUED.



THE LAW OF CONTRACTS.

CHAPTER VII.

GUARANTY OR SURETYSHIP.

SECT. I.—*What is a Guaranty.*

ORIGINALLY, the words warranty and guaranty were the same; the letter *g*, of the Norman French, being convertible with the *w* of the German and English, as in the names William or Guillaume. They are now sometimes used indiscriminately; but, in general, warranty is applied to a contract as to the title, quality, or quantity of a thing sold, which we have already considered under the head of sales; and guaranty is held to be the contract by which one person is bound to another, for the due fulfilment of a promise or engagement of a third party.¹ And this we shall now consider.

In general, a guaranty is not negotiable, nor in any way transferable, so as to enable an action to be maintained upon it by any other person than him with whom the contract is made. (*a*)²

(*a*) *True v. Fuller*, 21 Pick. 140; *Tyler v. Binney*, 7 Mass. 479; *Lamourieux v. Mart.* (La.) 682; *Upham v. Prince*, 12 *Hewett*, 5 Wend. 307; *Springer v. Hutchinson*, 14 Mass. 14; *Miller v. Gaston*, 2 Hill (N. Y.), 19; *Yeomans, 19 Ma. 359*; *McDoal v. Yeomans*, 188; *Watson v. McLaren*, 19 Wend. 557;

¹ As to the difference between guaranty and suretyship, see *McMillan v. Bull's Head Bank*, 32 Ind. 11.—A guaranty of collection is to the effect that a debt can be collected if an action is brought with due diligence, the debtor's insolvency in some cases excusing a failure so to do. *Stone v. Rockefeller*, 29 Ohio St. 625; *Aldrich v. Chubb*, 85 Mich. 350; *Brackett v. Rich*, 23 Minn. 485; *Evans v. Bell*, 45 Tex. 553.—Two joint debtors cannot, by an agreement between themselves and without the assent of their creditor, make one the surety of the other instead of a principal joint debtor, so as to deprive the creditor of his right to treat them both as principal debtors. *Swire v. Redman*, 1 Q. B. D. 536.

² If a person can enforce the principal debt, he can enforce a guaranty of it. *Craig v. Parkis*, 40 N. Y. 181; *Clafin v. Ostrom*, 34 N. Y. 581. In Iowa and Michigan, a guaranty is negotiable, and the assignee may sue in his own name. *First Bank v. Carpenter*, 41 Ia. 518; *Waldron v. Harring*, 28 Mich. 493.—A letter of credit is not negotiable. *Roman v. Serna*, 40 Tex. 306.

* 4 * It is a promise to pay the debt of another; but the guarantor may be held, although no suit could be maintained upon the original debt; and such guaranty may have been required for the very reason that the original debt could not be enforced at law; as where the guarantor promises to be responsible for goods to be supplied to a married woman, (b) or to be sold to an infant, not being necessaries. (c) But where the original debt is not enforceable at law, the promise to be responsible for it is considered, for some purposes, as direct and not collateral; as, in fact, the original promise. (d) But if an infant purchase necessities, and give a promissory note signed by himself, and by another as surety, who pays the note, such surety can recover the amount so paid, of the infant. (e)¹ In general, the liability

Tuttle *v.* Bartholomew, 12 Met. 452; Taylor *v.* Binney, 7 Mass. 479; Ten Eyck *v.* Brown, 4 Chand. 151; Tinker *v.* McCauley, 3 Mich. 188. Although the instrument may be in the form of a guaranty, yet if it contain in itself all the elements of a negotiable promissory note, it is then negotiable. See Ketchell *v.* Burns, 24 Wend. 456. In this case, the instrument was as follows: "For and in consideration of thirty-one dollars and fifty cents received of B. F. Spencer, I hereby guarantee the payment and collection of the within note to him or bearer. Auburn, Sept. 25, 1837." (Signed) Thomas Burns. And it was held negotiable. In Reed *v.* Garvin, 12 S. & R. 100, it was held, that a guaranty given by the assignor of a bond runs with it into whose-soever hands it may come, and the guarantor cannot be a witness. See McLaren *v.* Watson, 26 Wend. 425; Adams *v.* Jones, 12 Pet. 207; Walton *v.* Dodson, 3 C. & P. 163; Bradley *v.* Cary, 8 Greenl. (Bennett's ed.) 234; Phillips *v.* Bateman, 16 East, 356. If a guaranty is directed to a particular house, by name, and another house advance goods upon it, they have no claim upon the guarantor. Bleeker *v.* Hyde, 3 McLean, 279; Grant *v.* Naylor, 4 Cranch, 224; contra, see McNaughton *v.* Conkling, 9 Wis. 317. And if the letter of guaranty is addressed to two persons and received and acted upon by one only, the guarantor is not bound. Smith *v.* Montgomery, 3 Tex. 199; Myers *v.* Edge, 7 T. R. 254. But where the guaranty is

addressed to no person in particular it may be acted upon by any one, and if such appear to be the intention of the parties, goods may be furnished by several different dealers on the faith of the guaranty. Lowry *v.* Adams, 22 Vt. 160. And in Vermont it would seem that a guaranty is negotiable. Partridge *v.* Davis, 20 Vt. 499.

(b) See Maggs *v.* Ames, 4 Bing. 470; Connerat *v.* Goldsmith, 6 Ga. 14.

(c) See Conn *v.* Coburn, 7 N. H. 368.

(d) Harris *v.* Huntbach, 1 Burr. 373, and Reid *v.* Nash, there cited. See also Buckmyr *v.* Darnall, 2 Ld. Raym. 1085.

(e) Conn *v.* Coburn, 7 N. H. 368. In such case, the cause of action arises when the surety pays the note. Upon the point whether such undertaking by the surety is original or collateral, Parker, J., observed: "It is very clear that this note cannot be regarded as an extinguishment of the debt of Coburn, so as to make him immediately liable to the plaintiff upon the giving of the note. The debt arose by the purchase and execution of the note. That was the contract, that he should have the goods on giving the note. The giving of a note, by an infant, for a debt due for necessaries, does not cancel that debt, unless the note be paid (3 N. H. 348); and the giving of such a note, with a surety, certainly does not furnish evidence that the creditor intended to discharge the infant from all responsibility on account of the demand due him by reason of the articles furnished. If the infant is not liable on the

¹ A surety upon an infant's notes for the purchase-money of chattels, who has paid a judgment upon the notes, and received from the infant a note for the sum so paid secured by a mortgage of the chattels, was held entitled to hold the chattels against a subsequent purchaser from the infant with knowledge of the mortgage, in Knaggs *v.* Green, 48 Wis. 601.

* of the guarantor is measured by that of the principal, and * 5 will be so construed, unless a less or a larger liability is expressly assumed by the guarantor; as if he guaranteed payment of a note by an indorser, whether the indorser were notified or not.

No special words, or form, are necessary to constitute a guaranty. If the parties clearly manifest that intention, it is sufficient; and if the guaranty admits of more than one interpretation, and the guaranteee has acted to his own detriment with the assent of the other party, as by advancing money, on the faith of one interpretation, that will prevail, although it be one which is most for the interest of the guaranteee. (f) Still the contract is construed, if not strictly, accurately, (g)¹ and a guaranty of the notes or debts of one, not only does not extend to his notes given jointly with another, (h) but if that one varies his business so as to change his liability from that which it was intended to guaranty, it would seem that the guarantor is discharged. (i) And the

note, as he would not be if he elected to avoid such liability, as assumeit upon the delivery of the goods must be considered as subsisting against him, and the note of the surety be regarded as a collateral security for the payment. In this case nothing was paid at the time by the plaintiff. He only became surety for the payment. That was the contract as agreed to by all the parties. Had the plaintiff given his sold note, the case might have been different. He would then have assumed the whole liability, by the terms of the agreement, and the goods have been delivered entirely upon his credit. The defendant would have had no further concern with it, and no right to interfere. But that was not the case here. The defendant had the right to pay and take up the note given by himself and the plaintiff, and he had this right only because he was in fact a debtor. He most unquestionably had a right to pay a note upon which he was a promisor. Suppose he had paid, whose debt would he have discharged? If the plaintiff's debt, then he must have had a claim against the plaintiff. But no such

claim could have arisen upon such payment. If he had paid, then he would have discharged his own debt. But how could this be, if his debt had been paid by the giving of the note itself? Had the defendant paid the note, no right of action would ever have accrued to the plaintiff against him. Under such circumstances there is no ground for the position that the giving of the note was of itself a payment of the defendant's debt, so that a cause of action arose immediately to the plaintiff upon its execution; and the jury were correctly instructed that the cause of action arose when the defendant paid the money." *Clark v. Foxcraft*, 7 Greenl. 348.

(f) *Bell v. Bruen*, 1 How. 186; *Lawrence v. McCalmont*, 2 id. 449; *Tatum v. Bonner*, 27 Miss. 760.

(g) *Bigelow v. Benton*, 14 Barb. 123; *Ryan v. Trustees*, 14 Ill. 20; *Fisher v. Cutter*, 20 Mo. 206.

(h) *Russell v. Perkins*, 1 Mason, 368.

(i) *Id.*; *Wright v. Russell*, 3 Wils. 530; s. c. 2 W. Bl. 934; *Dry v. Davy*, 10 A. & E. 30.

¹ The liability of a surety is limited to the express terms of the contract, *Mix v. Singleton*, 86 Ill. 194; the terms of which should be construed strictly and favorably to him, *Ward v. Stahl*, 81 N. Y. 406. *Stull v. Hanse*, 62 Ill. 52, was to the effect that a doubt is generally, if not universally, solved in favor of a surety.—A guaranty to pay in case the holder "fails to recover" on a note, means a failure, after diligently prosecuting the maker. *Jones v. Ashford*, 79 N. C. 172.—The placing a seal on a guaranty changes neither its nature nor construction. *Jordan v. Dobbins*, 122 Mass. 168. See further, as to construction, *In re N. Y. Cent. R. Co.* 49 N. Y. 414; *Palmer v. Foley*, 71 N. Y. 106; *Belloni v. Freeborn*, 63 N. Y. 383; *Birdsall v. Heacock*, 32 Ohio St. 177; *Montgomery v. Hughes*, 65 Ala. 201.

guarantor who pays the debt of his principal is entitled to all the securities of the creditor, who must preserve them unimpaired; (*j*)¹ and equity will restrain a guaranteee from enforcing his guaranty, until he has done what is * necessary to turn these securities to account, if he alone can do this. (*k*) And if the creditor gives up any security for his debt without the guarantor's consent, he must account to the guarantor for it. (*kk*) So if the creditor agree with the principal that the debt shall be reduced or abated in a certain proportion, the guarantor consenting, he cannot hold the whole of the original guaranty, but must permit that to be abated or reduced in the same proportion. (*l*)² But after the guarantor has paid the debt, he has no right to demand an assignment to himself of the debt, or of the instrument which creates or expresses the debt, if a promissory note, bond, or the like, for the very reason that the debt, and with it the instrument, has been discharged, and so made of no effect. (*m*)³

(*j*) *Craythorne v. Swinburne*, 14 Ves. 162; *Parsons v. Bridgcock*, 2 Vern. 608; *Wright v. Moreley*, 11 Ves. 12; *Copis v. Middleton, Turn. & R.* 224; *Hodgson v. Shaw*, 3 Myl. & K. 183; *Yonge v. Reynell*, 15 E. L. & E. 237; s. c. 9 Hare, 809; *McDaniels v. Flower Brook Manf. Co.* 22 Vt. 286; *Grove v. Brien*, 1 Md. 438; *Mathews v. Aikin*, 1 Comst. 595; *Watson v. Alcock*, 19 E. L. & E. 239; *Strong v. Foster*, 33 E. L. & E. 282; s. c. 17 C. B. 201; *Pearl St. Cong. Soc. v. Inlay*, 23 Conn. 10. In *Chapman v. Collins*, 12 C. B. 163, held, that payment of a note by a principal discharges the surety, so that the note can-

not again be put in circulation against him.

(*k*) *Cotton v. Blane*, 2 Anst. 544; *Wright v. Nutt*, 3 Bro. Ch. 326; s. c. 1 H. Bl. 137; *Wright v. Simpson*, 6 Ves. 728.

(*kk*) *Thames v. Barbour*, 49 Ill. 370.

(*l*) *Bardwell v. Lydell*, 7 Bing. 489.

(*m*) *Copis v. Middleton, Turn. & R.* 224; *Hodgson v. Shaw*, 3 Myl. & K. 183; *Pray v. Maine*, 7 C. B. 253. But see *Low v. Blodgett*, 1 Foster (N. H.), 121; *Good-year v. Watson*, 14 Barb. 486; *Edgerly v. Emerson*, 6 Foster (N. H.), 557; *Alden v. Clark*, 11 How. Pr. 209.

¹ *York v. Landis*, 65 N. C. 535; *Price v. Trusdell*, 1 Stewart, 200. Thus a surety paying a mortgage note is entitled not only to the benefit of the mortgage, but to the surplus, if any, remaining from a sale of the mortgaged property under a prior mortgage. *Ottawa Bank v. Dudgeon*, 65 Ill. 11. See *Hall v. Hoxsie*, 84 Ill. 616. *Guild v. Butler*, 127 Mass. 386, states the rule to be, that a surety is entitled, in equity, to the benefit of any collateral security received by the creditor from the principal debtor; and if the creditor, knowing the relation between the debtors, surrenders part of such security, without the consent of the surety, the surety is exonerated to the amount so surrendered, although the relation of the debtors does not appear on the face of the debt, and first became known to the creditor after the debt was contracted; and that one who makes a promissory note for the accommodation of another is a surety, within this rule, and may avail himself of this equity in defence of an action at law against himself.

² Where a surety agrees to be liable for a part only of a debt, he may deduct a ratable proportion, reckoned on such part, of all dividends paid on the entire debt, and a continuing guaranty, limited in amount, made to secure a floating balance, is *prima facie*, at least, an agreement of liability for part only of the ascertained debt; but a guaranty, limited in amount, made to secure the entire debt, is entitled to no such deduction. *Ellis v. Emmanuel*, 1 Ex. D. 157.

³ In New York, a surety is, however, entitled to such an assignment as well as of collateral security. *Ellsworth v. Lockwood*, 42 N. Y. 89; *Hinckley v. Kreitz*, 58 N. Y. 583, 591.

It should be added, that unless the conditions of a guaranty are strictly complied with by the party to whom it was given, the guarantor will not be bound. (n)

SECTION II.

OF THE CONSIDERATION.

Although the promise to pay the debt of another be in writing,¹ it is nevertheless of no force unless founded upon a consideration. (o)² It is itself a distinct contract, and must rest * upon its own consideration; but this consideration may be * 7 the same with that on which the original debt is founded, for which the guarantor is liable. The rule of law is this: if the original debt or obligation is already incurred or undertaken previous to the collateral undertaking, then there must be a new and

(n) *Leeds v. Dunn*, 10 N. Y. (6 Seld.) 469.

(o) *Wain v. Warlters*, 5 East, 10; *Elliott v. Giese*, 7 Har. & J. 457; *Leonard v. Vredenburgh*, 8 Johns. 29; *Bailey v. Freeman*, 4 id. 280; *Clark v. Small*, 6 Verg. 418; *Aldridge v. Turner*, 1 G. & J. 427; *Neelison v. Sanborne*, 2 N. H. 414; *Tenny v. Prince*, 4 Pick. 385; *Cobb v. Page*, 17 Penn. St. 469. For the law will not, as a general rule, imply a consideration from the fact that the agreement was in writing. *Dodge v. Burdell*, 13 Conn. 170; *Cutler v. Everett*, 33 Me. 201. Forbearance, however, is a good consideration for the guaranty. *Sage v. Wilcox*, 6 Conn. 81; *Russell v. Babcock*, 14 Me. 188; *Oldershaw v. King*, 2 Hurl. & N. 517. And if the guaranty is given contemporaneously

with the original debt, no other consideration is necessary. *Bailey v. Freeman*, 11 Johns. 221; *Hunt v. Adams*, 5 Mass. 358; *Wheelwright v. Moore*, 2 Hall, 143; *Reband v. De Wolf*, 1 Paine, C. C. 580. So where the guaranty of a note is made at the same time with its transfer, the transfer is a sufficient consideration to support the guaranty. *How v. Kemball*, 2 McLean, 103; *Gilligham v. Boardman*, 29 Me. 79. See *Brown v. Curtiss*, 2 Comst. 225. But a guaranty of payment of a pre-existing promissory note, where the only consideration is a past benefit or favor conferred, and without any design or expectation of remuneration, is without sufficient consideration and cannot be enforced. *Ware v. Adams*, 24 Me. 177.

¹ An oral agreement of suretyship is void. *Ingersoll v. Baker*, 41 Mich. 48; *Bonine v. Denniston*, ib. 292.

² To the point *supra*, that forbearance is a good consideration, see *Hockenbury v. Myers*, 5 Vroom, 346; *Calkins v. Chandler*, 36 Mich. 320. See also *Briggs v. Downing*, 48 La. 550. An agreement, which is carried out, to withdraw a suit against the maker of a note, is a sufficient consideration for a guaranty. *Worcester Bank v. Hill*, 113 Mass. 25.—To the point *supra*, that a contemporaneous guaranty, as of an award, executed at the same time with a submission, is on good consideration, see *Wood v. Tunnicliff*, 74 N. Y. 38. A guaranty, although without consideration, is not void as against an innocent holder without notice, *Parkhurst v. Vail*, 73 Ill. 343; *Clopton v. Hall*, 51 Miss. 482; as a transfer by a corporation of bonds guaranteed by it, though *ab initio* void and failing to express the true consideration, to a purchaser for value, *Arnot v. Erie R. Co.* 67 N. Y. 315.

distinct consideration to sustain the guaranty. (*p*)¹ But if the original debt or obligation be founded upon a good consideration, and at the time when it is incurred or undertaken, or before that time, the guaranty is given and received, and enters into the inducement for giving credit or supplying goods, then the consideration for which the original debt is incurred, is regarded as a consideration also for the guaranty. (*q*) It is not necessary that any consideration pass directly from the party receiving the guaranty to the party giving it. If the party for whom the guaranty is given receive a benefit, or the party to whom it is given receive an injury, in consequence of the guaranty and as its inducement, this is a sufficient consideration. (*r*)

Wherever any fraud exists in the consideration of the contract of guaranty, or in the circumstances which induced it, the contract is entirely null. As where a guaranty was given for the price of a large amount of iron, and it was proved that the buyer by arrangement with the seller paid something more than the fair price,

* 8 which addition was to go towards the * payment of an old debt, the contract was not enforced as to so much of the price as would have been fair, but was set aside as altogether defeated by the fraud. (*s*)²

(*p*) *Rabaud v. De Wolf*, 1 Paine, C. C. 580; *Pike v. Irwin*, 1 Sandf. 14; *Eldeer v. Warfield*, 7 Har. & J. 391; *Ware v. Adams*, 24 Me. 177; *Parker v. Barker*, 2 Met. 423; *Anderson v. Davis*, 9 Vt. 136; *Blake v. Parlin*, 22 Me. 395; *Bell v. Welch*, 9 C. B. 154.

(*q*) *Bainbridge v. Wade*, 1 E. L. & E. 296; s. c. 16 Q. B. 89; *Campbell v. Knapp*, 15 Penn. St. 27; *Klein v. Courier*, 14 Ill. 237; *Bickford v. Gibbe*, 8 Cush. 156; *Leonard v. Vredenburgh*, 8 Johns. 29; *Graham v. O'Neil*, 2 Hall, 474; *Conkey v. Hopkins*, 17 Johns. 113; *Gardiner v. Hopkins*, 5 Wend. 23; *Rabaud v. De Wolf*, 1 Paine, C. C. 580. See *How v. Kemball*, 2 McLean, 103; *Kurtz v. Adams*, 7 Eng. (Ark.) 174.

(*r*) *Bickford v. Gibbe*, 8 Cush. 156; *Morly v. Boothby*, 3 Bing. 113, *Best*, C.

J.; *Leonard v. Vredenburgh*, 8 Johns. 29. In this case, A applied to B for goods on credit, and B refused to let him have them without security, on which A drew a promissory note for the amount, under which C wrote: "I guarantee the above," and the goods were then delivered. *Held*, that this was a collateral undertaking of C; but that, as the transaction was one and entire, the consideration passing between A and B was sufficient to support as well the promise of C as that of A, and no distinct consideration passing between B and C was necessary.

(*s*) *Jackson v. Duchaire*, 3 T. R. 551; *Pidcock v. Bishop*, 3 B. & C. 605; s. c. 5 Dow. & R. 505. And *Bayley*, J., in that case thus laid down the law: "It is the duty of a party taking a guaranty to put the surety in possession of all the facts

¹ *Good v. Martin*, 95 U. S. 90; *McNaught v. McClaughry*, 42 N. Y. 22; *Parkhurst v. Vail*, 73 Ill. 343. As signing a note as surety after the delivery of the note, *Clopton v. Hall*, 51 Miss. 482.

² A surety who becomes such in consequence of fraudulent answers of the guarantee to his inquiries about the financial condition of the party guaranteed is not bound, *Remington Sewing Machine Co. v. Kezertee*, 49 Wis. 409; nor is one induced to sign a note as a surety in the belief that two former parties were principals, one of whom was in fact a surety, liable for contribution as a co-surety, when such former surety pays the note, *Bobbitt v. Shryer*, 70 Ind. 513. See *Booth v. Storrs*, 75 Ill. 438.

* SECTION III.

* 9

WHETHER A PROMISE IS ORIGINAL OR COLLATERAL.

It often happens that what appears to be a promise to pay the debt of another is not in writing, but is nevertheless enforced by the courts on the ground that it is an original promise, and not a collateral one, and therefore not within the requirement of the statute of frauds. (*t*)¹ The question what are the circumstances

likely to affect the degree of his responsibility; and if he neglect to do so, it is at his peril. . . . The plaintiff, when he accepted the guaranty, knew that Tickell was to pay him not only the market price of the iron, but ten shillings per ton on the iron provided, in extinction of an old debt. The concealment of that fact from the knowledge of the defendant was a fraud upon him, and avoids this contract. Where by a composition deed the creditors agree to take a certain sum in full discharge of their respective debts, a secret agreement by which the debtor stipulates with one of the creditors to pay him a larger sum, is void, upon the ground that the agreement is a fraud upon the rest of the creditors. So that a contract which is a fraud upon a third person may, on that account, be void as between the parties to it. Here the contract to guarantee is void, because a fact materially affecting the nature of the obligation created by the contract was not communicated to the surety." See also *Stone v. Compton*, 5 Bing. N. C. 142; *Franklin Bank v. Cooper*, 36 Me. 179; *Selser v. Brock*, 3 Ohio St. 302. So it was held, in *Evans v. Keeland*, 9 Ala. 42, that a surety may avoid his contract for a fraudulent concealment or misrepresentation of facts by the creditor, to induce him to become surety, although the contract for which he was bound as surety, is binding on his principal. But it was held in the same case, that a misrepresentation which will have this effect, must be the false assertion of a fact, and not the expression of an opinion of the value or quality of the property sold. Thus a declaration by the vendor that the land he was selling was as good or better than other tracts to which he referred; that there was a comfortable dwelling-house, good outhouses, peach or-

chards, &c., on the land, is the expression of an opinion, and not the assertion of a fact, the incorrectness or falsehood of which would enable the surety to avoid his contract. So in *Martin v. Striblin*, 1 Speers, 23, it was held, that it is no discharge of a surety that he expected, when he signed as surety, that a third person would also sign as surety, and that such third person would receive from the principal certain books and papers as an indemnity for the suretyship; unless it is shown that the surety stipulated that the paper should not have effect until one or both of such things were done, or that the signature of the surety was obtained by means of a fraudulent representation that such third person would sign the notes, and that the principal would place in such third person's hands his books and papers, to be by him collected and applied in payment of the debt. And in *Graves v. Tucker*, 10 Sm. & M. 9, it was decided, that a fraud practised by a principal debtor upon his surety, in obtaining the signature of the surety, does not discharge him from his obligation to the obligee of the bond, unless such fraud was with the knowledge or consent of the obligee.—So, where the surety of a note given for property purchased at an administrator's sale when requested by the principal to sign it, was told by the payee that his signature was only wanted as a form to comply with the order of the ordinary, it was held, that no fraud was thereby practised on the surety which could avoid the note as to him. *Smyley v. Head*, 2 Rich. L. 590. See also *Railton v. Mathews*, 10 Cl. & F. 936, and *Hamilton v. Watson*, 12 id. 109; *North British Ins. Co. v. Lloyd*, 28 E. L. & E. 456; s. c. 10 Exch. 523.

(*t*) Thus, in *Allen v. Thompson*, 10 N.

¹ Thus the holder of property charged with the payment of a debt is liable on his promise to pay the creditor, whether in writing or not, *Townsend v. Long*, 77 Penn. St.

least—as a collateral undertaking, and therefore as within the statute of frauds. (w)¹

* 11 * The entry in the books of the seller is often of great importance in determining whether a promise be original or collateral. Being made by the seller, it is of course of far greater weight when against him than when it sustains his claim. Suppose that A promises to pay B, if B will sell goods which C is to receive. The question may occur whether they were sold to A for C's benefit, or to C on the guaranty of A. If, on examination of the books of B, it appears that at the time of the sale he charged the goods to C, as sold to him, it would be almost decisive against B's claim on A as the original purchaser. But if it was found that he had charged the goods to A, it would still be open to A to show that he had no right to do so. It often happens that a seller makes such a charge with a view of enlarging or asserting his rights, on the supposition that this charge will suffice to fix the liability on the person against whom it is made. But it is obvious that such an entry can have no effect, unless the circumstances of the sale show it to be in conformity with the true rights and obligations of the party. Nor would an entry by the seller to one party be absolutely conclusive against his right to claim payment of another as the original purchaser, if he were able to show clearly that the entry was made by mistake to one who was not the buyer, and without any purpose of discharging him who was the buyer. (x)

Whether a contract is collateral or original, may be a question of *construction*, and then it is for the court; but it is often regarded as a question of fact, and then it is for the jury. (y)

(w) *Manrow v. Durham*, 3 Hill (N. Y.), 584; s. c. 2 Comst. 533; *Hall v. Farmer*, 5 Denio, 484; s. c. 2 Comst. 557; *Weed v. Clark*, 4 Sandf. 31; *Spicer v. Norton*, 13 Barb. 542; *Brewster v. Silence*, 11 Barb. 144; s. c. 4 Seld. 207.

(x) In *Matthews v. Milton*, 4 Yerg. 576, it appeared that A and B being in the plaintiffs' store together, A told the plaintiffs he would pay for any article B might take up, and B thereupon purchased several articles, which the plaintiffs charged to A and B. *Held*, that the promise of A was within the statute of frauds, as being a promise to pay the debt of B. *Alio*, if the articles had been charged to A alone, for then it would not

have been B's debt. See also *Gardiner v. Hopkins*, 5 Wend. 23; *Graham v. O'Neil*, 2 Hall, 474; *Porter v. Langhorn*, 2 Bibb, 63; *Flanders v. Crolius*, 1 Duer, 206. But where A requested B to sell goods to C, promising by parol to indorse C's note for the price, it was *held*, that this promise was within the statute of frauds, and therefore void. *Carville v. Crane*, 5 Hill (N. Y.), 483. See also *Conolly v. Kettlewell*, 1 Gill, 260; *Hopkins v. Richardson*, 9 Gratt. 485; *Cutler v. Hinton*, 6 Rand. (Va.) 509; *Leland v. Creyon*, 1 McCord, 100.

(y) See *Sinclair v. Richardson*, 12 Vt. 33; *Flanders v. Crolius*, 1 Duer, 206.

¹ A written guaranty on a negotiable promissory note, though referring to the note, and made at the same time, and the ground of credit to the maker, is void within the

* Sales by a factor, with a guaranty of the price from the * 12 factor to the owner, are common in all commercial countries. In Europe they are commonly called “*del credere*” contracts; and the commission charged by the factor, and intended to cover not only his services in selling, but his risk in insuring the payments, is called a “*del credere* commission,” as we have remarked before; but this phrase is seldom used here, although this kind of contract is very common. It is, in one sense, a promise to pay the debt of another; and it has been said by English courts that it must be in writing. (z) We think, however, that this doctrine would not be held in England now, (a) and so far as the question has been adjudicated in this country, it has been held, as we have already stated, to be an original promise, and therefore enforceable at law, although not in writing. (b) The promisor in fact receives a direct consideration for this precise promise from the promisee.

SECTION IV.

OF THE AGREEMENT AND ACCEPTANCE.

The contract of guaranty, like every other contract, implies two parties, and requires the agreement of both parties to make it valid. In other words, a promise to pay the debt of another is not valid unless it is accepted by the promisee. (c) Language is sometimes used by courts and legists which might seem to mean that there were cases of guaranty which need not be accepted; but this is not accurate; there are cases in which this acceptance is implied and presumed; but there must be * acceptance or assent, expressed or implied, or there * 13 can be no contract. The true questions are, when must

(z) Chitty on Contracts, 196; Gall v. Comber, 1 J. B. Moore, 279.

(b) See *ante*, vol. i. p. *92, note (c).

(a) Since the first edition of this volume was published, the Court of Exchequer *have decided* in *Couturier v. Hastie*, 16 E. L. & E. 562; s. c. 8 Exch. 40, that such agreement by a factor is not within the statute of frauds, as being a promise to answer for the default of another.

(c) *Mozley v. Tinkler*, 1 C. M. & R. 692; *McIver v. Richardson*, 1 M. & Sel. 557. A mere overt or offer to guarantee is not binding unless accepted. Chitty on Cont. 437, n. (1); *Caton v. Shaw*, 2 Har. & G. 13; *Menard v. Scudder*, 7 La. An. 385; *M'Collum v. Cushing*, 22 Ark. 540.

statute of frauds if it fails to express the consideration. *Parry v. Spikes*, 49 Wis. 384, following *Taylor v. Pratt*, 3 Wis. 674.

this acceptance be express and positive, and in what way and at what time must it be made when an express acceptance is necessary. And these questions have sometimes been found to be very difficult. If one goes with a purchaser, and there says to the seller, "furnish him with the goods he wishes, and I will guarantee the payment," and the seller thereupon furnishes the goods, this would be a sufficient acceptance of the guaranty, and a sufficient notice to the guarantor. All the parts of the transaction would be connected, and could leave no doubt as to its character.¹ But if the guaranty were for a future operation, perhaps for one of uncertain amount, and offered by letter, there should then, according to the weight of authority, be a distinct notice of acceptance, and also a notice of the amount advanced upon the

guaranty, unless that amount be the same that is specified
* 14 in the guaranty itself. (d)² The reason of this * is, that

(d) We have already considered this subject somewhat in our chapter on assignment. See vol. i. p. *478. The modern cases have quite generally established the doctrine, that where the proposition to guarantee, or letter of credit, is future in its application, and uncertain in its amount, the guarantor must have notice that his guaranty is accepted, and that goods are delivered upon it. *Lee v. Dick*, 10 Pet. 482; *Adams v. Jones*, 12 Pet. 207; *Norton v. Eastman*, 4 Greenl. (Bennett's ed.) 521; *Tuckerman v. French*, 7 Greenl. (Bennett's ed.) 115; *Kay v. Allen*, 9 Penn. St. 320; *Cremer v. Higginson*, 1 Mason, 323; *Howe v. Nickels*, 22 Me. 175; *Hill v. Calvin*, 4 How. (Miss.) 231; *Taylor v. Wetmore*, 10 Ohio, 490; *Lawson v. Townes*, 2 Ala. 373; *Mussey v.*

Rayner, 22 Pick. 223; *Wildes v. Savage*, 1 Story, 22; *Walker v. Forbes*, 25 Ala. 139; *Bell v. Kellar*, 13 B. Mon. 381. And see *Lowe v. Beckwith*, 14 B. Mon. 187. This notice must be given in a reasonable time after it is accepted. *Id.* Notice of the acceptance is not necessary, however, where the acceptance is contemporaneous with the guaranty. *Wildes v. Savage*, 1 Story, 22; *Bleeker v. Hyde*, 3 McLean, 279. In *New Haven County Bank v. Mitchell*, 15 Conn. 206, where A executed a writing, whereby he agreed with B for value received, that he, A, would, at all times, hold himself responsible to B to a limited amount, for such paper as might be indorsed by C and held by B within the amount specified, without notice to be given to A by B, and

¹ *Thompson v. Glover*, 78 Ky. 193; *Crittenden v. Fiske*, 46 Mich. 70. If the guaranty is definite and absolute in terms, notice is not necessary; as, "I will sign the note with A. for the cow bought of B," *Carman v. Elledge*, 40 Ia. 409; and "If A. purchases a case of tobacco on credit, I agree to see the same paid for in four months," *Case v. Howard*, 41 Ia. 479. And so of a guaranty of an existing liability, as where goods were sold on an oral guaranty, and the guarantor subsequently requested in writing to "give A. a little more time and I will see that you get your money." *Wills v. Ross*, 77 Ind. 1.

² A direct promise to guarantee for future indebtedness requires no notice of acceptance. *Wilcox v. Draper*, 12 Neb. 138; *Kline v. Raymond*, 70 Ind. 271. A guaranty for existing and future indebtedness, "unconditionally at all times," under seal and expressed for a nominal consideration, given to the debtor for delivery to the guarantee, and by him acted upon, requires no notice to the guarantor of acceptance, or of the amount of indebtedness, or of the default of payment, *Davis v. Wells*, 104 U. S. 159; see also *King v. Batterson*, 13 R. I. 117. But notice was held necessary of the acceptance of a guaranty sent by letter to a general purchasing agent, and by him shown to the guarantee. *Clafin v. Briant*, 58 Ga. 414. — Notice of acceptance may be waived, as by a letter recognizing liability on a prior guaranty and promising to make it good. *Farwell v. Sully*, 38 Ia. 387.

the guarantor may know distinctly his liability, and have the means of arranging his relations as he would with the party in whose favor the guaranty is given, and take from him security or indemnity. From the reason of the thing we may state the rule to be, that every guarantor must have this opportunity; and unless the transaction is such that of itself it gives him all the knowledge he needs, at a proper time, then this knowledge must be given him by specific notice. The principle which underlies the whole law of guaranty, is that this contract, like every other, must be known to the parties to it. Still, this knowledge need be only a reasonable knowledge; and we understand the courts which hold that notice of acceptance is not always necessary to mean only, that where an offer to guarantee is absolute, and contains in itself no intimation of desire for specific notice of acceptance, it may be supposed that the offerer has a reasonable

such writing was simultaneously delivered by A and accepted by B, and B on the credit thereof discounted paper indorsed by C; it was held, 1st, that no other acceptance by B or notice thereof to A was necessary to perfect the obligation of A; 2d, that no notice to A of the amount of credit given by B on the paper indorsed by C was necessary, this being expressly dispensed with by the terms of the contract.—Some authorities hold that not only must the guarantor have reasonable notice of the acceptance of his guaranty, but also of the amount of goods delivered upon it, and that payment for the same has been demanded of the original debtor. Howe v. Nickels, 22 Me. 175. And see Union Bank of Louisiana v. Rowman, 9 La. An. 195; Farm. & Mech. Bank v. Kercheval, 2 Mich. 504. So in Clarke v. Remington, 11 Met. 361, R. by his guaranty engaged to pay C. for goods which C. might, from time to time, sell and deliver to D. C. accepted the guaranty, and R. had notice that it was accepted. C. delivered one parcel of goods to D., for which D. seasonably paid. In September, 1842, C. delivered other goods to D.; in March, 1843, took D.'s note therefor, payable in twenty days, which was never paid. In June, 1843, D. was in business, and had property sufficient to pay C. In April, 1844, D. was discharged from his debts under the insolvent laws, but paid no dividend, and C. did not prove his claim against him under the proceedings in insolvency. C. gave R. no notice of the credit which he had given to D., nor

of the state of D.'s accounts with him, nor of D.'s failure to meet his payments, until the 1st of January, 1845, when he demanded payment from R. of the amount due to him from D. Held, that R. was discharged from his liability on the guaranty by C.'s omission to give him reasonable notice of the amount due from D., and of D.'s failure to pay it. See also McGuire v. Newkirk, 1 Eng. (Ark.) 142. In Craft v. Isham, 13 Conn. 28, the facts were, that in April, 1832, A gave B a writing, guaranteeing the payment to B of goods which he should sell to C, to the amount of \$1,000, if C should fail to pay at the end of three years. C was the son-in-law of A, and A daily passed C's store, and occasionally purchased goods there. B furnished C goods, to the amount of about \$1,000, between the said April and November following, on a credit of four months, the last credit expiring on the 10th of March, 1833. In November, 1834, C became insolvent, and never paid for the goods. No notice was at any time given to A of the acceptance of the guaranty by B, nor was any notice given to him of the amount of the debt due from C for the goods, until November, 1835. In an action by B against A on the guaranty, it was held, that the defendant was entitled to notice, within a reasonable time, of the acceptance of the guaranty by the plaintiff, and of the amount of the goods furnished under it, and that the notice given in this case was not within a reasonable time.

knowledge that his guaranty is accepted and acted upon, unless he is informed to the contrary. (e)

* 15 * As to the manner of the notice, no cases have prescribed any special form, (f) nor is the time precisely determined. But the notice must be given with sufficient distinctness, and in a reasonable time; and that time will be reasonable which secures to the guarantor all rights and means of protecting himself. (g)¹

SECTION V.

OF THE CHANGE OF LIABILITY.

The guarantor cannot be held to any greater extent than the original debtor, either in point of amount or of time. (h)² Nor can this liability be extended or enlarged by operation of law or by statute (hh) without his consent. This would appear to be a

(e) In New York, in the case of Douglass *v.* Howland, 24 Wend. 35, the court say: "Unless there is something in the nature of the contract or terms of the writing, creating or implying the necessity of acceptance or notice as a condition of liability, neither are deemed requisite." And in Union Bank *v.* Coster's Ex'res, 3 Comst. 212, the court referring to Douglass *v.* Howland and Smith *v.* Dann, 6 Hill (N. Y.), 543, say: "We must hold the law to be settled in this State, that where the guaranty is absolute no notice of acceptance is necessary." And see Bright *v.* McKnight, 1 Snead, 158; Maynard *v.* Morse, 36 Vt. 617; Cooke *v.* Orne, 37 Ill. 186; Dickerson *v.* Derickson, 39 Ill. 574; Sanders *v.* Etcherson, 36 Ga. 404.

(f) It is immaterial how the notice is given to the guarantor, whether by the party accepting the guaranty, or him in whose favor it is given. Reasonable knowledge on the part of the guarantor that his guaranty is accepted is sufficient. Oakes *v.* Weller, 16 Vt. 63; s. c. 13 Vt. 106; Menard *v.* Scudder, 7 La. An. 385. An acknowledgment by the guarantor of his liability, and a promise to pay, supersedes the necessity of proving notice. Peck *v.*

Barney, 13 Vt. 93. But see Reynolds *v.* Douglass, 12 Pet. 497.

(g) What is a reasonable time, the facts not being in dispute, seems to be entirely a question of law, and not proper to be submitted to the jury. Craft *v.* Isham, 13 Conn. 28; Howe *v.* Nickles, 22 Me. 175; Lowry *v.* Adams, 22 Vt. 160.

(h) Walsh *v.* Baile, 10 Johns. 180; Tunison *v.* Cramer, 2 Southard, 498; Clark *v.* Bush, 3 Cowen, 151; United States *v.* Boyd, 15 Pet. 187; Fisher *v.* Salmon, 1 Cal. 413. The liability of the guarantor will be deemed coextensive with that of the principal, unless it be expressly limited. Curling *v.* Chalklen, 3 M. & Sel. 502. A guarantor is not bound beyond the fair import of the actual terms of his engagement. Miller *v.* Stewart, 9 Wheat. 680, 720; Wardens of St. Saviour's *v.* Bostock, 5 B. & P. 175; Borden *v.* Houston, 2 Tex. 594. One bound for a clerk appointed for a year was held not to be liable for the wrong-doing of the clerk after that year, and while he continued in office. Kitson *v.* Julian, 4 E. & B. 854; Kingst. Mut. Ins. Co. *v.* Clark, 33 Barb. 196.

(hh) Fielden *v.* Lahens, 6 Blatch. 524.

¹ See Central Bank *v.* Shine, 48 Mo. 456; Montgomery *v.* Kellogg, 43 Miss. 486.

² Grant *v.* Smith, 46 N. Y. 93. A release of A. from his debt by a composition deed, "in like manner as if A. had obtained a discharge in bankruptcy," discharges a surety on A.'s bond for the debt. Cragoe *v.* Jones, L. R. 8 Ex. 61. A statutory increase of duties not germane to the office discharges the sureties on an official bond, as where a sheriff was also made a tax-collector. White *v.* East Saginaw, 43 Mich. 567.

plain and certain principle of law, although there are some cases which seem to oppose it. (i) If one becomes bound for the fidelity of an officer in a corporation created by a statute for a limited period, and after that expires the charter is renewed, but no new bond given, and no confirmation of the old one, it has * been held in New Hampshire that the surety is still * 16 bound. (j) But this question has been decided differently, and more in accordance with the principles of the law of contracts, in Maryland. (k) There the surety was held to be discharged, on

(i) Thus, in *Reed v. Fullum*, 2 Pick. 158, where a surety became bound for a poor debtor, "that he would not depart without the exterior bounds of the debtor's liberties," and at the time the bond was given the "debtor's liberties" extended through the whole county, but they were subsequently reduced to much more narrow limits, it was held, that the surety was liable for the escape of the debtor, beyond the last mentioned limits, although he had not passed beyond the liberties as they existed when the bond was given.

(j) *Exeter Bank v. Rogers*, 7 N. H. 21. The facts were that the Exeter Bank was incorporated by an act of the legislature, in the year 1803, to continue for the term of twenty years from January 1, 1804. In 1822 an additional act of the legislature was passed, which provided that the first act should remain and continue in force for a further term of twenty years from January 1, 1824; that there should be no division of the capital stock without the consent of the legislature, and that the bank should not have in circulation at any time bills exceeding in amount the capital stock actually paid; any cashier or other officer violating these provisions to forfeit not less than \$1,000, nor more than \$10,000. R. was appointed cashier of the bank in 1809, gave a bond with sureties for the faithful discharge of the duties of the office, and continued cashier until 1830. It was held, that the bond covered all the time which R. remained in office, and that the sureties were not discharged by any of the provisions in the additional act of the legislature. And *Richardson*, C. J., in giving the opinion of the court, observed: "The true rules of law to be deduced from all the cases on this subject, are these: when the term of office is limited to a particular period, as a year or five years, and the person appointed cannot continue in office for a longer period without a new appointment, then the official bond, if nothing ap-

pear to the contrary, is presumed to be intended to be confined to the particular term; and if the officer be reappointed there must be a new bond. But when an office is held at the will of those who make the appointment, and is not limited to any certain term, then the bond is presumed to be intended, if nothing appear to the contrary, to cover all the time the person appointed shall continue in office under the appointment. Thus a sheriff is appointed in this State to hold his office during the term of five years, and cannot hold it beyond that term without a new appointment. The bond he gives does not therefore extend beyond the term for which he is appointed. But the deputies of the sheriff hold their offices at the will of the sheriff, and their bonds may extend to any period during which they are continued in office, notwithstanding the sheriff may in the mean time be reappointed and be compelled to give new bonds himself. These rules are founded in sound reason and good sense. The presumption which the law makes as to the intention of the parties to the bond is the natural presumption in both cases. Now we are of opinion that the terms of the condition in this case are broad enough to embrace the whole term during which Rogers was cashier, and that there is nothing in the form of the appointment, the nature of the office, the words of the condition, or the conduct of the parties, that gives the slightest indication of any intention in any party that the bond should be limited to the period mentioned in the original charter as the termination of the corporation."

(k) *Union Bank v. Ridgeley*, 1 Har. & G. 324, which was an action against the sureties of a cashier for the faithful performance of his duties. The charter of the bank expired, and was extended by a new act of the legislature. The alleged default of the cashier occurred after the re-enactment of the charter. The court held, that where an act of incorporation, under which a bond was taken to secure

* 17 the * ground that his liability was exactly defined when he assumed it, and could not be enlarged or varied without his consent, either by the party receiving the guaranty or by the operation of law. In England it has been held that the surety on the bond of a clerk of a railroad company, which was dissolved and united with another railroad company also dissolved, by a statute providing that all such bonds should remain in force, was responsible for the default of the clerk after the union. (*l*)

The Supreme Court of the United States have taken strong ground upon this point. They have decided that the surety is discharged not merely by payment of the debt or a release of the principal, but by any material change in the relations between the principal and the party to whom he owes a debt or duty; and that the surety cannot be held in such case by showing that the change was not injurious to him. For he had a right to judge for himself of the circumstances under which he was willing to be liable, and to stand upon the very terms of his contract. (*m*)¹

the good conduct of one of the officers of the corporation, was limited in its duration to a certain period, the bond must have the same limitation; because, the parties looking to that act, it would seem to be very clear that no responsibility was contemplated beyond the period of its specified existence. The extension of the charter beyond the period of its first limitation by legislative authority does not enter into the contract, and cannot enlarge it. See *S. C. Society v. Johnson*, 1 McCord, 41. In the case of *Bamford v. Iles*, 3 Exch. 380, a bond, reciting that A was appointed assistant overseer of the parish of M., was conditioned for the due performance of his duties, "thenceforth from time to time, and at all times, so long as he should continue in such office." On the 25th June, 1840, a vestry meeting was held, at which A was elected assistant overseer until the 25th March, 1841, at a salary of 8d. in the pound on some sums collected, and 4d. on others. Two justices, by their warrant, dated 9th July, 1840, reciting the vestry resolution, and that this salary had been fixed for the execution of his office until the 25th of March

then next, stated, that in pursuance of the 59 Geo. III. c. 12, they appointed him assistant overseer. On the 25th March, 1841, he was again elected to the same office, at a salary of £50 per annum, and was reappointed by the justices, and he continued to be so re-elected and re-appointed by the justices until March, 1846. On ceasing to hold office, he retained moneys in his hands. *Held*, that the sureties were not liable on the bond. See also *Mayor of Berwick-upon-Tweed v. Oswald*, 16 E. L. & E. 236; s. c. 1 E. & B. 295; *Frank v. Edwards*, 16 E. L. & E. 477, n.; s. c. 8 Exch. 214; *Northwestern Railway Co. v. Whinray*, 26 E. L. & E. 488; s. c. 10 Exch. 77; *Kitson v. Julian*, 30 E. L. & E. 326; s. c. 4 E. & B. 854; *Jamison v. Cosby*, 11 Humph. 273. And see *Oswald v. Mayor of Berwick-upon-Tweed*, 26 E. L. & E. 85; s. c. 3 E. & B. 653; *Mayor of Cambridge v. Dennis*, 21 Law Rep. 375.

(*l*) *Eastern Union R. Co. v. Cochrane*, 9 Exch. 197.

(*m*) *Miller v. Stewart*, 9 Wheat. 680. In this case a bond was given, conditioned for the faithful performance of the duties

¹ Any change in the contract without the surety's consent releases him, *Calvo v. Davies*, 73 N. Y. 211; and it is immaterial whether he is injured or benefited, *Paine v. Jones*, 76 N. Y. 274; unless he assents to the change, *Sage v. Strong*, 40 Wis. 575. The following alterations have been held to release a surety: the furnishing a more powerful engine and boiler for a higher price than the agreement called for, *Grant v. Smith*, 46 N. Y. 93; the addition of another joint maker to a note, *Hamilton v. Hooper*, 46 Ia. 515; the addition of "surety," *Robinson v. Reed*, 46 Ia. 219; or erasure, *Lamb v.*

So in Massachusetts, the sureties on a cashier's bond, are exonerated

of the office of deputy collector of direct taxes for eight certain townships, and the instrument of the appointment, referred to in the bond, was afterwards altered, so as to extend to another township, without the consent of the sureties. The court held, that the surety was discharged from his responsibility for moneys subsequently collected by his principal. See also United States v. Tillotson, 1 Paine, C. C. 305; United States v. Hillegas, 3 Wash. C. C. 70; Postmaster-General v. Reeder, 4 id. 678; Chute v. Pattee, 37 Me. 102. In Mayhew v. Boyd, 5 Md. 102, it was held, that any dealings with the principal debtor by the creditor, which amount to a departure from the contract by which a surety is bound, and which by possibility might materially vary or enlarge the latter's liability without his assent, discharges the surety. In the case of Bonar v. McDonald, 3 H. of L. Cas. 226; s. c. 1 E. L. & E. 1, in the House of Lords, the facts were, that in a bond by cautioners (sureties) for the careful attention to business and the faithful discharge of the duties of an agent of a bank, it was provided "that he should have no other business of any kind, nor be connected in any shape with any trade, manufacture, or mercantile copartnery, nor be agent for any individual or copartnery in any manner or way whatsoever, nor be security for any individual or copartnery in any manner or way whatsoever." The bank subsequently, without the knowledge of the sureties, increased the salary of the agent, he undertaking to bear one fourth part of all losses which might be incurred by his discounts. Held, affirming the decision of a majority of the court below, that this was such an alteration of the contract, and of the liability of the agent, that the sureties were discharged, notwithstanding that the loss arose, not from discounts, but from improper conduct of the agent. And see Small v. Currie, 27 E. L. & E. 304. But in Stewart v. McKeon, 29 E. L. & E. 383, s. c. 10 Exch. 675, the plaintiffs, bottle manufacturers, appointed W. M. their agent for the sale of bottles, on

commission, and received the following guaranty: "I hereby agree to guarantee my brother, W. M.'s intromissions, as your agent in Leith, to the extent of £500." The terms of the sale between the plaintiffs and W. M., at the time of the guaranty, were that the moneys received should be remitted from time to time, and an account of sales rendered at the end of each month, or when required, and an account current every three weeks. It was soon after agreed between the plaintiffs and W. M. that the account current should be rendered every six months, and subsequently, in pursuance of an agreement between them, W. M. from time to time gave his promissory notes to the plaintiffs, payable four months from date, for sums having no relation to the amount due, transmitted to W. M. the difference between the money then in his hands and the amount of the notes. The defendant had no knowledge of, and never inquired as to the original or subsequent terms of delivery. It was held (Pollock, C. B., dissenting), that the alteration in the mode of accounting and paying did not discharge the surety. In Mitchell v. Burton, 2 Head, 613, it was held, that if two or more persons become the sureties of a third person, to a bond, and the obligees and principal obligor erase the name of, and release one of the sureties, without the knowledge or consent of the co-sureties, or their subsequent ratification of the same, they are not bound on said bond. And further, that if, however, the obligation after such erasure, is presented to other persons, who sign the same as sureties, they are bound by their undertaking, although they may be ignorant of the circumstances of the erasure, and of the fact that the other sureties on the bond are released thereby. The erasure was visible, and they should have ascertained all the facts in reference thereto before signing the obligation, and not having done so, are bound by their act. See also General Steam Navigation Co. v. Rolt, 95 Eng. C. L. 550.

Paine, 46 Ia. 550; or that interest should be payable "annually," Marsh v. Griffin, 42 Ia. 403; or "semi-annually," Fulmer v. Seitz, 68 Penn. St. 237; or where a creditor without the surety's consent disposes of a security for the debt in a manner different from that provided in the original contract, the surety is discharged, Polak v. Everett, 1 Q. B. D. 669; see Holme v. Brunsell, 3 Q. B. D. 495; or if a creditor parts with property pledged for a debt without the knowledge or against the will of surety, he will lose his claim against the surety to that extent, Kirkpatrick v. Howk, 80 Ill. 122 — Payment by the principal maker of a promissory note to the payee, and accepted by the latter in good faith and without notice, which is afterwards avoided as a fraudulent preference, will not operate as a satisfaction of the debt so as to discharge the surety. Petty v. Cooke, L. R. 6 Q. B. 790.

erated by an increase of the capital of the bank, from liability for default of the cashier made after the increase. (*mm*)¹

* 18 * Anything, therefore, which operates as a novation, discharges the surety. So if a new note be given in discharge of a former one; (*n*) and it has been adjudged, upon good reasons, that where a surety is in fact discharged by a novation, or by a material change of the debt, and in ignorance of his being thus freed from his liability makes a subsequent acknowledgment of his liability, he cannot be held thereon. (*o*) But the guarantor may assent to the change, and waive his right of claiming a discharge because of it. (*p*)

* 19 * In general, a guaranty to a partnership, is extinguished by a change in the firm, although the copartnership name is not changed. (*q*) This has been held to be the effect of such

(*mm*) *Grocer's Bank v. Kingman*, 16 Gray, 473.

(*n*) *Burge on Suretyship*, b. 2, c. 5; *Letcher v. Bank of the Commonwealth*, 1 Dana, 82; *Castleman v. Holmes*, 4 J. J. Marsh. 1; *Bell v. Martin*, 3 Harrison, 167; *Farmers' & Mechanics' Bank v. Kercheval*, 2 Mich. 504.

(*o*) *Merrimack Co. Bank v. Brown*, 12 N. H. 320; *Fowler v. Brooks*, 13 id. 240. See also *Roe v. Harrison*, 2 T. R. 425.

(*p*) *Fowler v. Brooks*, 13 N. H. 240. In this case it was determined, that if a surety, with knowledge of the fact that an agreement for an extension of time has been made between the creditor and the principal, make a new promise to pay the debt, he cannot afterwards avail himself of the agreement, as a discharge of his liability, notwithstanding there was no new consideration for his promise. And see *Ex parte Harvey*, 27 E. L. & E. 272.

(*q*) *Bellairs v. Ebsworth*, 3 Camp. 52; *Russell v. Perkins*, 1 Mason, 368; *Weston v. Barton*, 4 Taunt. 673. It was here held, that a bond conditioned to repay to five persons all sums advanced by them, or any of them, in their capacity of bankers, will not extend to sums advanced after the decease of one of the five by the four survivors, the four then acting as bankers. *Manfield*, C. J., observed: "The question here is, whether the original partnership being at an end, in consequence of the death of

Golding, the bond is still in force as security to the surviving four, or whether that political personage, as it may be called, consisting of five, being dead, the bond is not at an end. . . . From almost all the cases, in truth we may say from all (for though there is one adverse case of *Barclay v. Lucas*, the propriety of that decision has been very much questioned), it results, that where one of the obligees dies, the security is at an end. It is not necessary now to enter into the reasons of those decisions, but there may be very good reasons for such a construction; it is very probable that sureties may be induced to enter into such a security by a confidence which they repose in the integrity, diligence, caution, and accuracy of one or two of the partners. In the nature of things, there cannot be a partnership consisting of several persons, in which there are not some persons possessing these qualities in a greater degree than the rest; and it may be that the partner dying, or going out, may be the very person on whom the sureties relied; it would therefore be very unreasonable to hold the surety to his contract after such change." See also *Bodenham v. Purchas*, 2 B. & Ald. 39. But in *New Haven County Bank v. Mitchell*, 15 Conn. 206, the facts were as follows: The guaranty of A, by its terms, made him responsible to B, a banking institution, for such paper as should be indorsed by the firm of S. M.

¹ *Locke v. McVean*, 33 Mich. 470, decided that the guarantor of the performance of a contract providing for notes at four months without interest, to be renewed, if desired, for sixty days at eight per cent, is not helden for notes running six months with interest for four months at seven per cent and thereafter at eight, nor for six months' notes at eight per cent after four months. See *Thomas v. Stetson*, 59 Me. 229.

change, * although the guaranty given to the firm was expressly for "advances by them, or either of them." The mere fact that the partnership is very numerous, does not seem to vary this rule, if the guaranty be given to the whole firm. But where the partnership was numerous, and seven of the members were trustees for the firm, and a bond was given to these trustees to secure the faithful services of the clerk of the company, and a part of the trustees died, there it was held that the surviving trustees might maintain an action on the bond, although it was shown that there had been changes in the company. (r)

A guaranty may doubtless be a continuing contract, and be unaffected by a change of circumstances, as to the subject-matter, and also as to the parties for whose benefit it shall enure. It may provide, for instance, for the fidelity of a cashier in a bank, as long as it shall continue under its present charter, and under any extension or renewal thereof. So provision may be made for its

& G., and held by B, and bound A to save B harmless from all loss which B might sustain by reason of holding paper indorsed by said firm. The partnership of S. M. & G. was afterwards dissolved, of which B had notice. The partners then executed a power of attorney to M, who had, previously to the dissolution, transacted nearly all the bank business of the partnership with B, authorizing him to sign and indorse notes which might be considered necessary in the management of the concern. M delivered the power to B; after which M, by virtue thereof, continued to use the name of S. M. & G., as drawers and indorsers of negotiable paper, which was discounted by B, and the proceeds credited to the firm, and applied in payment of their former indebtedness to B. By virtue of such power, M also signed in the name of the firm various other notes which were indorsed by A, with notice of the dissolution, and knowing that these notes were intended to be, as they were in fact, discounted by B, and the proceeds applied in payment of the debts and liabilities of the firm. In the course of these transactions, M, by virtue of said power, indorsed two notes, which were discounted by B, and the proceeds credited to the firm. The parties to these notes having failed, B sought a remedy on the guaranty against A; and it was held, that the guaranty, by its terms, contemplated only such paper as should be indorsed by the firm of S. M. & G., as a firm, and during the continuance of the partnership, but

that, for the purpose of settling the partnership concerns, the partnership relation between the partners continued to subsist after the dissolution, and the notes so indorsed by M were in legal contemplation indorsed by the firm; consequently they were embraced within the scope and true meaning of the guaranty. And in *Staats v. Howlett*, 4 Denio, 559, A gave B an undertaking in writing as follows: "I hereby obligate myself to hold you harmless for any indorsement you may make for, or have made for, the late firm of Peck, Howlett & Foester." The firm had previously become dissolved by the death of one of its members. A note subsequently made by one of the surviving partners, in the course of liquidating the business of the firm, and signed "S. R. Howlett, for the late firm of Peck, Howlett & Foster," was indorsed by B. Held, that it was within the terms of the guaranty. The case of *Pemberton v. Oakes*, 4 Russ. 154, illustrates the principle of the text. See further, that guarantees are to be construed strictly, and that if any partners be taken into or retire from a firm, the guarantee does not continue. *Simson v. Cook*, 8 J. B. Moore, 588; *Kippling v. Turner*, 5 B. & Ald. 261; *Wright v. Russell*, 3 Wils. 530; *Barclay v. Lucas*, 3 Doug. 321; *Penoyer v. Watson*, 16 Johns. 100; *Barker v. Parker*, 1 T. R. 287; *Dry v. Davy*, 2 Per. & D. 249; *Place v. Delegal*, 4 Bing. N. C. 426; *Dance v. Girdler*, 4 B. & P. 34; *Myers v. Edge*, 7 T. R. 254.

(r) *Metcalf v. Bruin*, 12 East, 405.

validity to a partnership after a change of members, perhaps by adequate covenants, even without the intervention of trustees; although it would certainly be the better, if not the only safe way, to constitute trustees. But, from what has already been said, it will be obvious, that unless the contract of guaranty expressly provides for these changes, their occurrence discharges the guarantor from his obligation. (s)

* 21 * The obligation of guaranty for good conduct does not seem to be one which survives the obligee and passes over to his representatives. They may of course have their action for any liability of the guarantor incurred by the default of the party whose good conduct is guaranteed, during the life of the party receiving the guaranty. But when he dies, the guaranty dies also so far, that if the party for whose good conduct the guaranty is given, goes on with the same service as before, but now rendering it to the representatives of the deceased, they cannot hold the guarantor for the default of one who is now at work for them. Thus, a bond for the good conduct of a clerk, when the obligee died, and the executor employed the same clerk in arranging and finishing the business of the obligee, was not held sufficient to maintain an action by the executor for misconduct of the clerk after the death of the obligee. (t)¹

In regard to the subject-matter, a guaranty to cover goods supplied to a certain amount, without restriction of time, continues until revoked; although even such continuing guaranty may be

(s) The case of *Barclay v. Lucas*, 3 Doug. 321; s. c. 1 T. R. 291, n. (a), although it has been doubted on some points (see *Weston v. Barton*, 4 Taunt. 681), is yet an authority for this principle, that if the terms of the contract show it was the intention of the parties that the liability should continue, such will be the case, although the names of the firm change. Such was evidently the court's understanding of the bond in that case, for Lord *Manfield* observed: "The question turns, as Lord Chief Justice *De Grey* observes, in the case which has been cited, upon the meaning of the parties. In endeavoring to discover that meaning, the subject-matter of the contract is to be considered. It is notorious that these banking-houses continue for ages with the occasional ad-

dition of new partners. In such establishments clerks are necessary, who now and then succeed as partners, an arrangement very proper and very beneficial to the clerks. The house requires security for their honesty. Now it seems to me to make no difference whether a new partner is introduced or not, for there is no doubt that it is a security to the house. I am glad that there is a distinction between this case and that decided in the Common Pleas; for I think that the plaintiffs are entitled to recover to the extent of the whole sum embezzled, or at all events to the extent of their own share." This principle was the foundation of the decision in *Pease v. Hirst*, 10 B. & C. 122.

(t) *Barker v. Parker*, 1 T. R. 287.

¹ A continuing guarantee also for advances, in the absence of express provision, is revoked as to subsequent advances by notice of the death of the guarantor. *Coulthart v. Clementson*, 5 Q. B. D. 42.

discharged by a change of the terms of credit. (*u*) If the guarantor means to limit his liability to a single transaction, he should so express it. (*v*) But as no special form or manner of expression is necessary, if this purpose may fairly be gathered from the whole contract, courts will so construe it. (*w*)

(*u*) In *Barstow v. Bennett*, 3 Camp. 220, A gave to B a written guaranty to the extent of £300 for any goods he might supply to C, provided C neglected to pay in due time. B supplied goods to C accordingly, at two months' credit, and C paid in due time to an amount exceeding £300. The account having run for some time on these terms, and there being a balance due to B, a new account was opened on new terms of credit. Held, that the guaranty extended to all goods furnished while the term of credit remained unchanged, but not to those furnished after the term of credit was changed, and a new account opened. See *Hatch v. Hobbs*, 12 Gray, 447.

(*v*) *Merele v. Wells*, 2 Camp. 413. In this case the guaranty was in these words: "Gentlemen, I have been applied to by my brother, William Welles, jeweller, to be bound to you for any debts he may contract, not to exceed one hundred pounds (with you), for goods necessary in his business as a jeweller. I have wrote to say by this declaration I consider myself bound to you for any debt he may contract for his business as a jeweller, not exceeding one hundred pounds, after this date. (Signed) John Wells." And Lord *Ellenborough* said: "I think the defendant was answerable for any debt not exceeding one hundred pounds which William Wells might from time to time contract with the plaintiffs in the way of his business. The guaranty is not confined to one instance, but applies to debts successively renewed. If a party means to be surely only for a single dealing, he should take care to say so. By such an instrument as this, a continuing suretyship is created to the specified amount. There must be, therefore, a verdict for the plaintiffs for £100." See *Brown v. Bachelor*, 1 Hurl. & N. 255.

(*w*) See *Cremer v. Higginson*, 1 Mason, 323, which is a leading case on this subject. In this case, the letter of guaranty contained this clause: "The object of the present letter is to request you if convenient, to furnish them" (Messrs. Stephen and Henry Higginson), "with any sum they may want, as far as fifty thousand dollars; say fifty thousand dollars. They will reimburse you the amount, together with interest, as soon as arrangements can be made to do it; and as our em-

bargo cannot be continued much longer, we apprehend there will be no difficulty in this. We shall hold ourselves answerable to you for the amount." It was held, that this was not an absolute original undertaking, but a guaranty; that it covered advances only to Stephen and Henry Higginson (who were then partners), on partnership account, and could not be applied to cover advances to either of the partners separately, on his separate account; that the authority of the guaranty was revoked by the dissolution of the partnership, and no subsequent advances made by the party, after a full notice of such dissolution, were within the reach of the guaranty; that the letter did not import to be a continuing guaranty for money advanced, *toties quoties* from time to time, to the amount of \$50,000, but for a single advance of money to that amount; and that, when once advances were made to \$50,000, no subsequent advances were within the guaranty; although, at the time of such further advances, the sum actually advanced had been reduced below \$50,000 by reimbursements of the debtors. In *Grant v. Ridsdale*, 2 Har. & J. 186, a guaranty in the following terms: "I will guarantee their engagements, should you think it necessary, for any transactions they may have in your house," was held an absolute and continuing guaranty, until countermanded. — So where the defendant addressed a letter to the plaintiffs, stating that his brother wished to go into business, and promising to be accountable for such goods furnished by the plaintiffs as his brother should call for, from \$300 to \$500 worth; in consequence of which the plaintiffs furnished him with divers parcels of goods; it was held, that this was a continuing guaranty to the amount specified, and was not limited to the bill of parcels first delivered. *Rapelye v. Bailey*, 5 Conn. 149. See also *Clark v. Burdett*, 2 Hall, 167. — A writing in these words: "I agree to be responsible for the price of goods purchased of you, either by note or account, at any time hereafter, to the amount of \$100," is a continuing guaranty to that extent, for goods to be at any time sold before the credit is recalled. *Bent v. Hartshorn*, 1 Met. 24. — Many of the cases seem to hold with *Lord Ellenborough*, in *Merle v. Wells*, 2 Camp. 413, that the

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* SECTION VI.

HOW A GUARANTOR IS AFFECTED BY INDULGENCE TO A DEBTOR.

A guarantor is entitled to a just protection. But this principle is not carried so far as to permit him to compel the creditor * 23 * unreasonably to proceed against the principal debtor. (x)¹ From some cases it may be doubted whether he has any power in this way. In one case, (y) it was held, that a surety,

guaranty will be understood to be continuing, unless expressly limited. But the contrary opinion was expressed in *White v. Reed*, 15 Conn. 457. In that case the defendant gave the plaintiff a writing in these words: "For any sum that my son G. may become indebted to you, not exceeding \$200, I will hold myself accountable." Held, that the terms of this instrument were satisfied when any indebtedness within the amount limited was incurred by G., and consequently that it was not a continuing guaranty. So in *Boyce v. Ewart*, 1 Rice, 126, the guaranty was in these words: "The bearer is about to commence business, to assist him in which he will need your aid, which, if you render, we will, in case of failure, indemnify you to the amount of \$4,000." Held, that it was not a continuing guaranty, but applicable to the bearer's commencing in business, and that, as soon as the bearer had refunded \$4,000, the guaranty ceased. In *Fellows v. Prentiss*, 3 Denio, 512, a guaranty in these words: "I hereby agree to guarantee to you the payment of such an amount of goods, at a credit of one year, interest after six months, not exceeding \$500, as you may credit to A," was held, not to be a continuing guaranty, but it was held to be exhausted by a single purchase of goods to the amount of \$500. See also *Whitney v. Groot*, 24 Wend. 82; *Lawrence v. McCalmont*, 2 How. 26; *Chapman v. Sutton*, 2 C. B. 684; *Tanner v. Moore*, 11 Jur. 11; *Allnut v. Ashendon*, 5 Man. & G. 392; *Hitchcock v. Humphrey*, id. 559; *Martin v. Wright*, 9 Jur. 178; *Johnston v. Nicholls*, 1 C. B. 251; *Farmers' & Mechanics' Bank v. Kercheval*,

2 Mich. 504; *Agawam Bank v. Strever*, 16 Barb. 82.

(x) It seems to be well settled that mere delay by the creditor to proceed against the principal, although requested to do so by the surety, will not in and of itself discharge the surety. *Huffman v. Hulbert*, 13 Wend. 377; *Davis v. Higgins*, 3 N. H. 231; *Bellows v. Lovell*, 5 Pick. 307; *Erie Bank v. Gibson*, 1 Watts, 143; *Cope v. Smith*, 8 S. & R. 110; *Johnson v. Planter's Bank*, 4 Sm. & M. 165; *Beebe v. Dudley*, 6 Foster (N. H.), 249; *Bickford v. Gibbs*, 8 Cush. 184. But if this delay of the creditor operates to the injury of the surety, as if the principal debtor was at the time of the request solvent, but afterwards became insolvent, and the surety will not be able to collect the amount, he is *pro tanto* discharged. *Row v. Pulver*, 1 Cowen, 246; *State v. Reynolds*, 3 Mo. 95; *Herrick v. Borst*, 4 Hill (N. Y.), 650. And see note (c), post. See *Miller v. Berkeley*, 27 Penn. St. 317. See also, for a general statement of the duties arising from the relation of principal and surety, *Huey v. Pinney*, 5 Minn. 310.

(y) *Townsend v. Riddle*, 2 N. H. 448. And *Woodbury*, J., said: "Here the character of the defendant as a surety did not appear on the face of the contract, nor was it proved that the plaintiff knew him to be only a surety. Here he was not liable as a mere indorser on the same instrument, or as a guarantor on a separate one. No time for an adjustment with the principal was fixed by law; no delay was given to him after a request by the surety for a prosecution; no new engagement for forbearance appears to have been entered into between the creditor and debtor."

¹ *Harris v. Newell*, 42 Wis. 687, decided that a surety was not discharged if the creditor after notice from him failed to proceed against the principal, but that equity, in some cases, would interfere to compel the principal to pay, or the creditor to proceed against him.

who was injured by a delay in suing the principal debtor, was not discharged, on the ground that he might have insured a prompt demand against the debtor, by making himself an indorser instead of a surety. But this would have secured only a demand, and not a suit; and it seems hard and severe to say that because one does not secure to himself the precise and immediate demand and notice necessary to hold indorsers, he shall not be entitled to any care or diligence on the part of the creditor. It would seem to be a just and reasonable rule, that the guaranteed creditor should use in collecting the debt from the original debtor, the same care and diligence which prudent creditors commonly use in collecting their debts; they have certainly no right to neglect a guaranteed debt because it is guaranteed. (yy)

If the surety requests the creditor to collect the debt, and there is refusal and delay, and subsequent insolvency, it would seem difficult to resist the surety's claim to be discharged. (z)

* In 1816 it was said by the Supreme Court of New York, * 24 in a case where such facts were pleaded and demurred to, that the plea was good, and the defence sufficient. (a)¹ Chanc-

(yy) Hoffman *v.* Bechtel, 53 Penn. St. 190. For a case in which the right to recover was lost by laches, see Whiting *v.* Stacey, 15 Gray, 270.

(z) In the Trent Navigation Co. *v.* Harley, 10 East, 35, Lord Ellenborough said: "The only question is, whether the laches of the obligees, in not calling upon the principal so soon as they might have done, if the accounts had been properly examined from time to time, be an estoppel at law [in an action] against the sureties? I know of no such estoppel at law, whatever remedy there may be in equity." And in Dawson *v.* Laws, 23 E. L. & E. 365, the Vice-Chancellor said, that in order to discharge sureties for the faithful performance of duties by their principal, from their obligation, there must be such an act of connivance as enabled the party to get the fund in his hands, or such an act of gross negligence as to amount to a wilful shutting of the person's eyes to the fraud which the party was about to commit, or something approximating to it.

(a) Pain *v.* Packard, 13 Johns. 174. And see People *v.* Jansen, 7 id. 386. In Herrick *v.* Borst, 4 Hill (N. Y.), 650, it was held, that although the creditor neglect to prosecute the principal after a request by the surety, this will not discharge the surety, if the principal was then insolvent. And the surety, in order to establish a defence of this kind, must show clearly that at the time the request was made, the debt could have been collected of the principal. Cowen, J., then observed: "The view taken of the question in Hoffman *v.* Hulbert, 13 Wend. 377, the only case in this court where the kind or degree of insolvency on which the surety is to be discharged has been noticed, is not inconsistent with the direction given at the circuit. Mr. Justice Nelson there said, the rule is founded on the assumption that the debt is clearly collectible by suit; and upon this ground only can the rule be defended. Again, he says, there must be something more than an ability to pay at the option of the debtor. Among other

¹ Pain *v.* Packard, 13 Johns. 174, *supra*, was criticized as a clear and unwarranted departure from the common law relating to sureties, in Inkster *v.* Marshall Bank, 30 Mich. 143. In Newcomb *v.* Hale, 90 N. Y. 326, distinguishing Pain *v.* Packard, 13 Johns. 174, *supra*, the neglect of the assignee of a guaranteed bond secured by a mortgage of land to sell the land after notice by the guarantor was held not to discharge the guarantor although the land afterwards depreciated in value.

lor *Kent* has questioned the law of this case, and it is said that two of the judges of the court afterwards retracted their opinion. But in 1833, the Supreme Court of the same State seemed to hold the same views. In 1811 this court decided, that a mere delay in

calling on the principal will not discharge the surety. (b)

* 25 Of * this there seems no question ; and the objection to discharging him where he requests a collection of the debt and is injured by the refusal, rests upon the right and power of the surety to pay the debt himself whenever he pleases, and then take his own measures against the debtor. It would be, however, unjust to hold him liable on this ground, where he has been injured by the certain fault of the party to whom he makes the guaranty. (c) And from a consideration of the cases, and the reasons

reasons he mentions the surety having a remedy of his own by payment and suit, a reason which, as I mentioned, would in other cases deprive the party complaining of all claim ; for in no other case that I am aware of can he demand compensation or raise a defence grounded on his own neglect. What principle such a defence should ever have found to stand upon in any court it is difficult to see. It introduces a new term into the creditor's contract. It came into this court without precedent (*Pain v. Packard*, 13 Johns. 174), was afterwards repudiated even by the Court of Chancery (*King v. Baldwin*, 2 Johns. Ch. 554), as it always has been both at law and equity in England ; but was restored on a tie in the Court of Errors, turned by the casting vote of a layman. *King v. Baldwin*, 17 Johns. 384. *Platt, J.*, and *Yates, J.*, took that occasion to acknowledge that they had erred in *Pain v. Packard*, as Senator *Van Vechten* showed most conclusively that the whole court had done. The decision was obviously erroneous in another respect, as was also shown by that learned senator. It overruled a previous decision of the same court in *Le Guen v. Governeur*, 1 Johns. Cas. 492, on the question of *res judicata* ; necessarily so, unless it be conceded that the defence belongs exclusively to equity. I do not deny that the error has become invertebrate, though it has never been treated with much favor. A *dictum* was referred to on the argument, in the *Manchester Iron Man. Co. v. Sweeting*, 10 Wend. 162, that the refusal to sue is tantamount to an agreement not to prosecute the surety. The remark meant, however, no more than that such a neglect as amounts to a defence is like the agreement not to sue in respect to being receivable under the general issue. The judge

was speaking to the question whether the defence should not have been specially pleaded as it was in *Pain v. Packard*. On the other hand, it has often been said that the defence should not be encouraged, but rather discountenanced ; and several decisions will be found to have proceeded on this ground."

(b) *People v. Jansen*, 7 Johns. 336. The authorities all agree upon this point. *Hunt v. United States*, 1 Gallison, 32; *Naylor v. Moody*, 3 Blackf. 93; *Hunt v. Bridgham*, 2 Pick. 581; *Winton v. Branch Bank*, 23 Ala. 762; *Nichols v. McDowell*, 14 B. Mon. 7. And even an agreement by the creditor to enlarge the time, unless it is made upon such consideration, or in such form as to be binding upon him, and to estop him from suing the principal, does not discharge the surety. *Leavitt v. Savage*, 16 Me. 72; *Bailey v. Adams*, 10 N. H. 162; *Joslyn v. Smith*, 13 Vt. 353; *Harter v. Moore*, 5 Blackf. 367; *Farmers' Bank v. Raynolds*, 13 Ohio, 84. And see note (f), post.

(c) The better authorities agree that if the surety can positively and clearly show an injury to himself by the failure of the creditor to prosecute after request, he is exonerated, *pro tanto*. *Row v. Pulver*, 1 Cowen, 246; *State v. Reynolds*, 3 Mo. 95; *Manchester Iron Co. v. Sweeting*, 10 Wend. 162; *Goodman v. Griffin*, 3 Stew. (Ala.) 169; *Hogaboom v. Herrick*, 4 Vt. 131; *Johnston v. Thompson*, 4 Watts, 446; *Wetzel v. Sponsler's Exr's*, 18 Penn. St. 460; *Lang v. Brevard*, 3 Strob. Eq. 59. In *Locke v. United States*, 3 Mason, 446, it was held, that the neglect of the postmaster-general to sue for balances due by postmasters, within the time prescribed by law, although he thereby is rendered personally chargeable with such balances,

on which they rest, we think this rule may be drawn: that a surety is discharged where the creditor, after notice and request, has been guilty of a delay which amounts to negligence, and by this negligence the surety has lost his security or indemnity. (cc) If, however, in that case the creditor should show full knowledge and an equal negligence on the part of the guarantor, or his assent, or that security was given him by the principal debtor, it would be difficult to point out any acknowledged principles which would lead to his discharge. (d)¹ In some of our States statutory provisions give a surety a right to require the creditor to proceed against the principal.

* A guarantor or surety has a right to expect that the * 26 creditor will not wantonly lose or destroy his claims against the principal debtor, with the intention of falling back upon the liability of the guarantor. (e) For the guarantor promises only to pay the debt of another, in case that other does not pay it; and this contract is held to imply some endeavor and some diligence on the part of the creditor to secure the debt from the principal

is not a discharge of the postmasters or their sureties upon their official bonds. And in *Bellows v. Lovell*, 5 Pick. 307, the Supreme Court of Massachusetts held, that a refusal of the creditor to sue the principal upon a mere request of the surety, unaccompanied with an offer of indemnity against the costs and charges of the suit, is not a defence at law to a suit against the surety, notwithstanding the principal may afterwards have become insolvent. So in *Davis v. Huggins*, 3 N. H. 231, where one who had signed a promissory note as surety requested the payee to collect the money of the principal, but the payee neglected so to do until the principal became insolvent; it was held, that the surety was not discharged. See *Strong v. Foster*, 17 C. B. 201.

(cc) *Shimer v. Jones*, 47 Penn. St. 268; *Ward v. Stout*, 32 Ill. 399; *Strickler v. Burkholder*, 47 Penn. St. 476.

(d) And it has been expressly held, that if the extension of payment is given to a principal, at the instance of the surety or with his consent, the surety is not discharged. *Snydam v. Vance*, 2 McLean,

99; *Solomon v. Gregory*, 4 Garrison, 112; *New Hampshire Savings Bank v. Colcord*, 15 N. H. 119. See also *Day v. Ridgway*, 17 Penn. St. 303; *Weiler v. Hoch*, 25 Penn. St. 525. Or if the surety, being informed of such an arrangement, assents to it, it is no defence to him. *Tyson v. Cox*, Turn. & R. 395; *Smith v. Winter*, 4 M. & W. 519; *La Farge v. Herter*, 11 Barb. 159; *Woodcock v. Oxford & Worcester Railway Co.* 21 E. L. & E. 285; s. c. 1 *Drewry*, 521; *Dubuisson v. Folkes*, 30 Miss. 432; *Shook v. State*, 6 Ind. 113; *Bangs v. Mosher*, 23 Barb. 478. Or if the surety has been amply secured and indemnified by the principal, even if the extension was made without his consent. *Smith v. Estate of Steele*, 25 Vt. 427. Otherwise if he assents in ignorance of the real facts. *West v. Ashdown*, 1 Bing. 164; *Robinson v. Offutt*, 7 Monr. 541. See also ante, p. *17, note (m).

(e) *N. H. Savings Bank v. Colcord*, 15 N. H. 119; *Holt v. Bodey*, 18 Penn. St. 207; *Perrine v. Fireman's Ins. Co.* 22 Ala. 575.

¹ Where a co-partnership gave a continuing guaranty to a State bank for loans, the bank reorganizing into a national bank, at a time when the loans were not fully paid up, and the corporation then dissolved, and afterwards one partner in writing acknowledged the validity of the obligation, relying on which the bank extended the time of payment, it was held that the indebtedness incurred before reorganization could be recovered from such partner but not from the copartnership, since its dissolution ended the guaranty. *City Bank v. Phelps*, 86 N. Y. 484.

debtor. (*ee*) To this the guarantor is entitled; but this does not give him the right to debar the principal debtor from all favor or indulgence. It was once uncertain whether a forbearance of the debt did not discharge the guarantor; but it is now well settled that a mere forbearance, leaving to the creditor the power of putting his claim in suit at any time, does not have this effect. (*f*)¹

(*ee*) *Dyer v. Gibson*, 16 Wis. 557.

(*f*) It is well settled that mere delay without fraud, or agreement with the principal, does not discharge the surety. *Hunt v. United States*, 1 Gallison, 32; *Naylor v. Moody*, 3 Blackf. 93; *Hunt v. Bridgman*, 2 Pick. 581; *Townsend v. Riddle*, 2 N. H. 448; *Leavitt v. Savage*, 16 Me. 72; *Freeman's Bank v. Rollins*, 13 id. 202; *Johnston v. Searcy*, 4 Yerg. 182; *Dawson v. Real Estate Bank*, 5 Ark. 283; *Montgomery v. Dillingham*, 3 Sm. & M. 647; *People v. White*, 11 Ill. 342; *Dorman v. Bigelow*, 1 Fla. 281. To have such effect, there must be an actual agreement between the creditor and the principal to extend the time of payment. *Hutchinson v. Moody*, 18 Me. 393; *Fuller v. Milford*, 2 McLean, 74; *Greely v. Dow*, 2 Met. 176; *Wagman v. Hoag*, 14 Barb. 232; *Campbell v. Baker*, 46 Penn. St. 263. And the agreement must be upon sufficient consideration, and must amount in law to an estoppel upon the creditor, sufficient to prevent him from beginning

a suit before the expiration of the extended time; and when such an agreement is made the surety is discharged. *Leavitt v. Savage*, 16 Me. 72; *Lime Rock Bank v. Mallett*, 34 id. 547; *Bailey v. Adams*, 10 N. H. 162; *Hoyt v. French*, 4 Foster (N. H.), 198; *Joslyn v. Smith*, 18 Vt. 353; *Wheeler v. Washburn*, 24 id. 293; *Chace v. Brooks*, 5 CUSH. 43; *Hoffman v. Coombs*, 9 Gill, 284; *Payne v. Commercial Bank*, 6 Sm. & M. 24; *Newell v. Hamer*, 4 How. (Miss.) 684; *Coman v. State*, 4 Blackf. 241; *Farmers' Bank v. Raynolds*, 13 Ohio, 84; *Haynes v. Covington*, 9 Sm. & M. 470; *Anderson v. Mannon*, 7 B. Mon. 217; *Sawyer v. Patterson*, 11 Ala. 523; *Gray's Ex'r's v. Brown*, 22 id. 262; *Moss v. Hall*, 5 Exch. 46; *Phillips v. Rounds*, 33 Me. 357; *Thomas v. Dow*, id. 390; *Turrill v. Boyn顿*, 23 Vt. 192; *Bangs v. Strong*, 4 Comst. 315; *Miller v. Stem*, 12 Penn. St. 383; *Mitchell v. Cotten*, 3 Fla. 134; *Burke v. Cruger*, 8 Tex. 60. Therefore a surety in a specialty is not discharged by a parol

¹ *Allen v. Brown*, 124 Mass. 77; unless it is the creditor's duty to sue, *Supervisors v. Otis*, 62 N. Y. 88; and is so requested by the surety, *Clark v. Sickler*, 64 N. Y. 231; or the forbearance is to the surety's injury, *McKecknie v. Ward*, 58 N. Y. 541; after a like request, *Colgrove v. Tallman*, 67 N. Y. 95. But an agreement for forbearance between the debtor and creditor without the surety's consent will discharge the latter, *Albion Bank v. Burns*, 46 N. Y. 170; *Myers v. First Bank*, 78 Ill. 257; *Amer., &c. Co. v. Gurnee*, 44 Wis. 49; *Buck v. Smiley*, 64 Ind. 431; *Apperson v. Cross*, 5 Heisk. 481; *Bonney v. Bonney*, 29 Ia. 448; *Rose v. Williams*, 5 Kans. 483; *Brown v. Prophit*, 53 Miss. 649; on a valid consideration, *Hoghead v. Williams*, 55 Ind. 145; if the extended time is definite, however short, *Berry v. Pullen*, 69 Me. 101; *Smith v. Shelden*, 35 Mich. 42; per *Blackburn*, J., in *Swire v. Redman*, 1 Q. B. D. 536; and barring suit until its expiration, *McKecknie v. Ward*, 58 N. Y. 541; *Howell v. Sevier*, 1 Lea, 360; *Wright v. Watt*, 52 Miss. 634; *Hosea v. Rowley*, 57 Mo. 357; *Byers v. Hussey*, 4 Col. 515; but otherwise if the debtor indemnifies the surety, *Kleinhaus v. Generous*, 25 Ohio St. 667; or if the surety is nevertheless allowed to sue, *Calvo v. Davies*, 73 N. Y. 211. An unexecuted or void agreement, however, to extend the time of payment, not creating an extension in fact, does not discharge a surety. *Jaffray v. Crane*, 50 Wis. 349.—An agreement to extend the time of payment of a note "until after threshing" is for a sufficiently definite time to discharge a non- assenting surety. *Moulten v. Posten*, 52 Wis. 169. If money is payable in instalments, and the creditor gives time to the principal debtor for the payment of one of them, the surety is not discharged as to the other instalments. *Croydon Gas Co. v. Dickinson*, 2 C. P. D. 46; but if a creditor learns, after the accruing of an action against two or more persons, that one of them is a surety, and then gives time to the principal without the surety's consent, the latter is in equity discharged, *Overend, &c. Co. v. Oriental Corporation*, L. R. 7 H. L. 348.—Joint debtors cannot by mutual arrangement, with notice to creditor, make one of them a surety merely, and deprive the creditor of his right to treat them as joint debtors. *Swire v. Redman*, 1 Q. B. D. 536. *Contra*, *Colgrove v. Tallman*, 67 N. Y. 95.

Thus, the neglect of postmasters to sue for * balances due * 27 them does not discharge their sureties. (g) Nor does the continuance in office of a cashier or treasurer, by a corporation after discovery of his default, or non-notice thereof to the surety, necessarily discharge the surety. (gg) Where a creditor received the interest in advance for sixty days, this did not discharge the surety; for though it undoubtedly signified that the debt was not to be demanded within that period, yet it might have been at any moment. (h) So where a bank renewed a note on receiving twenty-five per cent, and the interest on the remainder for a certain period, the note lying in the bank overdue, the surety was not discharged. (i)¹

agreement between the creditor and the principal on the day the debt became due, to allow the principal one year more for payment. *Tate v. Wymond*, 7 Blackf. 240. But the agreement for extension must not only be valid and binding in law, but the time of the extension must be definitely and precisely fixed. *Miller v. Stem*, 2 Penn. St. 286; *Parnell v. Price*, 3 Rich. L. 121; *Waddington v. Gary*, 7 Sm. & M. 522; *Gardner v. Watson*, 13 Ill. 347; *Watson v. Simpson*, 2 Gilman, 570; *People v. McHatton*, id. 638; *McGee v. Metcalf*, 12 Sm. & M. 535. And the sureties are not discharged by the giving of time to the principal, if a right has been reserved in the contract to proceed against the sureties at any time. *Wyke v. Rogers*, 12 E. L. & E. 162; s. c. 1 *De Gex*, M. & G. 408; *Viele v. Hoag*, 24 Vt. 46; *Hubbell v. Carpenter*, 1 Seld. 171; *Wagman v. Hoag*, 14 Barb. 232.

(g) See *Locke v. United States*, 3 Mason, 446; cited *ante*, note (c), p. * 25.

(gg) *Pittsburgh, &c. R. R. Co. v. Shaef-fer*, 59 Pa. St. 350.

(h) *Oxford Bank v. Lewis*, 8 Pick. 458.

(i) *Blackstone Bank v. Hill*, 10 Pick. 129. And the ground of this decision is thus stated by the court: "The first objection that an extension of credit was given to the principal without the consent of the surety, if made out, would be a good defence, but it is not supported in point of fact. The principle is stated in *Oxford Bank v. Lewis*, 8 Pick. 458, that to discharge the surety, the contract for new credit must be such as will prevent the holder of the note from bringing an

action against the principal. The plaintiffs were not precluded, during such supposed renewed term of credit, from suing the principal in the case under consideration. As to the understanding that the plaintiffs were not to collect the notes unless they should want money, that was a matter of courtesy rather than of legal obligation. The strongest circumstance showing a renewed credit is the receiving of interest in advance; but in the case of *Oxford Bank v. Lewis*, where that point was directly adjudged, it was held, that that circumstance did not tie the hands of the plaintiffs, if at any time they thought it necessary for their security to bring an action." See also *Strafford Bank v. Crosby*, 8 Greenl. 191. But these cases seem to rest on the ground of usage of the bank, and that the same was known to the sureties, and acquiesced in by them. And it was accordingly held in *Crosby v. Wyatt*, 10 N. H. 318, that if a note is made payable to a bank, where a regular usage exists to receive payment by instalments, at regular intervals, with the interest on the balance in advance, there is presumptive evidence of the assent of a surety that payment may be delayed, and received by instalments according to such usage, until the contrary is shown. But this principle cannot be held to apply to any delay beyond such regular usage, and no assent to any other course can be presumed. A similar doctrine was held in *Savings Bank v. Ela*, 11 N. H. 336. So in *Gifford v. Allen*, 3 Met. 255, it was determined, that if the holder of a note payable on demand makes a valid agree-

¹ An agreement, not under seal, to extend the time of payment of a note, interest to be paid at the original rate, a portion of it to be applied to the extinguishment of the debt, is without consideration, not binding on the holder, and does not discharge a surety. *Wilson v. Powers*, 130 Mass. 127.

It seems to be settled, that an express covenant not to sue the principal debtor within a *limited* time does not discharge the surety; because a suit may nevertheless be commenced at any time, and such a covenant is no bar, but only gives to the covenantee an action for damages. (*j*) But where there is an entry * on the docket of the court, made by counsel to the effect that no action shall be brought on the original debt, this discharges the surety, because it will be enforced by the court, and no such action will be permitted. It is therefore equivalent to a discharge of the debt by the creditor, which of course operates as a discharge of the guarantor. (*k*) Such an arrangement made with the principal debtor without the consent of the surety, although innocently done, may work an injury to the surety.

It is obvious that a surety is discharged by indulgence to a principal, only when the creditor knows the relation of the parties. Hence if two or more are promisors of a note, and some are principals and others are sureties, but this does not appear on the note and is not known to the holder, and he gives time to the promisor who is principal, this does not discharge those who are sureties. (*l*) Any valid extension of the credit, made in such a way as to be binding on the creditor, and made without the assent of the guarantor, is held to discharge him. (*m*)¹

SECTION VII.

OF NOTICE TO THE GUARANTOR.

A guaranty may be extinguished or discharged by the fact that the guarantee gives no notice to the guarantor of the failure of the

ment with the principal promisor, without the consent of the surety, to receive payment by yearly instalments, he thereby discharges the surety. And see further, *Draper v. Romeyn*, 18 Barb. 166; *Lime Rock Bank v. Mallett*, 34 Me. 547.

(*j*) *Perkins v. Gilman*, 8 Pick. 229. And in *Fullam v. Valentine*, 11 Pick. 156, where the defendant was arrested on mesne process and gave bail, and the plaintiff, before judgment was rendered, covenanted not to arrest him on any writ

or execution within four months, it was held, that the bail was not thereby discharged, for the covenant was only collateral to the action, and did not deprive the plaintiff of the power to arrest the defendant, nor the bail of the power to surrender him, within the four months.

(*k*) *Fullam v. Valentine*, *supra*.

(*l*) *Wilson v. Foot*, 11 Met. 285.

(*m*) *Dubuisson v. Folkes*, 30 Miss. 432; *Shook v. State*, 6 Ind. 113; *Bangs v. Mosher*, 23 Barb. 478.

¹ A surety may have an injunction against the collection of a note, the time of payment of which has been extended without his consent. *Bradshaw v. Combs*, 102 Ill. 428.

principal debtor, and of the intention of the guarantee to enforce the guaranty.¹ For a guarantor is entitled to reasonable notice of this. What the notice should be, or when it should be given, is not settled in the case of a mere guarantor as it is in the case of an indorser, but the reason and justice are the same in both cases, and equally require notice, in order that the guarantor may at once take what measures are within his power to secure or indemnify himself. The question of reasonable * time is a * 29 question of law, and the cases are very few which would help us in determining what time would be reasonable. But from the authorities and the reason of the thing, we deduce these rules: the guarantor is entitled to this notice, but cannot defend himself by the want of it, unless the notice and demand have been so long delayed as to raise a presumption of waiver or of payment, or unless he can show that he has lost by the delay opportunities for obtaining securities which a notice or an earlier notice would have given him. (n)² In this latter case a very brief delay, of a day or two only, might be fatal to the claim of the guarantee, if it appeared that notice could easily have been given, and would have saved the guarantor from loss. The question would be, in such a case, was there actual negligence, causing actual injury. (o) We think that cases which appear to hold

(n) *Allen v. Rightmere*, 20 Johns. 366; *Douglas v. Howland*, 24 Wend. 35; *Farrow v. Resess*, 11 Ired. L. 170; *Woodstock Bank v. Downer*, 1 Williams, 539; *Yancey v. Brown*, 3 Sneed, 89; *Dowley v. Camp*, 22 Ala. 659; *Louisville M. Co. v. Welsh*, 10 How. 461; *Dunbar v. Brown*, 4 McLean, 166; *F. & M. Bank v. Kercheval*, 2 Mich. 504. Insolvency of a principal, which will not excuse demand and

notice to an indorser, will excuse it in case of guaranty. *Bashford v. Shaw*, 4 Ohio St. 263.

(o) *Oxford Bank v. Haynes*, 8 Pick. 423; *Thomas v. Davis*, 14 Pick. 353; *Talbot v. Gay*, 18 id. 534; *Whiton v. Mears*, 11 Met. 563; *Farmers' & Mechanics' Bank v. Kercheval*, 2 Mich. 504; *Bickford v. Gibbs*, 8 Cushing. 154.

¹ A surety is not entitled to notice, *Harris v. Newell*, 42 Wis. 687; *Central Savings Bank v. Shine*, 48 Mo. 456; *McMillan v. Bull's Head Bank*, 32 Ind. 11; *Atlantic, &c. Tel. Co. v. Barnes*, 64 N. Y. 385; nor in some states a guarantor, *Barhydt v. Ellis*, 45 N. Y. 107; *Gage v. Lewis*, 68 Ill. 604; *Gage v. Mechanics' Bank*, 79 Ill. 62; *Kauzman v. Weirick*, 26 Ohio St. 330. If the liability, however, is contingent, there must be reasonable notice. *Murch v. Putney*, 56 N. H. 34. See *Clay v. Edgerton*, 19 Ohio St. 549. Thus in a continuing guaranty notice of the debtor's default and of the extent of the guarantor's liability should be given to the guarantor within a reasonable time after all transactions are closed. *Davis Sewing Machine Co. v. Mills*, 55 Ia. 543.—That reasonable notice is a question for the jury, see *Craig v. Parkis*, 40 N. Y. 181.

² In *McMillan v. Bull's Head Bank*, 32 Ind. 11, the rule is stated to be that a surety is not entitled to notice of the default of the principal, however such want of notice may, in fact, injure him; but that a guarantor should be given notice, in default of which he will be discharged to the extent that he can prove that he has suffered damage. *Gaff v. Sims*, 45 Ind. 262; *Rockford Bank v. Gaylord*, 34 Ia. 246. Notice need not be given if the principal is insolvent, *Montgomery v. Kellogg*, 43 Miss. 486; *Brackett v. Rich*, 23 Minn. 485.

that no notice needs to be given to an absolute guarantor, (*oo*)¹ or to a guarantor of a note, (*op*) are to be interpreted in accordance with the principles above stated.

A demand on the principal debtor, and a failure on his part to do that which he was bound to do, are requisite to found any claim against the guarantor; and notice of the failure, as we have said, must be given to him. (*p*) But if the guaranty is for the payment of a note, and is absolute and unconditional, it has been held that neither demand nor notice is necessary to charge the guarantor; (*q*) but we should have some question of this.

If the guaranty be that the debt or note is *collectible*, legal proceedings against all the principals are requisite to make the guarantor liable, (*r*)² because otherwise it cannot be certainly known that the note cannot be collected.

* SECTION VIII.

OF GUARANTY BY ONE IN OFFICE.

If a guaranty be made by one expressly in an official or special capacity, as attorney, executor, guardian, assignee, trustee, churchwarden, or the like; and the guarantor holds such office, and has a right to give the guaranty in his official capacity, then he is only bound in that capacity. But if he does not hold such office, or if he holds the office, but has no right to give the guaranty in that capacity, then he is personally liable, and such designation is merely surplusage, or words of description. (*s*)

(*oo*) *Voltz v. Harris*, 40 Ill. 155.

(*op*) *Bowman v. Curd*, 2 Bush, 565.

(*p*) *Douglass v. Reynolds*, 7 Pet. 114. But this demand and notice may be waived by the surety in his guaranty.

Bickford v. Gibbs, 8 Cush. 154.

(*q*) *Read v. Cutta*, 7 Greenl. 186; *Breed v. Hillhouse*, 7 Conn. 523; *contra*, *Greene v. Dodge*, 2 Hamm. 498; *Beebe v. Dudley*, 6 Foster (N. H.), 259.

(*r*) *Loveland v. Shepard*, 2 Hill (N. Y.),

139; *Van Derveer v. Wright*, 6 Barb. 547.

See also *Blanchard v. Wood*, 26 Me. 358; *Day v. Elmore*, 4 Wis. 190.

(*s*) *Redhead v. Cator*, 1 Stark. 14;

Hall v. Ashurst, 1 Cr. & M. 714; *Burrell v. Jones*, 3 B. & Ald. 47; *Appleton v. Binks*, 5 East, 148; *Sumner v. Williams*, 8 Mass. 162.

¹ *Gage v. Mechanics' &c. Bank*, 79 Ill. 62; *Barker v. Scudder*, 56 Mo. 272; *Gammell v. Parramore*, 58 Ga. 54.

² A guarantor of the collection of a note cannot be sued until legal proceedings to enforce its collection have been taken against the maker of the note without effect. *Bosman v. Akeley*, 39 Mich. 710. See *French v. Marsh*, 29 Wis. 649. A guaranty to pay a claim in case it "cannot be collected from the representatives of T.", is valid without obtaining judgment and execution if the ordinary statutory remedy is pursued. *Schmitz v. Langhaar*, 88 N. Y. 503.

SECTION IX.

OF REVOCATION OF GUARANTY.

A promise of guaranty is always revocable at the pleasure of the guarantor by sufficient notice, unless it be made to cover some specific transaction which is not yet exhausted, or unless it be founded upon a continuing consideration, the benefit of which the guarantor cannot or does not renounce.¹ If the promise be to guarantee the payment of goods sold up to a certain amount, and after a part has been delivered, the guaranty is revoked, it would seem that the revocation is good, unless it be founded upon a consideration which has been paid to the guarantor for the whole amount; or unless the seller has, in reliance on the guaranty, not only delivered a part to the buyer, but bound himself by a contract enforceable at law to deliver the * residue. * 81 And if the guaranty be to indemnify for misconduct of an officer or servant, this promise is revocable, provided the circumstances are such, that when it is revoked, the promisee may dismiss the servant without injury to himself on his failure to provide new and adequate sureties. (ss) ²

It seems, however, that a distinction is taken between the power of revocation, when the guaranty is given by parol contract, and when it is under seal. In the former case this power is very broadly asserted, but in the latter it is almost wholly

(ss) This sentence was quoted, the law cided in accordance with it, in *Phillips v. therein stated approved, and the case de- Foxall*, L. R. 7 Q. B. 677.

¹ Death of the guarantor is a revocation of a guaranty of the payment by another of goods to be sold, not founded upon any present consideration passing to the guarantor, and providing that it should continue until written notice should be given of its termination. *Jordan v. Dobbins*, 122 Mass. 168. See *Harris v. Fawcett*, L. R. 8 Ch. 866, that the personal representative of a guarantor is not liable for advances after the latter's death, especially if party advancing received notice. But the death of one co-surety to a continuing guaranty for future advances does not discharge the other. *Beckett v. Addyman*, 9 Q. B. D. 783.

² That the guarantor of a servant's fidelity by a guaranty under seal may, by paying what is due on the discovery of his dishonesty, in equity, compel the delivery and cancellation of his bond, see *Burgess v. Eve*, L. R. 13 Eq. 450, per *Malins*, V. C. See *Sanderson v. Aston*, L. R. 8 Ex. 73.

denied. An eminent judge says, indeed, that there are no means or mode of revocation of guaranty under seal. (t) But whether this is strictly true may well be doubted.

(t) Lord *Ellenborough*, in *Hassell v. Long*, 2 M. & Sel. 370. And see *Bayley*, J., in *Calvert v. Gordon*, 7 B. & C. 809. So in *Hough v. Warr*, 1 C. & P. 151. *Abbott*, C. J., expressed the opinion that

* CHAPTER VIII.

* 32

HIRING OF PERSONS.

SECT. I.—*Servants.*

IN England, a domestic servant who is turned away without notice, and without fault, is entitled to one month's wages although there be no agreement to that effect. (a) We are

(a) *Robinson v. Hindman*, 3 Esp. 235. And this is on the ground that a *general* hiring, that is to say, a hiring without any engagement as to the duration of the service, is *presumed* to be a hiring *for a year*, and it will be construed in a court of law to be a hiring on the terms that either party might determine the engagement upon giving a month's notice, and the law implies a promise by the master to pay a month's wages, if he dismisses his servant without cause, without giving such notice. See *Fawcett v. Cash*, 5 B. & Ad. 904; *Lilley v. Elwin*, 11 Q. B. 754; *Nowlan v. Ablett*, 2 C. M. & R. 54; *Beeston v. Collyer*, 4 Bing. 309; s. c. 2 C. & P. 607; *Spain v. Arnott*, 2 Stark. 257; *Huttman v. Boulnois*, 2 C. & P. 511; *Holcroft v. Barber*, 1 Car. & K. 4; *Baxter v. Nurse*, 1 Car. & K. 10. But this presumption of a yearly hiring may be rebutted by evidence showing that such was not the intention of the parties. *Bayley v. Rimmell*, 1 M. & W. 506. This was an action by an assistant surgeon against his employer, to recover the amount of salary due him in that capacity. The plaintiff claimed for salary for a hundred and sixty-one days, at the rate of £200 per annum, and he so described his claim in the particulars of his demand annexed to the record. No specific contract of hiring was proved, but evidence was given of the service. It appeared that after the plaintiff had been some time in the defendant's employment, he was taken ill, and went to a hospital, where he remained three months. He did not return to his employment, nor did the defendant request him to do so.

It appeared that the plaintiff had been paid different sums of money, but not at any fixed or definite periods. It was submitted, that upon this evidence it must be taken to be a general hiring, and that in legal estimation that was a hiring for a year, and therefore that no wages were recoverable, as the year's service had not been performed. *Sed non allocatur*; and *Parke*, B., in giving the opinion of the court, observed: "Admitting that there was some evidence of a hiring, and agreeing in the proposition that a general hiring, if unexplained, is to be taken to be a hiring for a year, I think there is abundant evidence in this case to show that there was no hiring for a year. It appears that payments were made, but they were not made according to the yearly amount, nor at any definite periods of the year. The parties separated in the middle of the year, and neither did the plaintiff return, nor did the defendant require him to return and complete the service. If, indeed, the jury ought to have found whether this was a yearly hiring, the learned judge should have been required to leave that question to them; but there is really nothing to show that the compensation was to be paid at the end of the year." The presumption of a yearly hiring is not a presumption of *law*, but of fact merely. *Cresswell*, J., in *Baxter v. Nurse*, 6 Man. & G. 935, 941, and the presumption of a yearly hiring does not arise, where the services of the servant are expressed to be at the will of either party; as where a boy was hired by a farmer, for his meat and clothes, "*so long as he had a*

*33 not * aware that a similar rule exists in this country; but where the wages are payable at definite periods, as by the week or by the month, the contract for each period would perhaps be considered as so far entire, that a servant leaving without cause after the month had commenced, could not recover wages for his services within that month; and a master turning off his servant without cause would be bound to pay him his wages through the month. This, however, may be doubted, unless there was some agreement expressed or distinctly inferable from the contract, or a custom or usage were proved which the parties might be considered as having contemplated. (b)¹ It has

mind to stop." *Rex v. Christ's Parish in York*, 3 B. & C. 459. See also *Rex v. Great Borden*, 7 B. & C. 249. As to what words are sufficient to constitute a yearly hiring, see *Emmens v. Elderton*, 26 E. L. & E. 1. There was formerly a doubt whether a contract to serve *during life* was valid, but it seems that such contract is not itself illegal. *Lord Abinger*, in *Wallis v. Day*, 2 M. & W. 281. See further, 1 Bl. Com. 425, n. (1), (Christian's ed.).

(b) In England this doctrine rests on the ground that the parties may make the contract with reference to *general usage*, which thereby becomes a part of the contract. See *Turner v. Robinson*, 5 B. & Ad. 789; *Ridgway v. Hungerford Market Co.* 3 A. & E. 171. In this country it has been held, that a contract to work "for eight months for \$104, or \$13 a month," was so far an entire contract, that if the plaintiff left without cause before the eight months, he could not recover for any part of the time; and although he had worked more than a month, he was not allowed to recover for a month, since there was no provision that he should be paid monthly. *Reab v. Moor*, 19 Johns. 337. So, where the plaintiff agreed to work for the defendant "*seven months at \$12 per month*," it was held that this was an entire contract; that \$84 were to be paid at the end of the seven months, and not \$12 at the end of each month; and that if the plaintiff left without good cause, before the seven months were expired, he could not recover anything for his ser-

vices, although the defendant had paid a part during the continuance of the service. *Davis v. Maxwell*, 12 Met. 286. In this case, *Hubbard*, J., said: "In regard to the contract itself, which was an agreement to work for the defendant for seven months, at twelve dollars per month, we are of opinion that it was an entire one, and that the plaintiff, having left the defendant's service before the time expired, cannot recover for the partial service performed; and that it differs not in principle from the adjudged cases of *Stark v. Parker*, 2 Pick. 267; *Olmstead v. Beale*, 19 Pick. 528; and *Thayer v. Wadsworth*, 19 Pick. 349; which we are unwilling to disturb, upon mere verbal differences between the contracts in those cases and in this, which do not affect its spirit. The plaintiff has argued that it was a contract for seven months, at twelve dollars per month, to be paid at the end of each month. But however reasonable such a contract might be, it is not, we think, the contract which is proved. There is no time fixed for the payment, and the law therefore fixes the time; and that is, in a case like this, the period when the service is performed. It is one bargain; performance on one part and payment on the other; and not performance and full payment for the part performed. The rate per month is stated, as is common in such contracts, as fixing the rate of payment, in case the contract should be given up by consent, or death or other casualty should determine it before its expiration,

¹ A servant whose contract of hiring provides that if he intends to leave his master's employ he will give notice of such intention and work ten full working days thereafter, and in default thereof forfeit all money that may be due him, cannot recover from the master wages previously earned, if without sufficient cause he leaves his work without giving the required notice, and remains away so long as to warrant the master in regarding his absence as an abandonment of his work, and in procuring another person to supply his place, although the servant's intention is to be absent only temporarily. *Naylor v. Fall River Iron Works*, 118 Mass. 317.

* been held in England, that a hiring "for at least three years at the option of the hirer," at a certain rate by the year, permitted the hirer to end the hiring only at the end of a year. (c)

Where the contract is for a certain time, if the master discharge the servant before the time, he is still liable, unless the servant has given cause, by showing himself unable or unwilling

- to do what he has undertaken to do. (d)¹ And it is held in
- * England, that after the refusal of the master to employ,

without affecting the right of the party. Such contracts for hire, for definite periods of time, are reasonable and convenient, are founded in practical wisdom, and have long received the sanction of the law. It is our duty to sustain them when clearly proved." See also *Eldridge v. Rowe*, 2 Gilman, 91. So in *Nichols v. Coolahan*, 10 Met. 449, where a contract was made by N. and C. that N. should have eleven dollars per month and board, so long as he should work for C.; C. informing N. that he (C.) might not have two days' work for him. N. worked for C. several months, and brought an action for his wages, and annexed to his writ a bill of particulars, in which he charged the price agreed on per month, and gave C. credit for a certain sum on account of three weeks' sickness of N., during which time he was unable to work. C. filed in set-off an account against N. for board during his sickness. Held, that the contract was a hiring by the month; that C. was not entitled to payment for N.'s board during his sickness; but that N. could not recover wages during any part of the time of his detention from work by sickness. — And wherever the contract shows that the hiring was intended for a longer term, as for a year, the mere reservation of wages for a shorter term, as so much per week, or per month, will not control the hiring. Thus, where a farm servant was hired for a year, at three shillings a week, with liberty to go at a fortnight's notice, the contract was held to be a hiring for a year, the fortnight's notice plainly showing that it was not a weekly hiring. *Rex v. Birdbrooke*, 4 T. R. 245. In England, in the hiring of domestic servants for a year, there is generally an implied condition arising from general custom, that the contract may be determined by a month's notice to quit, and if the servant leave without such notice, and without the fault of his master, he can recover nothing for

his services. See *Hartley v. Cummings*, 5 C. B. 247; *Pilkington v. Scott*, 15 M. & W. 657; *Archard v. Hornor*, 3 C. & P. 349; *Johnson v. Blenkensop*, 5 Jur. 870; *Nowlan v. Ablett*, 2 C. M. & R. 54; *Debriar v. Minturn*, 1 Cal. 450. But it has been held in this country, that where one enters into the service of employers, under no express agreement to continue in their service for any definite time, but with a knowledge of a regulation adopted by them requiring that all persons employed by them shall give them four weeks' notice of an intention to quit their service, he does not forfeit his wages by quitting their service without giving such notice; but he is liable to them for all damages caused by his not giving the notice; and in a suit against them for his wages, the amount of such damages may be deducted therefrom. *Hunt v. The Otis Company*, 4 Met. 464.

(c) *Down v. Pinto*, 9 Exch. 327. See also *Taylor v. Laird*, 1 H. & N. 266.

(d) It seems that where a servant is hired for a year, or other fixed period, at an entire sum, and is discharged by his employer, *without cause*, during the term, he may at the end of the time recover *for the whole time*, according to the contract. *Gandell v. Pontigny*, 4 Camp. 375; *Costigan v. Mohawk & Hudson Railroad Co.* 2 Denio, 609; *Cox v. Adams*, 1 Nott & McC. 284; *Clancey v. Robertson*, 2 Rep. Com. Ct. 404; *Byrd v. Boyd*, 4 McCord, 246; *Sherman v. Champlain Trans. Co.* 31 Vt. 162. It seems, however, that the action in such case should be *special*, and not for work and labor done. *Fewings v. Tidal*, 1 Exch. 295; *Archard v. Hornor*, 3 C. & P. 349; *Smith v. Hayward*, 7 A. & E. 544; *Broxham v. Wagstaffe*, 5 Jur. 845; *Hartley v. Harman*, 11 A. & E. 798. But if the servant obtains work elsewhere, during the continuance of the term for which he was originally employed by the defendant, this ought, and probably would,

¹ A servant may be discharged for habits of intoxication. *McCormick v. Demary*, 10 Neb. 515.

the servant is entitled to bring an action immediately, and is not bound to wait until after the day agreed upon for commencement of performance has arrived. (e) A promise by the servant to obey the lawful and reasonable orders of his master, within the scope of his contract, is implied by law; and a breach of this promise, in a material matter, justifies the master in discharging him. (f)

reduce the damages to which the servant would otherwise be entitled by such wrongful dismissal. *Stewart v. Walker*, 14 Penn. St. 293. And see *Costigan v. Mohawk & Hudson R. R. Co.* 2 Denio, 617; *Beardsley, J. v. Hoyt v. Wildfire*, 3 Johns. 518; *Emerson v. Howland*, 1 Mason, 51; *Sherman v. Champlain Trans. Co.* 31 Vt. 162. In *Goodman v. Pocock*, 15 Q. B. 576, a clerk dismissed in the middle of a quarter brought an action for a wrongful dismissal, the declaration containing a special count for such dismissal. The jury were directed not to take into account the services actually rendered during the broken quarter, as they were not recoverable except under an *indebitatus* count, and they gave damages accordingly. The plaintiff then brought a second action to recover under an *indebitatus* count for his services during the broken quarter. It was held, that the action was not maintainable, because the plaintiff by his former action on the special contract had treated it as an open contract, and he could not afterwards recover under the *indebitatus* count as for services under a rescinded contract. It was also held, that in the former action the jury ought to have been directed to take the services rendered during the broken quarter into account, in awarding damages under the special count for the wrongful dismissal. And semble, per *Patteson, J.*, and *Erle, J.*, that under an *indebitatus* count, the servant wrongfully dismissed before the termination of the period for which he was hired, cannot recover his whole wages up to such termination, as for a constructive service, but can recover only in respect to his service up to the time of his dismissal. See *Lilley v. Elwin*, 11 Q. B. 755; *Green v. Hulett*, 22 Vt. 188.

(e) *Hochster v. De Latour*, 2 E. L. & B. L. 678.

(f) *The King v. St. John, Devizes*, 9 B. & C. 896. The wilful disobedience, on the part of the servant, of any lawful order of the master, is a good cause of discharge. *Spain v. Arnott*, 2 Stark. 256; *Callo v. Brouncker*, 4 C. & P. 518; *Amor v. Fearon*, 9 A. & E. 548. See also *Fil-*

lien v. Armstrong, 7 A. & E. 557. In the case of *Turner v. Mason*, 14 M. & W. 112, an action of assumpsit was brought for the wrongful dismissal of a domestic servant, without a month's notice, or payment of a month's wages. Plea, that the plaintiff requested the defendant to give her leave to absent herself from his service during the night, that he refused such leave, and forbade her from so absenting herself, and that against his will she nevertheless absented herself for the night, and until the following day, whereupon he discharged her. Replication, that when the plaintiff requested the defendant to give her leave to absent herself from his service, her mother had been seized with sudden and violent sickness and was in imminent danger of death, and believing herself likely to die, requested the plaintiff to visit her to see her before her death, whereupon the plaintiff requested the defendant to give her leave to absent herself for that purpose, she not being likely thereby to cause any injury or hindrance to his domestic affairs, and not intending to be thereby guilty of any improper omission or unreasonable delay of her duties; and because the defendant wrongfully and unjustly forbade her from so absenting herself for the purpose of visiting her mother, &c., she left his house and service, and absented herself for that purpose for the time mentioned in the plea, the same being a reasonable time in that behalf, and she not causing thereby any hindrance to his domestic affairs, nor being thereby guilty of any improper omission or unreasonable delay of her duties, as she lawfully might, &c. Held, on demurrer, that the plea was good, as showing a dismissal for disobedience to a lawful order of the master, and that the replication was bad, as showing no sufficient excuse for such disobedience. So where the servant assaulted his employer's servant maid, with intent to commit a rape upon her. *Atkin v. Acton*, 4 C. & P. 208. Or commits any crime, though the same be not immediately injurious to his employer. *Libhart v. Wood*, 1 W. & S. 265. So where an unmarried female servant be-

* If the contract be for a time certain, and the servant leave without cause before the time expires, it has been held in many cases, in England and in this country, that he has no claim for the services he has rendered. (g) Some of these

comes pregnant. *Rex v. Brampton, Caldecot*, 11, 14. So using abusive language to his employer. *Byrd v. Boyd*, 4 *McCord*, 246. Or quarrels with a fellow clerk, in the store in the presence of ladies, and draws a revolver. *Kearney v. Holmes*, 6 *La. An.* 373. Or is guilty of any misconduct, inconsistent with the relation of master and servant. *Singer v. McCormick*, 4 *W. & S.* 265. As if the servant set up a claim to be a partner with his employer. *Amor v. Fearon*, 9 *A. & E.* 548. Or conduct so as materially to injure his employer's business. *Lacy v. Osbaliston*, 8 *Car. & K.* 80. Or is guilty of repeated intoxication; *semble, Wise v. Wilson*, 1 *Car. & K.* 662. And see further *Lomax v. Arding*, 28 *E. L. & E.* 543; *s. c.* 10 *Exch.* 784.

(g) If this question is to be governed solely by the number of authorities, it would seem to be at rest, for it is supported by the following adjudged cases: *Cutter v. Powell*, 6 *T. R.* 320; *Lilley v. Elwin*, 11 *Q. B.* 755; *Stark v. Parker*, 2 *Pick.* 267; *McMillan v. Vanderlip*, 12 *Johns.* 165; *Jennings v. Camp*, 13 *id.* 94; *Reab v. Moor*, 19 *id.* 337; *Waddington v. Oliver*, 5 *B. & P.* 61; *Ellis v. Hamlen*, 3 *Taunt.* 52; *Marsh v. Ruleson*, 1 *Wend.* 514; *Miller v. Goddard*, 34 *Me.* 102; *Faxon v. Mansfield*, 2 *Mass.* 147; *Lantry v. Parks*, 8 *Cowen*, 63; *Ketchum v. Everett*, 13 *Johns.* 365; *Sickles v. Pattison*, 14 *Wend.* 257; *Weeks v. Leighton*, 5 *N. H.* 343; *Olmstead v. Beale*, 19 *Pick.* 528; *Thayer v. Wadsworth*, *id.* 349; *St. Albans Steamboat Co. v. Wilkins*, 8 *Vt.* 54; *Davis v. Maxwell*, 12 *Met.* 286; *Hunt v. Otis Man. Co.* 4 *id.* 465; *Winn v. Southgate*, 17 *Vt.* 355; *Sutton v. Tyrell*, 12 *id.* 79; *Ripley v. Chipman*, 13 *id.* 268; *Coe v. Smith*, 1 *Cart. (Ind.)* 267; *Swift v. Williams*, 2 *Cart. (Ind.)* 365; *Hawkins v. Gilbert*, 19 *Ala.* 54. Nor does it make any difference in this respect whether the wages are estimated at a gross sum, or are to be calculated according to a certain rate per week or month, or are payable at certain stipulated times, provided the servant agree for a definite and whole term; such an arrangement being perfectly consistent with the entirety of the contract. *Davis v. Maxwell*, 12 *Met.* 286. The law on this point was fully affirmed in the case of *Winn v. Southgate*, 17 *Vt.* 355. It was there held, that if one contract to labor for another for a specified term, and

leave the service of his employer before the expiration of the term, without any cause, attributable either to the employer or to the act of Providence, he cannot recover any compensation for the portion of the term during which he in fact labors. And it makes no difference that the employer, before the expiration of the term, permitted the plaintiff to be absent from his employment for a few weeks upon a journey,—the plaintiff having, after his return, again resumed labor for his employer, under the contract. Nor does it make any difference, that the plaintiff ceased laboring for his employer, under the belief that, according to the legal method of computing time under similar contracts, he had continued laboring as long as could be required of him. Nor that the employer, during the term, has from time to time made payments to the plaintiff for his labor. But if, in such case, the defendant has made payments to the plaintiff upon the contract, during the term, and the plaintiff, having commenced an action of book account to recover for his services, is defeated, upon the ground that he left the service of the defendant without legal cause, before the expiration of the term, the defendant can have no recovery against the plaintiff for the amount of payments thus made. See also *Rice v. The Dwight Man. Co.* 2 *Cush.* 80, where it is again held, that if A enter into the service of B upon an agreement to labor for him a year, and leave at the end of six months, A can maintain no action for the services so rendered; but if B then promise A to pay him for the six months' labor, upon the performance of any additional service, however slight, or the doing of some act by A, to his personal inconvenience, though of no value to B, and such service is rendered, or act done, this will so far operate as a waiver of the original contract that an action may be maintained by it for the six months' labor. That an offer to pay, by the employer, is a waiver of all forfeiture, see also *Seaver v. Morse*, 20 *Vt.* 620. So where the employer gives the laborer a note, before the time for which he was hired has elapsed, for the amount of wages already earned, he cannot resist payment thereof by showing that the payee left his service before the expiration of the time for which he was originally hired. *Thorpe v. White*, 13 *Johns.* 53. See also *Hayden v. Madison*,

* 87 cases are of * great severity ; as where the hiring was for a year, and after ten months and a half the servant went away, saying he would work no more for that master, and after two days returned and offered to fulfil his contract, and the master refused to receive him, it was held that the servant could recover no wages for the time he had worked. (h) The * 38 ground taken in these cases, * and on which they all seemed to rest, is the entirety of the contract, which is supposed to prevent any apportionment of the wages. And it has been held, that the servant cannot recover if he left because the master

7 Greenl. 76. The rule before adverted to as to entire performance is not binding upon persons under the age of twenty-one years, and although they engage to work a specified time, and for a specified sum, they may nevertheless leave when they please, and recover upon a *quantum meruit* for what their services are really worth. *Moses v. Stevens*, 2 Pick. 332; *Judkins v. Walker*, 17 Me. 38; *Bishop v. Shepherd*, 23 Pick. 492; *Vent v. Osgood*, 19 id. 572; *Thomas v. Dike*, 11 Vt. 273; *Medbury v. Watrous*, 7 Hill (N. Y.), 110; *Whitmarsh v. Hall*, 3 Denio, 375; deducting, it seems, any damage to his employer by such violation of the contract. *Thomas v. Dike*, 11 Vt. 273; *Moses v. Stevens*, 2 Pick. 332; *Judkins v. Walker*, 17 Me. 38. But see *contra*, *Whitmarsh v. Hall*, 3 Denio, 375, where the subject was fully considered, and *Jewett*, J., observed upon this point: "It is insisted on the part of the defendants that the justice erred in rejecting the evidence offered by them, on the ground that, although the plaintiff was an infant, and had a right to avoid his contract and recover the value of his services, yet that the defendants were entitled, if they had sustained an injury by such avoidance, to have a proper allowance therefor made against such value. In other words, it is claimed that the defendants are entitled, as a set-off against the value of the plaintiff's services, to such sum as is equal to the amount of the injury sustained by them, by the avoidance of the contract by the plaintiff, which in effect would charge the infant with the performance of his contract, or with damages for its violation. The proposition is not sustained by any elementary principle known to the law, and I do not find that it has been recognized by any adjudged case, unless by that of *Moses v. Stevens*, 2 Pick. 332. In that case the plaintiff, an infant, had made a special agreement to labor for the defendant a certain time for certain wages, and before the time ex-

pired left his service voluntarily, without cause. It was held, that he might recover on a *quantum meruit* for the services performed, and if his employer was injured by the sudden termination of the contract without notice, a deduction should be made on that account. The learned judge, in delivering the opinion of the court, said: 'We think the special contract being avoided, an *indebitatus assumpsi* upon a *quantum meruit* lies, as it would if no contract had been made; and no injustice will be done, because the jury will give no more than, under all circumstances, the services were worth, making any allowance for any disappointment, amounting to an injury, which the defendant in such case would sustain by the avoidance of the contract.' With great respect, I am unable to yield my assent to the soundness of the qualification annexed to the proposition. I think that the infant plaintiff, in such an action, is entitled, by well-settled principles of law, to recover such sum for his services as he would be entitled to if there had been no express contract made. A recovery is allowed upon the assumption that there is no express contract at all." But in the case of *Moulton v. Trask*, 9 Met. 577, decided since *Whitmarsh v. Hall*, it was held, that where a minor makes a contract, either absolute or conditional, to labor for a year, for one hundred dollars, and his employer, without sufficient cause, discharges him before the year expires, *indebitatus assumpsi* may be maintained for the minor's wages for the time during which he labored; and his employer is bound to pay at the rate of one hundred dollars a year, deducting any loss that he may have sustained from the minor's unfaithfulness, or occasional absence without leave. See also *ante*, vol. i. p. *315, note (l).

(h) *Lantry v. Parks*, 8 Cowen, 63; *Swanzey v. Moore*, 22 Ill. 63; *Hansell v. Erickson*, 28 Ill. 257. See *ante*, p. *33, note (b).

required of him services different from those specified in the contract, if he made no objection thereto. (i) But if prevented from performing the stipulated amount of labor by sickness, or similar inability, he may recover pay for what he has done on a *quantum meruit*. (j)

The case of *Britton v. Turner*, 6 N. H. 481, (k) resists the

(i) *Hair v. Bell*, 6 Vt. 35; *Mullen v. Gilkinson*, 19 id. 503. See also *De Camp v. Stevens*, 4 Blackf. 24. In this case a person contracted to work for a year, at a certain sum per month; but after working three months and ten days, he left his employer, and sued him for the work thus done. It was proved that the defendant had manifested a disposition to get the plaintiff to leave him, and had said, after the plaintiff was gone, that he was glad of it, as the plaintiff was worth nothing.

Held, that the action was not sustained.

(j) *Dickey v. Linscot*, 20 Me. 453; *Fenton v. Clark*, 11 Vt. 557. In this case, *Bennett*, J., in giving the opinion of a majority of the court, observed: "In the case before the court, the plaintiff contracted with the defendant to labor personally for him for four months, at ten dollars per month, and by the terms of the contract was to receive no pay till he had worked the four months. These services being of a personal character, the contract could not be performed by another, and as the plaintiff was disabled to perform it himself, by reason of sickness, which was the act of God, upon the authority of the foregoing cases, the contract was discharged. The inquiry then arises, What is the result? It appears to me apparent that the plaintiff must, at least, after the expiration of the four months be permitted to recover as upon a *quantum meruit, pro rata*, for the services rendered. Common justice requires this, and I should be sorry to find that it was not tolerated by the principles of the common law. To hold, in a case like this, where the plaintiff has been discharged of his contract by the act of God, that there can be no apportionment, upon the technical ground that the contract is entire, and its performance a condition precedent, is, to my mind, leaving the substance and adhering to the shadow." *Redfield*, J., dissented. See also *Seaver v. Morse*, 20 Vt. 620. In this case the plaintiff, having contracted to labor for the defendant six months, at a specified price for the term, was taken unwell, and left the defendant's service, and was so unwell for about a month that he was unable to perform the full labor of a man, and then he recovered his health, but did

not return to the defendant's employment. It was held, that he was entitled to recover for his services, upon a *quantum meruit*, for the time he labored. And it was also held, that, if this were not so, an offer by the defendant, after the plaintiff had left his service, to pay the plaintiff the amount due to him, at the rate of compensation fixed by the original contract, was a waiver of all claim of forfeiture. To the same effect is *Fuller v. Brown*, 11 Met. 440, where a special agreement was made by A and B that A should work for B, and that, if he should be dissatisfied, and wished to leave the service, he should give B four weeks' notice, and work for him four weeks after the notice, and then receive his pay. After A had begun to work under this agreement, he became sick and unable to work, and left B without giving four weeks' notice, and remained sick for several weeks. *Held*, that this agreement as to notice applied to a voluntary leaving of the service by A, and not to a leaving by reason of his sickness and inability to continue therein; and that he was entitled to recover a proper compensation for the work which he had done. And see *Fahy v. North*, 19 Barb. 341.

(k) In this case the whole subject was fully and ably examined by *Parker*, J., and the court came to the following conclusions, which the American editor of Chitty on Contracts regards as 'manifestly just and sensible.' 1. Where a party undertakes to pay, upon a special contract for the performance of labor, he is not liable to be charged upon such special contract until the money is earned according to the terms of the agreement; and where the parties have made an express agreement the law will not imply and raise an agreement different from that which the parties have entered into, except upon some further transaction between them. 2. In case of a failure to perform such special contract, by default of the party contracting to do the service, if the money is not due by the terms of the special agreement, and the nature of the contract is such that the employer can reject what has been done, and refuse to receive any benefit from the part performance, he is entitled to do so, unless he has

* 39 * whole doctrine of these cases, and permits the servant to recover on a *quantum meruit*. His right to recover is carefully guarded in this case by principles which seem to protect the master from all wrong; and to require of him only such payment as is justly due for benefits received and retained, and after all deduction for any damage he may have sustained from the breach of the contract. So guarded, it might seem that the principles of this case are better adapted to do adequate justice to both parties, and wrong to neither, than those of the numerous cases which rest upon the somewhat technical rule of the entirety of the contract. It is certain, however, that, since this case was *40 reported, the same question has been again considered * in other courts, and decided in conformity with the earlier decisions. (*l*)¹

before assented to and accepted of what has been done, and, in such case the party performing the labor is not entitled to recover, however much he may have done. 3. But if, upon a contract of such a character, a party actually receives useful labor, and thereby derives a benefit and advantage, over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done and the value received furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of the excess. And the rule is the same, whether the labor was received and accepted by the assent of the party prior to the breach, and under a contract by which, from its nature, the party was to receive the labor from time to time until the completion of the whole contract, or whether it was received and accepted by an assent subsequent to the performance of all that was in fact done. 4. In case such contract is broken, by the fault of the party employed, after part performance has been received, the employer is entitled, if he so elect, to put the breach of contract in defense for the purpose of reducing the damages, or showing that nothing is due, and the benefit for which he is liable to be charged, in that case, is the amount of value which he has received, if any, beyond the amount of damage, and the implied promise which the law will raise, is to pay such amount of the stipulated price for the whole labor as remains, after deducting what it would cost to procure a completion of the whole service, and also

any damage which has been sustained by reason of the non-fulfilment of the contract. 5. If in such case it be found that the damages are equal to or greater than the amount of the value of the labor performed, so that the employer, having a right to the performance of the whole contract, has not, upon the whole case, received a beneficial service, the plaintiff cannot recover. 6. If the employer elects to permit himself to be charged for the value of the labor, without interposing the damages in defence, he is entitled to do so, and may have an action to recover his damages for the non-performance of the contract. 7. If he elects to have the damages considered in the action against him, he must be understood as conceding that they are not to be extended beyond the amount of what he has received, and he cannot therefore afterwards sustain an action for further damages.

(*l*) The case of *Britton v. Turner* was cited and alluded to by the court, in giving the opinion, in the subsequent case of *Olmstead v. Beale*, 19 Pick. 529, but *Morton*, J., who there delivered the opinion of the court, said: "We have no hesitancy in adhering to our own decisions, supported as they are by principle, and a long series of adjudications." On the other hand the principles of *Britton v. Turner* were clearly approved by *Bennett*, J., in delivering the opinion of *Fenton v. Clark*, 11 Vt. 560. The court of Vermont seems in other cases inclined to construe all entire contracts of labor and service equitably for the laborer, and to hold, where the employer has received benefit

¹ *Byerlee v. Mendel*, 39 Ia. 382, follows *Britton v. Turner*, *supra*.

On the same principle of entirety of contract, it is held, that if a servant is discharged for misconduct during the currency of a quarter, he is entitled to no wages from the beginning of that quarter, although he did not misbehave until the day when discharged. (*m*) But if the contract be dissolved by mutual consent, he may recover wages *pro rata*, without any express contract to that effect, (*n*) and so he may if he leave for justifiable cause. (*o*) If a justifiable cause for dismissal exists, he cannot recover, although not dismissed expressly on that ground, (*p*) and even although the master did not know of its existence at the time. (*q*) And if the servant by his misconduct, forfeits his claim for wages, a subsequent promise of the * master to pay the * 41 wages has been held void for want of consideration; (*r*) but this cannot be a general rule.

Where the servant is wrongfully dismissed during a quarter, or other definite term, he may, after the quarter or term ends,

from the servant's labor, and the parties cannot be placed *in statu quo*, that the employer is liable on a *quantum meruit* for the labor actually performed, although the contract was not performed *exactly* as agreed. See *Gilman v. Hall*, 11 Vt. 510; and *Blood v. Enos*, 12 Vt. 625; *Sherman v. Champlain Trans. Co.* 31 Vt. 162. See notes (*g*), p. *36, and (*j*), p. *38. It may be seen in 7th *Six Wm. Jones' works*, 366, that the laws of Menn contain the very same principle as that of the common law, as asserted in *Olmstead v. Beale*; so that it has, at all events, the sanction of an extreme antiquity.

(*m*) *Atkin v. Acton*, 4 C. & P. 208; *Ridgway v. Hungerford Market Co.* 3 A. & E. 171; *Cussons v. Skinner*, 11 M. & W. 161; *Baillie v. Kell*, 4 Bing. N. C. 638. See also *Mercer v. Whall*, 5 Q. B. 457, Lord Denman.

been left to the jury to say whether the parties had come to an agreement that those services should be paid for.

(*o*) *Patterson v. Gage*, 23 Vt. 558; *Pritchard v. Martin*, 27 Mo. 305. And where the contract was dissolved by authority of the State (the employé being sent away under a statute as a witness in a criminal case), it was held, that the hirer was bound to pay, and only to pay, *pro rata* wages for the time in which the servant was actually in his employ. *Melville v. De Wolf*, 30 E. L. & E. 323; s. c. 4 E. & B. 844.

(*p*) *Ridgway v. Hungerford Market Co.* 3 A. & E. 171; *Cussons v. Skinner*, 11 M. & W. 161; *Baillie v. Kell*, 4 Bing. N. C. 638. See also *Mercer v. Whall*, 5 Q. B. 457, Lord Denman.

(*q*) *Spotswood v. Barrow*, 5 Exch. 110; *Willets v. Green*, 3 Car. & K. 59.

(*r*) This point was decided in the case of *Mockman v. Shepherdson*, 3 Per. & D. 182. But it is to be observed that in that case there was an express agreement between the parties, that if the servant should get drunk any time during the service, he should forfeit all his wages up to that time. The case of *Seaver v. Morse*, 20 Vt. 620, is an authority for holding, that a forfeiture of wages, incurred by a failure to perform an entire contract, is waived by a subsequent promise of the employer to pay such wages, although the promise is made without any new consideration. See also, *ante*, p. *36, note (*g*).

recover for the whole in an action, not for work and labor, but for preventing him from doing his work. (s)

If the servant hired for a certain time, reserves the right of leaving earlier, or at his own pleasure, for some specified cause, he cannot leave except for that cause: thus, if he reserves the right to leave "if dissatisfied," he cannot leave to attend to other business, or for any other reason whatsoever, unless he is "dissatisfied," and allege this as the cause of his leaving. (t)

It would seem from the decisions that a master is not bound to provide medical attendance or medicines for his farm servant, or his house servant, in case of illness; even if this be caused by an accident occurring while he was in the discharge of his

duty. (u) But it is also held, that if he does send for a * 42 * physician he is not only liable himself, but cannot deduct the charge from the wages of the servant without an express agreement to that effect. (v) The master is bound to take

(s) The earlier cases seem to have allowed a recovery in such case, on a common count for *work and labor done*. *Gandal v. Pontigny*, 4 Camp. 375; *Eardly v. Price*, 5 B. & P. 333; *Smith v. Kingsford*, 3 Scott, 279; *Collins v. Price*, 2 Mo. & P. 233. But the more recent authorities have established the better principle, that the balance due for work actually performed, at the time of such wrongful dismissal, may be recovered on the common counts, while there must be a special account for the amount of the month's wages which has not been earned; or, to speak more correctly, for the recovery of damages for the wrongful dismissal, a month's wages being the measure of damages for such breach of contract. See *Archard v. Hornor*, 3 C. & P. 349; *Fewings v. Tisdal*, 1 Exch. 295; *Broxham v. Wagstaffe*, 5 Jur. 848; *Smith v. Hayward*, 7 A. & E. 544; *Hull v. Heightman*, 2 East, 145. See *Lilley v. Elwin*, 11 Q. B. 755. In such case the wages due at the time of dismissal cannot be recovered under such special count; there must be a count for work and labor done; and these may be joined in the same declaration. *Hartley v. Harmon*, 11 A. & E. 798. But see *Goodman v. Pocock*, 15 Q. B. 576. See also, *ante*, p. * 34, note (d).

(t) *Monell v. Burns*, 4 Denio, 121; *Lantry v. Parks*, 8 Cowen, 63.

(u) The contrary opinion was once declared by Lord Kenyon, in *Scarmar v. Castell*, 1 Esp. 270, but this doctrine has long since been overruled. See *Sellen v. Norman*, 4 C. & P. 80; *Cooper v. Phillips*, id. 581. In *Dunbar v. Williams*, 10

Johns, 249, it is said, that no action lies by a physician for medicine administered to, and attendance on, a *slave*, without the knowledge or request of the master, in a case not requiring instant and immediate assistance. But it *seems*, that if medical or other assistance be rendered to a slave, in case of such pressing necessity as not to admit a previous application to the master, the person rendering such assistance would be entitled to recover a compensation from the master on the *implied assumpsit*, arising from the legal obligation of the master to make the requisite provision for his slave. And in England a master is liable to provide medical attendance for his *apprentice*. *Regina v. Smith*, 8 C. & P. 153.

(v) *Sellen v. Norman*, 4 C. & P. 80; *Emmons v. Lord*, 18 Me. 351. It would seem that he cannot deduct the servant's wages during the time he was sick and unable to work. Story on Cont. § 962, *j*, *k*, and cases cited. In *Nichols v. Coolahan*, 10 Met. 449, a contract was made by N. & C. that N. should have eleven dollars per month and board, so long as he should work for C., C. informing N. that he (C.) might not have two days' work for him. N. worked for C. several months, and brought an action for his wages, and annexed to his writ a bill of particulars, in which he charged the price agreed on per month, and gave C. credit for a certain sum on account of three weeks' sickness of N., during which time he was unable to work. C. filed in set-off an account against N. for board during his sickness; it was held, that the contract was a hiring by the

proper care of his servant, and not expose him to danger, (*w*)¹ but it has been held that he is not responsible for an accident happening in the course of his service, unless the master knew that it exposed the servant to peculiar danger, and the servant did not. (*x*)

* It has been held, that a master who uses due care in the * 48 selection and employment of his servants, is not responsible to one of them for an injury received from the carelessness of

month, that C. was not entitled to payment for N.'s board during his sickness; but that N. could not recover wages for any part of the time of his detention from work by sickness. "Another question," *Hubbard*, J., remarked, "might have been raised on this contract, namely, whether the plaintiff might not have been entitled to payment for his whole time; but by crediting the loss of time he has precluded that inquiry, and is properly bound by his admission." Nor, without a specific agreement to that effect, can the master deduct the value of articles injured or lost by the servant; but must bring a cross action therefor. *Le Loir v. Bristow*, 4 Camp. 134. But see *Snell v. The Independence*, *Gilpin*, 40; *The New Phoenix*, 2 *Hagg. Add.* 420. If the servant is an infant, the master may deduct from his wages such sum as he has paid for the infant's necessaries, but no other. *Hedgley v. Holt*, 4 C. & P. 104. In this case, *Bayley*, J., said: "Payments made on account of wages due to an infant, for necessaries, and which could not be avoided, are valid payments; but an infant cannot bind herself for things which are not necessary; indeed, even the statement of an account does not bind an infant. It appears that this young woman was under age when she settled the account. The consequences might be very injurious if the law were otherwise. What would it lead to in this very case? Here is a female, who is described as rather a showy woman, suffered to dress in a manner quite unfitted to her

station; and at the end of her twelve months' servitude she would not have a farthing in her pocket." In *Adams v. The Woonsocket Company*, 11 Met. 327, a father, whose minor daughter was employed by a manufacturing company, at a distance of many miles from his residence, forbade them to employ her any further, and gave them notice that if they should continue to employ her, he should demand \$3.50 per week for her time and labor, without any deduction on any account whatever, and also directed them not to pay or allow her any thing, either goods or money, on account of her labor. It was held, in an action of assumpit by the father against the company, to recover pay for his daughter's labor subsequently done for them, that he was entitled to recover only as much as her labor was reasonably worth, deducting the price of board provided for her by them, without any deduction for clothing, which they provided for her.

(*w*) In *Priestley v. Fowler*, 3 M. & W. 1, Lord *Ahinger* says, that this should be such care as the master may reasonably be expected to take of himself. And see *Paterson v. Wallace*, 28 E. L. & E. 48.

(*x*) *Priestley v. Fowler*, 3 M. & W. 1. In *Buzzell v. Laconia Man. Co.* 48 Me. 113, it is held to be the duty of the master to keep safe and convenient all bridges, passageways, or ladders, necessary to be used by the employé, in going to or returning from his labor. See also *Ormond v. Holland*, 96 Eng. C. L. 102.

¹ A master should warn an inexperienced servant of the dangers of the work committed to him, *O'Connor v. Adams*, 120 Mass. 427; and put guards about dangerous machinery, failing which he is liable, *Button v. Great Western Cotton Co.* L. R. 7 Ex. 130, as well as for defects in machinery unknown to the servant, but which the master with ordinary care could have cured. *Walsh v. Peet Valve Co.* 110 Mass. 23; *Booth v. Boston, &c. R. Co.* 67 N. Y. 593; *Dillon v. Union Pacific, &c. R. Co.* 3 *Dillon*, 319. — A cab-owner has been held liable for furnishing to a driver a horse not reasonably fit to be driven in a cab, in *Fowler v. Lock*, L. R. 7 C. P. 272; 10 C. P. 90; a railroad for allowing a derrick after disuse to remain so as to be thrown down by natural causes, to the injury of a brakeman, in *Holden v. Fitchburg R. Co.* 129 Mass. 268; and a corporation for furnishing giant powder without explaining its use, in *Smith v. Oxford Iron Co.* 13 *Vroom*, 467.

another while employed in the master's service. (y)¹ And the rule has been applied to the case where the party injured was not the servant of the defendants, but was, at the time of the injury, voluntarily assisting their servants; (z)² and also where the servants are employed in distinct departments of the general business. (zz) But where the servants, though employed upon common work, are in the employment of different masters, and for separate ends, as in the case of a servant of a carrier injured by the negligence of a merchant's porter, in the process of delivering goods from a warehouse on board a dray, to be transported by the carrier for the merchant, the master of the negligent servant will be responsible to the other servant for the injury. (a)³ The

(y) *Farwell v. Boston & Worcester R. R. Co.* 4 Met. 49; *Priestley v. Fowler*, 3 M. & W. 1; *Brown v. Maxwell*, 6 Hill (N. Y.), 594; *Hutchinson v. York, Newcastle, & Berwick Railway Co.* 5 Exch. 343; *Wigmore v. Jay*, id. 354; *Tarrant v. Webb*, 18 C. B. 797. See also *Skipp v. Eastern Counties R. Co.* 9 Exch. 223; *Hubgh v. New Orleans Railroad*, 6 La. An. 495; *Ryan v. The Cumb. Valley Railroad Co.* 23 Penn. St. 384; *Coon v. Syracuse & Utica Railroad*, 1 Seld. 493; *Sherman v. Rochester & Syracuse Railroad*, 15 Barb. 574; *Albro v. Agawam Canal Co.* 6 Cush. 75; *Shields v. Yonge*, 15 Ga. 349; *Mitchell v. Penn. R. R. Co.* Amer. Law Register, Oct. 1853, p. 717; *Honner v. Illinois Central Railroad Co.* 15 Ill. 550; *The Ohio & Miss. R. R. Co. v. Tindall*, 13 Ind. 366; *C. & X. & L. M. R. R.*

Co. v. Webb, 12 Ohio St. 475; *Illinois Central R. R. Co. v. Cox*, 21 Ill. 20; *Hard, Adm'r v. Vt. & Canada R. R. Co.* 32 Vt. 473; *contra*, *Little Miami Railroad Co. v. Stevens*, 20 Ohio, 415; *Cleveland, Colum. & Cincin. R. R. Co. v. Kearney*, 3 Ohio St. 201; *Manville v. Cleveland & Toledo R. R. Co.* 11 Ohio St. 417; *Chamberlain v. Mil. & Miss. R. R. Co.* 11 Wis. 238, and the Scotch case of *Dixon v. Ranken*, 20 Law Times, 44; *Gilman v. Eastern R. R. Co.* 10 Allen, 233; *Burke v. Norwich R. R. Co.* 34 Conn. 474.

(z) *Degg v. Midland R. Co.* 1 H. & N. 773. See also *Vose v. Lancashire & Y. R. Co.* 2 H. & N. 728.

(zz) *Foster v. Minnesota Central R. R. Co.* 14 Minn. 360.

(a) *Abraham v. Reynolds*, 5 H. & N. 143.

¹ A servant takes upon himself the risks of his employment, *Lovell v. Howell*, 1 C. P. D. 161; *Gibson v. Erie R. Co.* 63 N. Y. 449; *Pennsylvania R. Co. v. Lynch*, 90 Ill. 333; although an infant, *De Graff v. N. Y. Cent. R. Co.* 76 N. Y. 125; and a master ought to discharge a servant as soon as he discovers his unfitness, *Columbus, &c. R. Co. v. Troesch*, 68 Ill. 545; *Mich. Cent. R. Co. v. Dolan*, 32 Mich. 510; *Houston, &c. R. Co. v. Orain*, 49 Tex. 341. — But a master is liable for not employing servants of ordinary skill and care, whereby a fellow-servant is injured. *Chapman v. Erie R. Co.* 55 N. Y. 579; *Ardesco Oil Co. v. Gilson*, 63 Penn. St. 146; *Couch v. Watson Coal Co.* 46 Ia. 17; *Hardy v. Carolina R. Co.* 76 N. C. 5. — A master, by joining in the work, does become not free from liability as a fellow-servant. *Wilson v. Merry*, L. R. 1 Sc. & Div. App. 326.

² *Osborne v. Knox, &c. R. Co.* 68 Me. 49; unless the assistance was rendered in a transaction of common interest to master and volunteer, with the former's assent, as in getting coal other than at the usual place, which was crowded, *Holmes v. N. E. R. Co. L. R. 4 Ex. 254*; 6 Ex. 123; or in loading his box, the number of porters being insufficient, *Wright v. London, &c. R. Co. L. R. 10 Q. B. 298*; 1 Q. B. D. 252; or in clearing snow from a railroad track, *Bradley v. N. Y., &c. R. Co.* 62 N. Y. 99.

³ This is equally true of a ship-owner and a pilot whom the former was compelled to hire, *Smith v. Steele*, L. R. 10 Q. B. 125; as well as where a colliery engaged A. to complete a shaft, supplying the steam while A. employed and paid the workmen, and a workman was injured by an engineer under A.'s control, but paid by the colliery, *Rourke v. White Moss Colliery Co.* 1 C. P. D. 556; 2 C. P. D. 205. See *Allen v. New Gas Co.* 1 Ex. D. 251. But a person employing master mechanics, each of whom was to furnish

employer will be held responsible to a servant injured by the act of a fellow-servant, if the injury was caused by the fellow-servant's using insufficient or unsafe materials which were supplied to him by the employer. (b) If the master has a general manager who employs the servants, standing in the place of the master, he is to be treated as the *agent* of the master, and not as a co-servant, and if he does not hire careful servants the master is liable as if he hired improper servants himself. (c)¹ There have been of late many cases under the rule exempting an employer from liability for injury to a servant from a co-servant; and there seems to be a tendency to limit the rule to cases where the injured servant was engaged in a common business with the inflicter of the injury, so that he would have an opportunity of preventing by due care his fellow-servant's negligence. (cc)² It has been held by an application of the general rule that a servant of a railroad company is not entitled to the same remedy for injuries sustained as a passenger. (cd) But such a company was held liable to a repairer of their road injured by cars running out of line. (ce)

In Iowa a statute gives to an employé an action against a railroad company for injury caused by a co-employé; but under this

(b) *Roberts v. Smith*, 2 H. & N. 213.

(c) *Walker v. Bolling*, 22 Ala. 294; *Louisville R. R. Co. v. Collins*, 2 Duvall, 114; *Feltham v. England*, Law Rep. 2 Q. B. 33; *Murphy v. Smith*, 19 C. B. (n. s.) 361.

(cc) *Cooper v. Mullins*, 30 Ga. 146. And see as to the general rule, *Catawissa R. R. Co. v. Armstrong*, 49 Penn. St. 186; *Schultz v. Pacific R. R. Co.* 36 Mo. 13; *Columbus, &c. R. R. Co. v. Arnold*, 31 Ind. 174; *Donaldson v. Mississippi R. R. Co.* 18 Iowa, 280; *Morgan v. Vale of*

Neath R. Co. L. R. 1 Q. B. 417; *Nashville R. R. Co. v. Elliot*, 1 Cold. 611. See also *Stewart v. Harvard College*, 12 Allen, 58; *Cooper v. Hamilton Man. Co.* 12 Allen, 193; *Felch v. Allen*, 98 Mass. 572; *Anderson v. New Jersey, &c. Co.* 7 Rob. 611; *Shank v. Northern R. R. Co.* 25 Md. 463; *Rohback v. Pacific R. R. Co.* 43 Mo. 187.

(cd) *Weger v. Penn. R. R. Co.* 55 Penn. St. 460.

(ce) *Haines v. East Tenn. R. R. Co.* 3 Cold. 222.

the men, tools, and tackle for his work, is not liable, if not negligent in their selection, to a servant of one for an injury caused by imperfect tackle furnished by the other. *Harkins v. Standard Sugar Refinery*, 122 Mass. 400. See *Johnson v. Boston*, 118 Mass. 114.

¹ A corporation president is not a co-servant, *Smith v. Oxford Iron Co.* 13 Vroom, 467; but *contra* of a "manager," *Wilson v. Merry*, 1 Sc. & Div. App. 326; of a "vice-principal" of a colliery, *Howell v. Landore Steel Co.* L. R. 10 Q. B. 63; and of a "foreman," *O'Connor v. Roberts*, 120 Mass. 227; *Zeigler v. Day*, 123 Mass. 152; *Malone v. Hathaway*, 64 N. Y. 5.

² A brakeman and an inspector of rolling-stock, *Wonder v. Baltimore*, 32 Md. 411; the conductor and engineer of the same train, *Dow v. Kansas, &c. R. Co.* 8 Kan. 642; *Summerhays v. Kansas, &c. R. Co.* 2 Col. 484; *Ragsdale v. Memphis R. Co.* 59 Tenn. 426; a construction-train conductor and a laborer, *McGowan v. St. Louis, &c. R. Co.* 61 Mo. 528; and a station-master and engineer, *Evans v. Atlantic R. Co.* 62 Mo. 49, have been held co-servants.

statute it is held that the employing company is not bound to extraordinary diligence. (*cf*) From recent cases it would seem that the general rule is now much modified. If the injury was caused directly by the negligence of the employer, he would undoubtedly be responsible, and in a case where the superintendent of an iron company, caused injury to a fellow workman by employing a dangerous explosive, it was held that the negligence of the superintendent was the negligence of the employer. (*cg*) An employé injured by negligence of a fellow employé, claimed that this person was notoriously negligent and incompetent; but, as it appeared that having this knowledge he continued in this employment, it was held that he took the risk on himself, and the employer was not liable. (*ch*)

The master is under no legal obligation to give a testimonial * of character to his servant. If he does, it will be presumed that he speaks the truth, or what he believes to be true; and therefore if he says what injures the standing and prospects of the servant, and this turns out not to be true, the master is nevertheless not liable, unless the servant can prove that the falsity was uttered in malice. (*d*) Such is the English rule; but it may be supposed that in this country, if the master is proved to have said what is untrue, he would be responsible for any injury arising therefrom to the servant; at least unless he could satisfy the jury that he spoke from sufficient cause, and not from malice.

In order to constitute a contract of hiring and service, there must be a mutual engagement, on the one part to serve, and on the other to employ and pay. (*e*) But these engagements cannot always be implied one from the other, or measured one by the other. If a servant agrees to serve for a term of two years, and the master only agrees to pay so much weekly, the master is under no obligation to keep or employ him during the two years,

(*cf*) *Hunt v. Chicago, &c. R. R. Co.*
26 Ia. 363.

(*cg*) *Lalor v. C. B., &c. R. Co.* 52 Ill. 401; *Spelman v. Fisher Iron Co.* 56 Barb. 151; *Louisville, &c. R. R. Co. v. Filbern, 6 Bush*, 574.

(*ch*) *Davis v. Detroit, &c. R. R. Co.*
20 Mich. 105.

(*d*) *Rogers v. Clifton*, 3 B. & P. 591; *Edmonson v. Stephenson*, Bull. N. P. 8; *Weatherston v. Hawkins*, 1 T. R. 110.

(*e*) See *Sykes v. Dixon*, 9 A. & E. 693, where B. contracted in writing to work for the plaintiff in his trade, and for no other person, during twelve months, and so on from twelve months to twelve months, until B. should give notice of quitting. *Held*, that such agreement was invalid under the statute of frauds for want of mutuality.

but only to pay so much while he does employ him. (f) But where the contracts are mutual, and cover * the same * 45 ground, for both parties, then the master has at once a right to require the servant to enter upon the discharge of his duty during the term, and the servant has a right to require the master to employ him during the whole of the term.

Like other agreements, a contract for labor and service, if not to be performed within a year, is within the statute of frauds, and if by parol, is wholly void. (g) And if the contract of service is begun within a year from the making of it, but by the terms of the agreement is not to be completed within that time, it is within the statute and void. (h) It must be certain, however, from the terms of the contract, or be necessarily implied therefrom, that the contract cannot be performed within a year, or it will not be void. (i) This subject will be, however, * considered more * 46

(f) In *Williamson v. Taylor*, 5 Q. B. 175, by an agreement between the defendant and plaintiff, the defendant, being the owner of a colliery, retained and hired the plaintiff to hew, work, &c., at the colliery, for wages at certain rates in proportion to the work done, payable once a fortnight; and the plaintiff agreed to continue the defendant's servant during all times the pit should be laid off work, and, when required (except when prevented by unavoidable cause), to do a full day's work on every working day. Held, that the defendant was not obliged by this contract to employ the plaintiff at reasonable times for a reasonable number of working days during the term. In *Aspin v. Austin*, 5 Q. B. 671, by an agreement between the plaintiff and defendant, the plaintiff agreed to manufacture cement for the defendant, and the defendant, on condition of the plaintiff's performing such engagement, promised to pay him £4 weekly during the two years following the date of the agreement, and £5 weekly during the year next following, and also to receive him into partnership as a manufacturer of cement at the expiration of three years; and the plaintiff engaged to instruct the defendant in the art of manufacturing cement. Each party bound himself in a penal sum to fulfil the agreement. The defendant afterwards covenanted by deed for the performance of the agreement on his part. Held, that the stipulations in the agreement did not raise an implied covenant that the defendant should employ the plaintiff in the business for three or two years, though the defendant was bound by the

express words to pay the plaintiff the stipulated wages during those periods respectively, if the plaintiff performed, or was ready to perform, the condition precedent on his part. See *Dunn v. Sayles*, 5 Q. B. 685; *Pilkington v. Scott*, 15 M. & W. 657; *Elderton v. Emmens*, 6 C. B. 160; *Rust v. Nottidge*, 16 E. L. & E. 170, s. c. 1 E. & B. 99; *Regina v. Welch*, 20 E. L. & E. 82, s. c. 2 E. & B. 357.

(g) *Bracegirdle v. Heald*, 1 B. & Ald. 722. In this case the contract was by parol on the 27th of May, for a year's service from the 30th of June following, and was held void. See also *Snelling v. Lord Huntingfield*, 1 C. M. & R. 20; *Hinckley v. Southgate*, 11 Vt. 458; *Tuttle v. Swett*, 31 Me. 555.

(h) Id.; and see *Pitcher v. Wilson*, 5 Mo. 46; *Drummond v. Burrall*, 13 Wend. 307; *Squire v. Whipple*, 1 Vt. 69; *Birch v. Earl of Liverpool*, 9 B. & C. 392.

(i) A parol agreement to labor for a company "for the term of five years, or so long as A. shall continue to be agent of the company" is not void under the statute, as it might have been completed within a year, although in some contingencies it might extend beyond a year. *Roberts v. Rock-bottom Company*, 7 Met. 47.—This construction of the statute is supported also by the cases of *Kent v. Kent*, 18 Pick. 569; *Peters v. Westborough*, 19 Pick. 364; *Wells v. Horton*, 4 Bing. 40.—In *Broadwell v. Getman*, 2 Denio, 87, it was held, that a parol agreement which is not wholly to be performed within one year, is void, though some of the stipulations are to be executed within the year. And

fully in the second part of this work, in the chapter upon the statute of frauds.

A nice distinction is taken in some cases between the presumptions which arise where service is rendered to a stranger, and where it is rendered to near relations. In general, wherever service is rendered and received, a contract of hiring, or an obligation to pay will be presumed. (j) But it is said not to be so

semble per Beardsey, J., it is void although one of the parties is to perform every thing on his part within the year, if a longer time than a year is stipulated for the performance by the other. But in *Cherry v. Heming*, 4 Exch. 631, it was held (affirming *Donnellian v. Read*, 3 B. & Ad. 899), that in the 4th section of the statute of frauds the words "not to be performed within the space of one year," mean, "not to be performed on either side," and that the contract in question having been performed on one side within a year from the making thereof, the case was not within the statute.—So in *Herrin v. Buttner*, 20 Me. 119, the law on this subject is thus laid down: where by the terms of a contract the time of its performance was to be extended beyond a year, it is within the statute of frauds, though a part of it was by the agreement to be performed within a year. To bring a case within the statute of frauds, it must have been expressly stipulated by the parties, or it must, upon a reasonable construction of their contract, appear to have been understood by them, that the contract was not to be performed within a year. A. G. B. contracted in writing with S. to clear eleven acres of land in three years from the date of the contract, one acre to be seeded down the (then) present spring, one acre the next spring, and one acre the spring following; as a compensation for which, he, A. G. B., was to have all the proceeds of said land three years, except the two acres first seeded down. A. G. B. assigned verbally his interest, to the extent of half the contract, to H., who verbally assigned said half to C. B.; said H. and C. B. respectively agreeing verbally to perform one-half of the contract. A. G. B. and C. B. commence the performance of the contract, but do not complete it. S. sued A. G. B., and recovers damages for non-performance, which are paid by A. G. B. H. being called upon by A. G. B. for half of the damages so recovered and paid, pays the same to him, and then commences a suit for the same against C. B.—It was held, that the contract between them (H. and C. B.) was void by the statute of frauds, and that he was

not entitled to recover.—See also *Roberts v. Tucker*, 3 Exch. 632.

(j) *Phillips v. Jones*, 1 A. & E. 333, *Lord Denman*. See *Peacock v. Peacock*, 2 Camp. 45; *Waterman v. Gilson*, 5 L. An. 672. In *Newel v. Keith*, 11 Vt. 214, it is said, that if personal services are rendered by A to B at the request of the latter, an action will lie for them, unless it appears from the whole evidence that they were designed to be *gratuitous*; and this is a question of fact.—So where one person has by fraud induced another to labor for a third person, the latter may still be liable for the work. *Lucas v. Godwin*, 3 Bing. N. C. 737. In *Peter v. Steel*, 3 Yeates, 250, it was held, that assumption would lie in favor of a free negro, for work, labor, and service, against a person who held him in his service, claiming him as a slave. The court laid down the general principle that, where one by compulsion does work for another, whom he is under no legal or moral obligation to serve, the law will imply and raise a promise on the part of the person benefited thereby to make him a reasonable compensation. So in *Higgins v. Breen*, 9 Mo. 497, it was held, that when a married man represents himself to be a widower, and thus induces a woman to marry him, his wife being still alive, such woman may recover of him for her services during such time as she may live with him.—And generally where labor is performed for the benefit of another without his express request, yet if he knows of the work, and tacitly assents to it, an implied promise will arise to pay a reasonable compensation. *James v. Bixby*, 11 Mass. 34; *Farmington Academy v. Allen*, 14 Mass. 172. So where one employs the slave of another the law implies a promise to pay the master for the services of the slave. *Cook v. Husted*, 12 Johns. 188. So of an apprentice. *Bowes v. Tibbetts*, 7 Greenl. 457. But labor and service voluntarily done by one for another without his privity or consent, however meritorious or beneficial it may be to him, as in saving his property from destruction by fire, affords no grounds for an action. *Bartholomew v. Jackson*, 20 Johns. 28.

where the service is rendered to the parent or uncle, or other near relative of the party, on the ground, that the law regards such services as acts of gratuitous kindness and affection. We find American authorities which recognize this distinction, and particularly where it grows out of the relation of parent * and child. (k)¹ But if a destitute person is received from

So if a workman be employed to do a particular job, and he choose to perform some additional work without consulting his employer, he cannot recover for such additional work. *Hort v. Norton*, 1 McCord, 22. See also *ante*, vol. i. p. *468, *et seq.* Even if it is agreed between the parties that certain work shall be done *gratuitously*, such contract is *nudum pactum*, and the party is not bound to perform it; although it is said that if he once enter upon the performance of such contract, he is bound to complete it. See *Rutgers v. Lucet*, 2 Johns. Cas. 92, n. (2d. ed.)

(k) In *Andrus v. Foster*, 17 Vt. 556, it was held, that where a daughter continues to reside in the family of her father after the age of majority, the same as before, the law implies no obligation on the part of her father to pay for her services. And the same rule applies to cases where the person from whom the compensation for services is claimed took the plaintiff into his family when she was a child, to live with him till she should become of age, and she continues, after that time, to reside in his family, he standing *in loco parentis* to her. If she claim pay, it is incumbent on her to show that the services were performed under such circumstances as to justify an expectation on the part of both that pecuniary compensation would be required. The right to compensation for services in such cases must depend upon the circumstances of each particular case. See also *Fitch v. Peckham*, 16 Vt. 150; *Weir v. Weir*, 3 B. Mon. 647; *Alfred v. Fitzjames*, 3 Esp. 3. In *Guild v. Guild*, 15 Pick. 130, the law on this point is thus summed up by *Shaw*, C. J.: "The point is, whether, where a daughter, after arriving at twenty-one years of age, being unmarried, continues to reside in her father's family, performing such useful services as it is customary for a daughter to perform, and receiving such protection,

subsistence, and supplies of necessaries and comforts, as is usual for a daughter to receive in a father's family, the law raises any presumption that she is entitled to a pecuniary compensation for such services, and whether, after proving these facts, the burden of proof is on the defendant to show that the services were performed without any view to pecuniary compensation. Some of the court are of opinion that, as it is the ordinary presumption, between strangers, that, upon the performance of useful and valuable services in the family of another, it is upon an implied promise to pay as much as such services are reasonably worth, so, after the legal period of emancipation, the law raises a similar implied promise from a father to a daughter. Other members of the court are of opinion (confining the opinion to the case of daughters, and expressing no opinion as to the case of sons, laboring on the farm or otherwise in the service of a father) that the prolonged residence of a daughter in her father's family, after twenty-one, performing her share in the ordinary labors of the family, and receiving the protection and supplies contemplated in the supposed case, may well be accounted for, upon considerations of mutual kindness and good-will, and mutual comfort and convenience, without presuming that there was any understanding, or any expectation, that pecuniary compensation was to be made; that proof of these facts alone, therefore, does not raise an implied promise to make any pecuniary compensation for such services, or throw on the defendant the burden of proof to show, affirmatively, that the daughter performed the services gratuitously, and without any expectation of receiving wages or pecuniary compensation, but with a view to the share she might hope to receive in her father's estate or otherwise." The court were equally divided on this ques-

¹ Services to one's family or friends give rise to no inference of payment, without proof of a special contract, *Brown v. Yaryan*, 74 Ind. 305; as where a daughter does work after becoming of age in her father's family, *Smith v. Smith*, 3 Stewart, 564. See *O'Connor v. Beckwith*, 41 Mich. 657; *Harshberger v. Alger*, 31 Gratt. 52; *Timan v. Titman*, 64 Penn. St. 480; *Moist's Appeal*, 74 Penn. St. 166; *Neal v. Gilmore*, 79 Penn. St. 421. But a son-in-law who takes care of his mother-in-law in his family, with an understanding that he should be paid for her board, is entitled to remuneration, *Wence v. Wykoff*, 52 La. 644. See *Schoch v. Garrett*, 69 Penn. St. 144.

* 48 charity, provided with necessaries and set to work, he is under no obligation *to remain, nor has he any claim for wages, unless there be some express agreement, or one may be implied from the peculiar circumstances of the case.

A person who seduces a servant away from the service of his master or employer, is liable in an action for damages. Although this principle has been less positively settled by adjudication in this country than in England, we have no doubt of it as a rule of law. (*l*)

tion, and did not decide it; but they were unanimous in the opinion, that in all such cases the question must be determined by the jury, on all the circumstances, whether there was an implied request for labor, and an implied promise of repayment or not. In *King v. Sow*, 1 B. & Ald. 179, a female natural child was hired for a year by the wife of its reputed father, and continued doing the household work for three years; but after the first year no wages were paid, nor was there any new contract of hiring. *Held*, that the sessions were warranted in finding that after that time she did not continue on the terms of the original contract. And *Bailey*, J., said: "Where the parties are not related, it may fairly be presumed, from a continuance in the service, that the terms on which they continue are the same as during the preceding year. But where the relation of father and child subsists, the ground for that presumption fails." See to the same effect, *Dye v. Kerr*, 15 Barb. 444; *Ridgway v. English*, 2 N. J. 409; *Swires v. Parsons*, 5 W. & S. 357; *DeFrance v. Austin*, 9 Penn. St. 309; *Steel v. Steel*, 12 id. 64; *Lantz v. Frey*, 14 id. 201; *Zerbe v. Miller*, 16 id. 488; *Resor v. Johnson*, 1 Cart. (Ind.) 100; *Hussey v. Roundtree*, 1 Busb. L. 110; *Partlow v. Cooke*, 2 R. I. 451; *Davis v. Goodenow*, 1 Williams, 715; *Candors' Appeal*, 5 W. & S. 513. So an action cannot be maintained for services performed with a view to a legacy, and not in expectation of a reward in the nature of a debt. See *Osborn v. Governors of Guy's Hospital*, Stra. 728; *Le Sage v. Coussmaker*, 1 Esp. 188; *Little v. Dawson*, 4 Dallas, 111; *Lee v. Lee*, 6 G. & J. 309. Nor will an action for work and labor lie for services performed under a contract of apprenticeship which before expiration of the service turns out to be void. *Maltby v. Harwood*, 12 Barb. 473. But where one party has rendered services for another, and it is manifest from the circumstances of the case that it was understood by both parties that compensation should be made by

will, and none is made, an action will lie to recover the value of such services. *Martin v. Wright*, 13 Wend. 460. In *Eaton v. Benton*, 2 Hill (N. Y.), 576, it is said, that one who has served another in expectation of a testamentary provision, and to whom the latter subsequently devises a portion of his estate, cannot maintain a suit for such services against the executors. The general rule seems to be, that a legacy left by a debtor to his creditor, which in amount is equal to or greater than the debt, shall be presumed to be in satisfaction of it.

(*l*) *Lumley v. Gye*, 20 E. L. & E. 168; s. c. 2 E. & B. 216; *Keane v. Boycott*, 2 H. Bl. 511; *Hart v. Aldridge*, Cowp. 54. See also *Peters v. Lord*, 18 Conn. 337; *Haight v. Badgeley*, 15 Barb. 499. This doctrine was held at nisi prius by *Morton*, J., in an interesting case in Massachusetts, a few years since. So one is liable for continuing to employ the servant of another, after notice, although the defendant did not himself procure the servant to leave his former master, or know when he employed him that he was the servant of another. *Blake v. Lanyon*, 6 T. R. 221. Although a servant is hired by the piece, and not for any certain time, yet an action lies for enticing him away. *Anon. Loftt*, 493. But an action will not lie for inducing a servant to leave his master's employ at the expiration of the time for which he originally hired himself, although the servant had not at the time any intention of then quitting his master. *Nichol v. Martyn*, 2 Esp. 734. The contract of hiring between the servant and his former master must have been binding, in order to render one enticing him away liable therefor. *Sykes v. Dixon*, 9 A. & E. 693. The damages in this action are not such as the master sustained at the time, but such as he would naturally sustain from the leaving of his employment. *Gunter v. Astor*, 4 J. B. Moore, 12; *Dixon v. Bell*, 1 Stark. 287. See *Hays v. Borders*, 1 Gilman, 46; *McKay v. Bryson*, 5 Ired. L. 216.

In some cases very liberal presumption of payment is made in favor of the master; as where the servant has left his master for a considerable period; and where it is usual to pay wages weekly. (m)

As the contract of service is mutual, the employer has a claim against the employed for his neglect of duty; and it is held that the employer does not waive this claim by paying the servant and continuing him in his service. (mm)¹

* SECTION II.

* 49

APPRENTICES.

The English law of apprenticeship grew out of, and with nearly all its incidents rested upon, the ancient establishment of guilds, or companies for trade or for handicraft, which were once almost universal throughout Europe, and still generally subsist, although much modified in form and effect. No one could pursue a trade or mechanical occupation, on his own account, who was not a member of such guild or company. Nor could he become a member except by a regular apprenticeship.

Hence, a change of trade became very difficult; and the several companies provided with great care against such increase of their numbers as should render it too difficult for all to find occupation. Under such circumstances, to enter upon an apprenticeship which led to such membership was to acquire a support for life, and it was usual to pay large fees to the master. This custom exists in England now very generally. In this country we suppose it to occur much less frequently; and the entire freedom of employment, and the absolute right which every person has to engage in what business he pleases, and to change his business as often as he pleases, has undoubtedly operated to make apprenticeships less common with us than in Europe. In some parts of our country

(m) See *Sellen v. Norman*, 4 C. & P. 81; *Lucas v. Novosiliecki*, 1 Esp. 296; *Evans v. Birch*, 3 Camp. 10. But it is no evidence of payment for one servant's labor that other laborers employed by the party, on the same work, at the same time, were duly paid. *Filer v. Peebles*, 8 N. H. 226.

(mm) *Stoddard v. Treadwell*, 26 Cal. 294.

¹ But if an employer keeps a hired person through a term of service, he cannot deduct his wages for time lost, or compel him to make it good. *Bast v. Byrne*, 51 Wis. 531.

they are comparatively infrequent; and perhaps in none are they so necessary or so universal an introduction to business as they still are in England.

The contract of apprenticeship is generally in writing, and it has been said, that it could be made only by writing; (*n*) it is also most frequently by deed, and is to be construed and enforced as to all the parties, by the common principles of the law of contracts. Usually, the apprentice, who is himself a minor, and his father or guardian with him, covenant that he shall serve * 50 * his master faithfully during the term. And the master covenants that he will teach the apprentice his trade; but it is said that the indenture is not made invalid by the omission to specify any trade or profession as that to be taught. (*o*) He also covenants to supply him with all necessaries, and at the end of the term give him money or clothes. Slight informalities would not make the indenture void. Even if they are of sufficient magnitude to have this effect, the indenture will, it is said, prescribe and measure the claim of each of the parties against the other, if they have lived under this indenture as master and servant. (*p*) It is also said, that the apprentice's consent will not be inferred from his mere signature, but must be expressed. (*q*)

In case of sickness the master is bound to provide proper medicines and attendance. (*r*) At common law the infant is not himself responsible, on his covenants as apprentice, being a minor; (*s*) and therefore an adult also covenants with him; and at the age of majority the infant may repudiate the contract if it extends beyond that period. The master cannot transfer his

(*n*) *Peters v. Lord*, 18 Conn. 337.

(*o*) *Fowler v. Hollenbeck*, 9 Barb. 309.

(*p*) *Malby v. Harwood*, 12 Barb. 473.

(*q*) *Harper v. Gilbert*, 5 Cush. 417.

(*r*) *Regina v. Smith*, 8 C. & P. 153.

(*s*) *Cuming v. Hill*, 3 B. & Ald. 59.

At common law, an indenture of apprenticeship was not binding upon an infant. See *Gylbert v. Fletcher*, Cro. C. 179; *Jennings v. Pitman*, Hutton, 63; *Lilly's case*, 7 Mod. 15; *McDowle's case*, 8 Johns. 331; *Whitley v. Loftus*, 8 Mod. 191. In *Woodruff v. Logan*, 1 Eng. (Ark.) 276, it was said, that a contract of apprenticeship was binding upon an infant, as being for his benefit; but this is not consistent with the current of authority, or the analogy of the law.—But the father might be bound on the covenants; and it would be no defence to an action by

the master against the father, for the desecration of the infant, that the infant was not bound by the indenture; for if the son does not choose to do that which the father covenanted he should do, the covenant is broken, and the father is liable. *Cuming v. Hill*, 3 B. & Ald. 57. In *Hiatt v. Gilmer*, 6 Ired. L. 450, where a boy was bound by his father as an apprentice to a copartnership, to be taught a mechanical trade, and the father took away the boy before his time was expired, and soon afterwards the partnership was dissolved, the period of apprenticeship being still unexpired, it was held by a majority of the court, *Ruffin*, C. J., dissenting, that the persons composing the partnership could only recover damages for the loss of the boy's services during the time the copartnership continued, and not afterwards.

trust, or his rights over the apprentice. (*t*) He has no right to employ the apprentice in menial services not connected with the trade or business which he has agreed to teach him. (*u*) And when he neglects to take due charge of the apprentice, the parent's or guardian's authority will revive. (*v*)

* The sickness of the apprentice, or his inability to learn * 51 or to serve, without his fault, does not discharge the master from his covenants, (*w*) because these covenants are independent, and he takes this liability on himself. Nor will such misconduct as would authorize a master to discharge a common servant, discharge the master of an apprentice from his liability on his contract. (*x*)¹ But if the apprentice deserts from his service, and contracts a new relation which disables him from returning lawfully to his master, the latter is not bound to receive him again if he offers to return. (*y*)

The parties who covenant for the good behavior and continued service of the apprentice are not liable for trifling misconduct; but it seems by the English cases that, for whatever produces substantial injury to the master, as long-continued absence, re-

(*t*) *Futrell v. Vann*, 8 Ired. L. 402; *Tucker v. Magee*, 18 Ala. 99.

(*u*) *Commonwealth v. Hemperly*, 12 Penn. Law Rep. 129.

(*v*) *Commonwealth v. Conrow*, 2 Penn. St. 402.

(*w*) *Rex v. De Hales Owen*, 1 Stra. 99.

(*x*) *Winstone v. Linn*, 1 B. & C. 460. So in *Wise v. Wilson*, 1 Car. & K. 662, it was held, that a person has a right to dismiss a servant for misconduct, but has no right to turn away an apprentice because he misbehaves; but the case of a young man, seventeen years old, who, under a written agreement not under seal, is placed with a surgeon as "*pupil and assistant*," and with whom a premium is paid, is a case between that of apprenticeship and service; and if such a person on some occasions come home intoxicated, this alone will not justify the surgeon in dismissing him. But if the "*pupil and assistant*," by employing the shop-boy to compound the medicines, occasion real danger to the surgeon's practice, this would justify the surgeon in dismissing him. And Lord *Dawson*, C. J., in summing up, said:

"There is a great distinction between a contract of apprenticeship, and a contract with a servant. A person has a right to dismiss a servant for misconduct, but has no right to turn away an apprentice because he misbehaves."

(*y*) *Hughes v. Humphreys*, 6 B. & C. 680, which was covenant by the father of an apprentice against the master, for not teaching and providing for the apprentice. Plea, that up to a certain time the defendant did teach, &c., and that then the apprentice, without leave, quitted the defendant's service, and never returned. Replication, that on, &c., the defendant refused then, or ever, to receive back the apprentice, and thereby discharged him from his service. Rejoinder, that the apprentice enlisted as a soldier, and that the plaintiff never requested the defendant to receive back the apprentice, when he was able to return to the service. Surrejoinder, that soon after the apprentice enlisted, the defendant refused then, or ever, to take him back, and wholly discharged him from his service. Held, on demurrer, that the surrejoinder was bad, not being a sufficient answer to the rejoinder.

¹ But where a contract of apprenticeship provides that the apprentice shall obey all commands, and give his services entirely to business during business hours, the master may dismiss the apprentice for wilful disobedience and habitual neglect of duties. *Westwick v. Theodor*, L. R. 10 Q. B. 224.

* 52 pudiation at majority, or the like, they are liable. (z) * But it seems not to be so in this country, under our common statutory apprenticeships, (a) although doubtless phraseology might be adopted, which would have that effect. Where the indenture can be construed as meaning only that the parent or guardian sanctions the binding of the apprentice, and does not bind himself, it will be so construed, although the covenants may seem to be covenants both of the apprentice and of the parent.

Not only a party who seduces an apprentice from his service is liable, (b) but where one employs an apprentice without the knowl-

der, and that the plea was good, as it disclosed a sufficient excuse for non-performance of the defendant's covenant.

(z) *Wright v. Gihon*, 3 C. & P. 583, where it was held, that the staying out by an apprentice on a Sunday evening beyond the time allowed him, is not such an unlawful absenting of himself as will enable his master to maintain an action of covenant against a person who became bound for the due performance of the indenture. In *Cuming v. Hill*, 3 B. & Ald. 59, the action was covenant upon an indenture of apprenticeship, by the master against the father; the breach assigned was, that the apprentice absented himself from the service; plea, that the son faithfully served till he came of age, and that he then avoided the indenture. Held, that this was no answer to the action. *Abbott*, C. J., said: "I am of opinion that the father is liable to this action. He covenants that the son shall faithfully serve; the avoidance of the apprenticeship by the son during the term cannot discharge the father's covenant. The indenture of apprenticeship has existed in this form for more than a century, and has been in universal use. A construction has been put upon the instrument in a court of law, in the case cited from *Douglas* (*Branch v. Ewington*, Dougl. 518). I do not see any reason to doubt the propriety of that decision, and I think, therefore, upon principle as well as upon authority, that the defendant is answerable in this action." *Bayley*, J., also said: "I may bind myself that A B shall do an act, although it is in his option whether he will do it or not. The father here binds himself that the son shall serve seven years. It is no answer in an action brought against the father, for the breach of that covenant, for him to say that it was in the option of the son whether he would serve or not. If the son does not choose to do that which the father covenanted he should do, the covenant is then broken, and the

father is liable." — It seems, that any change of trade on the part of the master discharges the father from his obligation that the son shall continue to serve. *Ellen v. Topp*, 4 E. L. & E. 412; s. c. 6 Exch. 424.

(a) *Blunt v. Melcher*, 2 Mass. 228, where it was held, that in an indenture of apprenticeship made by the master, the apprentice, and the guardian of the apprentice, the covenants that "the apprentice shall faithfully serve his master," &c., are not the covenants of the guardian. And *Parker*, J., in giving his opinion, observed: "The question for our determination is, whether the defendant is bound by the covenants in this indenture for the apprentice's good conduct. My opinion is decidedly that he is not bound. He is not mentioned as a party to those or any other covenants contained in the instrument. The intent of all the parties in making this indenture, appears from the instrument itself. The apprentice binds himself with the consent of his guardian. To express that consent, and, in my opinion, with no other intent, and for no other purpose, the guardian signs and seals the instrument. It is objected to this, that great inconveniences and mischiefs will arise from this construction of this species of indenture. But to guard against these, the guardian may enter into covenants explicitly with the master, and there is no doubt such covenants will be valid and binding upon him." See also *Holbrook v. Bullard*, 10 Pick. 68. The same rule is supported by *Ackley v. Hoskins*, 14 Johns. 374. See further, *Sackett v. Johnson*, 3 Blackf. 61; *Chapman v. Crane*, 20 Me. 172.

(b) *Lightly v. Clouston*, 1 Taunt. 112; *Foster v. Stewart*, 3 M. & Sel. 191. So, it seems, that the seduction of a minor, who is a servant *de facto*, though not a legal apprentice, from the service of the master, is actionable. *Peters v. Lord*, 18 Conn. 337.

edge and consent of his master, the employer is liable to the master for the services of the apprentice, although he did not know the fact of the apprenticeship. (c) It may be added, * 58
* that if an action be brought for harboring an apprentice against the will or without the consent of his master, the plaintiff is bound to prove that the defendant had a knowledge of the apprenticeship. (d) But a defendant who did not know the apprenticeship when he hired or received the apprentice, and who, being informed thereof, continued to retain and harbor him, thereby makes himself liable. (e)

In a recent case in Vermont, where a boy of ten was bound as an apprentice by his father until he should be twenty-one, it was held that the contract was voidable when the boy reached the age of fourteen years; and was revoked by his enlisting into military service after that age. (f)

(c) *Bowes v. Tibbets*, 7 Greenl. 457; *Conant v. Raymond*, 2 Aik. 243; *Munsey v. Goodwin*, 3 N. H. 273; *James v. Le Roy*, 6 Johns. 274. In *Ayer v. Chase*, 19 Pick. 556, where the plaintiff put his apprentice into the service of another person exercising the plaintiff's trade for a short time, on wages to be paid to the plaintiff, and during that period the apprentice absconded, and went to sea, it was held, that by such transfer of the apprentice the

plaintiff's right to his services was suspended, and that it did not revive upon his absconding, so as to entitle the plaintiff to his earnings on the voyage.

(d) *Ferguson v. Tucker*, 2 Har. & G. 182. And see *Stuart v. Stimpson*, 1 Wend. 376; *Conant v. Raymond*, 2 Aik. 243.

(e) *Ferguson v. Tucker*, 2 Har. & G. 182.

(f) *Hudson v. Worden*, 39 Vt. 382.

CONTRACTS FOR SERVICE GENERALLY.

THERE is in all such contracts a promise, implied if not expressed, that the party employing will pay for the service rendered ; (a) and, on the other hand, that the party employed will use due care and diligence, and have and exercise the skill and knowledge requisite for the employment undertaken. (b) It is on this ground that physicians and surgeons are liable for any injury caused by their want of due skill, or of due care. (c)

If the contract express that the service shall be gratuitous, then it is void for want of consideration ; (d) but there may be a valid agreement to delay payment, or to make the payment conditional on the happening of some event, — as when the work is finished, or when the employer receives his pay. (e) If a party agrees to do work, and receive no pay, he cannot recover pay, (f)

(a) Phillips *v.* Jones, 1 A. & E. 333, *ante*, p. *48, note (j).

(b) Morris *v.* Redfield, 23 Vt. 295; Goulin *v.* Hodson, 24 id. 140; Hall *v.* Cannon, 4 Harring. (Del.) 360; Hager *v.* Nolan, 6 La. An. 70. And see Streeter *v.* Horlock, 1 Bing. 34.

(c) Howard *v.* Grover, 28 Me. 97; Bowman *v.* Woods, 1 Greene (Ia.), 441.

(d) In such case the person contracting to do the work is not bound to commence it. But if, in the understanding of all parties, the services were originally rendered gratuitously, they cannot afterwards be made a charge. James *v.* O'Driscoll, 2 Bay, 101. So in Davies *v.* Davies, 9 C. & P. 87, A and his wife boarded and lodged in the house of B, the brother of A, and both A and his wife assisted B in carrying on his business. A brought an action for the services, to which B pleaded a set-off for board and lodging. Held, that neither the services on the one hand, nor the board and lodging on the other, could be charged for, unless the jury were satisfied that the

parties came together on the terms that they were to pay and to be paid; but that if that were not so, no *ex post facto* charge could be made on either side.

(e) Robinson *v.* The New York Ins. Co., 2 Caines, 357; s. c. 1 Johns. 616.

(f) In Jacobson *v.* Le Grange, 3 Johns. 199, where a young man, at the request of his uncle, went to live with him, and the uncle promised to do by him as his own child; and he lived and worked for him above eleven years, and the uncle said that his nephew should be one of his heirs, and spoke of advancing a sum of money to purchase a farm for him, as a compensation for his services, but died without devising any thing to the nephew, or making him any compensation; it was held, that an action on an implied assumpiton would lie against the executors, for the work and labor performed by the nephew for the testator. But in Patterson *v.* Patterson, 13 Johns. 379, the facts were, that the plaintiff, after he had come of age, lived with and worked for his father, the de-

if he does the work; but if there be a * contract of service * 55 which is silent or indefinite in regard to compensation, the party who renders the service under it may recover pay under a *quantum meruit*; (g) and if by the contract the party employed agrees to leave the compensation *entirely* to the employer, the jury may give what the employer ought to give. (h)

It seems to be doubted in England whether an arbitrator can recover for his services without an express promise; (i) but the doubt appears to grow out of the peculiar English rule, that the employment of a barrister-at-law is wholly honorary, and gives him no legal claim for compensation. We have no such recognized rule here, although the distinction between barristers and attorneys is preserved in some States, and it seems that some difference has been made as to their lien on * the pa- * 56 pers or the judgment for fees. (j) In general, however, all lawyers have in this country the same legal claim for compensation that attorneys have in England. (k) So in England a *physician* (or one licensed by the College of Physicians), has no remedy

fendant, who said he would reward him well, and provide for him in his will: *held*, that the plaintiff could not maintain an action to recover compensation for his services during the lifetime of his father. See also *ante*, p. *47, note (k).

(g) See *Jewry v. Busk*, 5 Taunt. 302; *Bryant v. Flight*, 5 M. & W. 114.

(h) Thus, in *Bryant v. Flight*, 5 M. & W. 114, A agreed to enter into the service of B, and wrote to him a letter, as follows: "I hereby agree to enter your service as weekly manager, commencing next Monday; and the amount of payment I am to receive I leave entirely to you." A served B in that capacity for six weeks. *Held* (*Parke*, B., dissenting), that the contract implied that A was to be paid something at all events for the services he performed; and that the jury, in an action on a *quantum meruit*, might ascertain what B, acting *bona fide*, would or ought to have awarded. So in *Jewry v. Busk*, 5 Taunt. 302, it is *held*, that a request to a tradesman to show the defendant's house, "and the defendant would make him a handsome present," is evidence of a contract to pay a reasonable compensation for the work and labor bestowed in that service. But in the earlier case of *Taylor v. Brewer*, 1 M. & Sel. 290, where a person performed work for a committee, under a resolution entered into by them, "that any service to be rendered by him should be taken into consideration, and such remuneration be made as should

be deemed right," it was *held*, that an action would not lie to recover a recompence for such work, the resolution importing that the committee were to judge whether any remuneration was due.

(i) Although the English cases are not quite agreed upon the subject, yet it seems the more generally received opinion in that country, that the appointment of an arbitrator is not of such a nature as to raise an implied promise to pay him a reasonable compensation for his services. *Virany v. Warne*, 4 Esp. 447; *Burroughes v. Clarke*, 1 Dowl. P. C. 48. But see *Swinford v. Burn*, 1 Gow, 5. An *express* promise to pay by the party will, however, bind him, and give the arbitrator a right of action. *Hoggins v. Gordon*, 3 Q. B. 466. In this country, arbitrators and referees under a rule of court have the same right to recover for their services as any person for his labor. *Hinman v. Hapgood*, 1 Denio, 188; *Hassinger v. Diver*, 2 Miles, 411. But the action must not be against both parties to the suit *jointly*, but only against the party producing the claim or demand. *Butman v. Abbot*, 2 Greenl. 361. If there were several arbitrators, each may maintain a separate action for his own services. *Hinman v. Hapgood*, 1 Denio, 188; *Butman v. Abbot*, 2 Greenl. 361.

(j) See *ante*, vol. i. p. *117.

(k) *Wilson v. Burr*, 25 Wend. 386; *Stevens v. Adams*, 23 id. 57; *Newman v*

at law for his services; (*l*) but a "medical practitioner," whose legal appellation is usually "apothecary," has; but we have no such distinction here. (*m*)

Where there is a special agreement for the performance of work, no action can be maintained on a *quantum meruit* while the contract remains open and executory. (*n*)

* 57 * It oftens happens, where there is a contract for a piece

Washington, Mart. & Y. 79. And see *Van Atta v. McKinney*, 1 Harrison, 235. An attorney has, in some states, a lien upon his client's papers left with him, for any general balance due him. *Dennett v. Cutts*, 11 N. H. 163; *Walker v. Sargeant*, 14 Vt. 247; *Aliter in Pennsylvania*. *Walton v. Dickerson*, 7 Penn. St. 376. So by statute in many states he has a lien upon a judgment actually recovered in favor of his client, for his fees and disbursements. *Duncklee v. Locke*, 13 Mass. 525; *Potter v. Mayo*, 3 Greenl. 34; *Gammon v. Chandler*, 30 Me. 152; *Ocean Ins. Co. v. Rider*, 22 Pick. 210; *Hobson v. Watson*, 34 Me. 20. And even without statute provisions. *Sexton v. Pike*, 8 Eng. (Ark.) 193. A counsel, who, with his client's consent, withdraws from a case after having tendered beneficial services, does not thereby lose his right to compensation for the services rendered, unless at the time of his withdrawal he waives or abandons his claim to compensation. *Coopwood v. Wallace*, 12 Ala. 790.

(*i*) *Chorley v. Bolcot*, 4 T. R. 317; *Lipescome v. Holmes*, 2 Camp. 441; *Poucher v. Norman*, 3 B. & C. 745. Neither could a physician, who prepared or dispensed his own medicines, recover for them, although they were furnished to his own patients. *Best, J.*, in *Allison v. Haydon*, 1 Mo. & P. 591; s. c. 4 Bing. 619.

(*m*) In some states physicians may recover for their services, although they were never licensed as physicians. See *Towle v. Marrett*, 3 Greenl. 22; *Hewitt v. Wilcox*, 1 Met. 154; *Bailey v. Mogg*, 4 Denio, 60; *Warren v. Saxby*, 12 Vt. 146. In other states there either now exist, or have existed, statutes providing, that they shall not be entitled to the benefit of the law to recover their fees, unless they have been duly licensed by some medical society, or graduated a doctor in some medical school. See *Hewitt v. Charier*, 16 Pick. 333; *Spaulding v. Alford*, 1 id. 33; *Smith v. Tracy*, 2 Hall, 465; *Berry v. Scott*, 2 Har. & G. 92. In some states it has been held, that although such restrictive statutes have been repealed, a

physician cannot recover for services performed before such repeal. *Warren v. Saxby*, 12 Vt. 146; *Nichols v. Poulsom*, 6 Ohio, 305; *Bailey v. Mogg*, 4 Denio, 60; *contra*, *Hewitt v. Wilcox*, 1 Met. 154. A physician undertakes to employ usual skill, but not to cure. *Gallaher v. Thompson*, Wright, 466. He may, however, make a conditional contract, that if he does not cure he shall not be paid; such a contract is valid; and in such case he cannot recover for his services or his medicines, unless he shows a performance of the condition on his part. *Smith v. Hyde*, 19 Vt. 54. It is not necessary, however, in order to constitute such a conditional contract, that a specific price should be agreed upon. In case of a cure he will be entitled to a reasonable compensation. *Mock v. Kelly*, 3 Ala. 387.

(*n*) *Clark v. Smith*, 14 Johns. 326; *Rees v. Lines*, 8 C. & P. 126; which was an action of assumpsit. The first count of the declaration was on special agreement for the plaintiff to build a house for the defendant, at an agreed price, and stated that the plaintiff had bestowed work upon the house, and that the defendant abandoned the contract, and hindered the plaintiff from completing it; 2d count, for goods sold. *Pleas, non-assumpsit*, and that the defendant did not abandon the contract, or prevent the plaintiff from completing the house. The particulars of demand were for work and materials under the agreement. *Held*, that if the defendant had not hindered the plaintiff from completing the house, the plaintiff could not recover any thing, except for extra work, which was not in the contract; and that the fact that the defendant, when asked for money, had said that he would never pay a farthing, was no proof that the contract had been abandoned, as the defendant was not then liable to pay any thing, the work not being completed.—So where A engaged to convey away certain rubbish for B at a specified sum, under a fraudulent representation by B as to the quantity of rubbish which was to be so conveyed. *Held*, that in an action for the

of work to be done for a definite sum, as for a house to be built or repaired, that extra work is done by the party employed; and there are numerous and conflicting cases as to the rights and obligations of the parties in these cases. It seems to have been at one time doubted whether any claim existed for such extra work, unless a new contract could be shown; and such is the provision of the French law. (o) But from the authorities generally, and the reason of the case, we think the following principles may be deduced. The party cannot recover for extra work, or even for better materials used, if he had not the authority of the other party therefor. (p) But the authority will be implied if the employing party saw or knew of the work or materials in time to object and stop the work, without injury to himself, and not under circumstances to justify his belief that no charge was intended,—and did not object, but received and held the benefit of the same. (q) And if he received from the

work actually done, A could recover only according to the terms of the special contract, although when he discovered the fraud he might have repudiated the contract, and sued B for deceit. *Selway v. Fogg*, 5 M. & W. 83. If the whole of such special contract is executed on the plaintiff's part, and the time of payment has elapsed, general assumpsit may be maintained; and the measure of damages will be the rate of compensation fixed by the special contract. *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Perkins v. Hart*, 11 Wheat. 237; *Cheapeake and Ohio Canal v. Knapp*, 9 Pet. 541; *Baker v. Corey*, 18 Pick. 496.

(o) *Code Civil*, b. 3, tit. 8, art. 1793.

(p) *Hort v. Norton*, 1 McCord, 22; *Wilmot v. Smith*, 3 C. & P. 453, where it was ruled by Lord *Tenterden* that if A agrees to make an article of certain materials for a stipulated price, but puts in materials of a better kind, he is not at liberty on that account to charge more than the stipulated price, nor can he require the article to be returned, because the buyer will not pay an increased price on account of the better materials. For labor and service voluntarily done by one for another, without his privity or consent, however meritorious or beneficial it may be to him, as in saving his property from destruction by fire, itself affords no ground for an action. *Bartholomew v. Jackson*, 20 Johns. 28.

(q) In *Lovelock v. King*, 1 Mood. & R. 60, a very important and wholesome principle was laid down upon the subject

of extra work, where there is a specific contract for certain work at a fixed price. The action was assumpsit on a carpenter's bill for alterations in a house of the defendant. Lord *Tenterden*, in summing up to the jury, observed: "That the case, although very common in its circumstances, involved a very important principle, and required their very serious consideration. In this case, as in most others of the kind, the work was originally undertaken on a contract for a fixed sum. A person intending to make alterations of this nature generally consults the person whom he intends to employ, and ascertains from him the expense of the undertaking; and it will very frequently depend on this estimate whether he proceeds or not. It is therefore a great hardship upon him if he is to lose the protection of this estimate unless he fully understands that such consequences will follow, and assents to them. In many cases he will be completely ignorant whether the particular alterations suggested will produce any increase of labor and expenditure; and I do not think that the mere fact of assenting to them ought to deprive him of the protection of this contract. Sometimes, indeed, the nature of the alterations will be such that he cannot fail to be aware that they must increase the expense, and cannot therefore suppose that they are to be done for the contract price. But where the departures from the original scheme are not of that character, I think the jury would do wisely in considering that a party does not abandon the security of

*58 * person employed an estimate of the cost of such *extra work*, and then ordered it, the party employed might be bound by that estimate. And if the changes were such that the employer need not infer that they involved any additional expense, and he was not so informed, an express assent to them does not imply a promise to pay for them; because it is fair to suppose that he believed they were done under the contract, and assented to only on those terms. If the changes necessarily imply an increased price, and he expressly authorizes, or silently, but with full knowledge, assents to them, he is then bound to pay for them. The question may then arise, whether he is to pay for them according to the usual rate of charging for such work, with no reference to the contract, or whether he must pay only according to the rate of the contract. Some cases hold the former; but we think the better practice and the better reason in favor of the latter. (r)

*59 * If A agrees to make something for B, to meet the approval of B, or with any similar language, B may reject it

his contracts by consenting that such alterations shall be made, unless he is also informed, at the time of the consent, that the effect of the alteration will be to increase the expense of the work."

(r) In McCormick v. Connolly, 2 Bay, 401, it was said, that where a contract is made for any building, of whatever size or dimensions, it becomes a law to both parties, and they are both bound by it; and whatever additions or alterations are made in such building, they form a new contract, either express or implied, and must be paid for agreeably to such new contract. See Wright v. Wright, 1 Litt. 179. In Dubois v. Del. & Hud. Canal Co. 12 Wend. 344, a party entered into an agreement for the construction of a section of a canal, by which he was to receive a given price per cubic yard for ordinary excavation, and an increased sum per cubic yard for excavation of rock, but no compensation was provided for the excavation of hard pan. During the progress of the work a large quantity of the latter substance was excavated, a fair remuneration for which exceeded the highest price specified in the contract for any species of work, and the parties, whilst the section was constructing, treated the excavation of hard pan as not embraced in the contract; and after its completion it was conceded by him for whom the work was done that the contractor was entitled to

compensation for such work, beyond the price fixed for ordinary excavation; it was held, that the contractor was entitled to recover for such work, upon a *quantum meruit*, whatever he could show the work was worth. In Tebbetts v. Haskins, 16 Me. 288, where a contract in writing had been made between two persons, wherein one agreed to build a house, and the other to pay a certain sum therefor, and which had afterwards been abandoned by them, and a house had been built by one party to the written contract for the other party and two others; it was held, that it was not necessary to prove an express contract, but that one might be implied; and that the price for building the house was not to be ascertained from that fixed in the written contract. In De Boom v. Priestly, 1 Cal. 206, which was an action on a *quantum meruit*, the court held, that where there has been a special contract which is afterwards deviated from, the party cannot sue thereon, but must bring his action on an implied contract, and at the trial the damages must be graduated according to the terms of the original contract, so far as the work can be traced under it. And in Farmer v. Francis, 12 Ired. L. 282, it is held, that a party working after the time limited for the performance of the contract, is confined in his action to the rate of compensation fixed by the contract. The same doctrine

for any objection which is made in good faith, and is not merely capricious. (s)¹

is held, in *Jones v. Woodbury*, 11 B. Mon. v. Ware, 13 Met. 42; *White v. Oliver*, 36 167. See also *Clarke v. Mayor*, 4 Comst. Me. 92. 338; *Jones v. Jndd*, 4 Comst. 412; *Snow* (s) *Andrews v. Belfield*, 2 C. B. (n. s.) 779.

¹ Thus where a suit of clothes was to be made to the "satisfaction" of A., he is not liable if they prove unsatisfactory. *Brown v. Foster*, 113 Mass. 136; or a portrait painted, *Gibson v. Cranage*, 39 Mich. 49; or a bust modelled, *Zalecki v. Clark*, 44 Conn. 218.

* 60

* CHAPTER X.

MARRIAGE.

We have now to consider, first, contracts to marry; then contracts in relation to a future marriage; then contracts in restraint of marriage; and, lastly, the contract of marriage.

SECTION I.

CONTRACTS TO MARRY.

Contracts to marry at a future time were once regarded by the English courts with disfavor. They "should be looked upon," says Lord *Hardwicke*, "with a jealous eye;" and Lord *Mansfield* quoted this remark with approbation. (*a*)¹ But it is now perfectly well settled, both in England and in this country, and indeed has been for a considerable time, that these contracts are as valid and effectual in law as any; and that, in actions upon them, damages may be recovered, not only for pecuniary loss, but for suffering and injury to condition and prospects. (*b*) The reason is obvious; marriages can seldom be celebrated simultaneously with betrothal, or engagement; a certain time must intervene; and it would be very unjust to

(*a*) *Holcroft v. Dickinson, Carter*, 238; *Key v. Bradshaw*, 2 Vern. 102; *Woodhouse v. Shepley*, 2 Atk. 539; *Lowe v. Peers*, 4 Burr. 2230. In this last case Lord *Mansfield* says: "All these contracts should be looked upon (as Lord *Hardwicke* said in *Woodhouse v. Shepley*) with a jealous eye; even supposing them clear of any direct fraud." This particular phrase is not found in Lord *Hardwicke's* decision as reported, but the opinion may be gathered from what he says.

(*b*) *Boynton v. Kellogg*, 3 Mass. 189; *Paul v. Frazier*, *id.* 71; *Wightman v. Coates*, 16 *id.* 1; *Morgan v. Yarborough*, 5 La. An. 817.

¹ See *Short v. Stotts*, 58 Ind. 29, which declared that an action for breach of a marriage contract existed at common law long before the fourth year of James I.

leave parties who suffer by a breach of a contract of such extreme importance wholly remediless.

* The promises must be reciprocal; (c) but they need not * 61 be made at the same time; for if an offer be made, though retractable until acceptance, yet if not retracted, it remains open for acceptance for a reasonable time, and when accepted the contract is complete.

An apparent exception as to this necessity of reciprocity is taken where the promise to marry is made by deed. There, as the seal implies consideration, no other is strictly necessary; but the covenantee must be ready, able, and willing to receive the covenantor in marriage. The plaintiff need not aver or prove a promise on his or her part; and if the plaintiff be a woman, she need not aver or prove an offer by her; "it is well enough without saying *obtulit se* at all, because she was *semper parata*. The man is *ducere uxorem*." (d) "The modesty of the sex is considered by the common law," says Lord Coke. "It can hardly be expected that a lady should say to a gentleman, 'I am ready to marry you, pray marry me.'" (e)¹

A woman is doubtless bound by such a covenant as well as a man; yet it would be regarded with more suspicion; and if such an obligation were obtained by a man who gave no corresponding promise on his part, and it were obvious that he intended to bind her but leave himself at liberty, it would probably be set aside in equity. Where the promise is mutual, it was long since settled that an action for a breach of the contract may be maintained against the woman. (f)

This action cannot be maintained against an infant;² and some question has been made whether an infant can maintain

(c) *Hebden v. Butter*, 1 Sid. 180, 1 Lev. 147; *Harrison v. Cage*, Carth. 467; *Stretch v. Parker*, 1 Roll. Abr. 22, pl. 20.

(d) *Holcroft v. Dickenson*, 1 Freem. 347.

(e) *Seymour v. Gartside*, 2 Dow. & R. 57. See *Wells v. Padgett*, 8 Barb. 823.

57. In *Moritz v. Melhorn*, 18 Penn. St. 881, 886; s. c. 1 Salk. 24.

and in *Wetmore v. Wells*, 1 Ohio St. 28, it is decided, that where the defendant's promise is proved, the female may prove her own acts and declarations in order to show her assent. See also *Morgan v. Yarborough*, 5 La. An. 317.

(f) *Harrison v. Cage*, 1 Ld. Raym. 886; s. c. 1 Salk. 24.

¹ But the plaintiff must aver and prove her readiness and willingness to marry the defendant. *Graham v. Martin*, 64 Ind. 567.

² That an infant's promise to marry is not binding, and is incapable of ratification, see *Ditcham v. Worrall*, 5 C. P. D. 410, and 20 Am. Law Reg. n. s. 447, and note; but a jury may determine whether language used by him after majority amounts to a ratification or a fresh promise, *Northcote v. Doughty*, 4 C. P. D. 385; *Coxhead v. Mullis*, 3 C. P. D. 439.

this action ; because the promise of the infant being void or voidable, the contract is not mutual, and is without consideration. But in many cases an infant may bring an action for breach of contract against the adult, where the adult could not sue *62 the infant for a breach on his or her part. It seems to * be distinctly settled, that this is so in the case of a contract to marry. (g)¹

The very words, or time, or manner of the promise need not be proved ; for it may be inferred from circumstances. It may be that this inference is sometimes made too easily, and that juries, or perhaps courts, justify the reproach, that feeble evidence is sometimes held sufficient to prove such a promise. But it must be remembered that such engagements are often, if not usually, made without witnesses, and are not often reduced to writing. A requirement of precise and direct testimony would facilitate fraud, more perhaps than in any other class of contracts, and fraud that might work extreme mischief. It has therefore been wisely decided that the contract may be inferred from the conduct of the parties, and from the circumstances which usually attend an engagement to marry ; as visiting, the understanding of friends and relations, preparations for marriage, and the reception of the party by the family as a suitor.² But it also held that preparations by the plaintiff in the absence of the defendant, and not connected with him, are inadmissible as evidence. (gg)

Where the promise by the defendant was proved, the demeanor of the plaintiff, being that of a betrothed woman, was held to be sufficient evidence of her promise. (h) And consent

(g) *Holt v. Ward*, Stra. 937; *Willard v. Stone*, 7 Cowen, 22; *Hunt v. Peake*, 5 Cowen, 475; *Pool v. Pratt*, 1 D. Chip. (Vt.) 252.

(gg) *Russell v. Cowles*, 15 Gray, 582.

(h) In the case of *Hutton v. Mansell*, 3 Salk. 16, tried before *Holt*, C. J., the promise of the man was proved, but no actual promise on the woman's side, yet he held, that there was sufficient evidence

to prove that the woman likewise promised, because she carried herself as one consenting, and approving the promise of the man. This question was much discussed in the case of *Wightman v. Coates*, 15 Mass. 1. That was an action of assumpsit on a promise to marry the plaintiff, and a breach thereof by refusal, and having married another woman. At the trial, the evidence of a promise re-

¹ See *Frost v. Vought*, 37 Mich. 65; *Reish v. Thompson*, 55 Ind. 34.

² *Wagenseller v. Simmers*, 97 Penn. St. 465. *Homan v. Earle*, 53 N. Y. 267, declared that the promise may be inferred from acts without any formal words ; and where the defendant continues in acts by which the plaintiff to the defendant's knowledge has been induced to believe in an engagement to marry, the defendant cannot deny such engagement ; whether the latter's acts are intended and regarded as serious being a question of fact for the jury. See *Richmond v. Roberts*, 98 Ill. 472, where a newspaper article entitled "Love, the Conqueror," given by the defendant to the plaintiff previous to the time of the alleged contract, was allowed to be read in evidence.

* of parents in the presence of a daughter, with the absence of objection on her part, is held to imply her consent; (i) nevertheless language used to third parties, amounting to an expression of intention to marry the plaintiff, but not uttered in the presence of the plaintiff, does not in general prove a promise to marry. (j) But statements made to a father, who had a right to make such inquiries, and to receive a true answer, especially where corroborated by visits and the conduct of the parties, are not only sufficient evidence of a promise, but although the statement of the defendant is of a promise to marry the plaintiff in six months, and the count is upon a promise to marry generally, or in a reasonable time, the jury may infer from the statement a general promise to marry. (k)

It has been contended that the promise should be in writing,

sulted from sundry letters written to the plaintiff by the defendant, and from his attentions to her for a considerable length of time. It was objected by the defendant, that there being no direct evidence of an express promise, the action could not be maintained. But this objection was overruled by the judge; and the jury were instructed, that if, from the letters of the defendant read in evidence, and the course of his conduct towards the plaintiff, they were satisfied that there was a mutual understanding and engagement between the parties to marry each other, they might find for the plaintiff. To this ruling and instruction the defendant excepted, and the case having been carried up, *Parker*, C. J., delivering the opinion of the court said: "As to the technical ground upon which the objection to the verdict now rests, we entertain no doubts. The exception taken is, that there was no direct evidence of an express promise of marriage made by the defendant. The objection implies that there was indirect evidence from which such a promise may have been inferred; and the jury were instructed, that if, from the letters written by the defendant, as well as his conduct, they believed that a mutual engagement subsisted between the parties, they ought to find for the plaintiff. They made the inference, and without doubt it was justly drawn. Is it then necessary that an express promise in direct terms should be proved? A necessity for this would imply a state of public manners by no means desirable. That young persons of different sexes, instead of having their mutual engagements inferred from a course of devoted

attention, and apparently exclusive attachment, which is now the common evidence, should be obliged, before they consider themselves bound, to call witnesses, or execute instruments under hand and seal, would be destructive of that chaste and modest intercourse which is the pride of our country; and a boldness of manners would probably succeed, by no means friendly to the character of the sex, or the interests of society. A mutual engagement must be proved to support this action; but it may be proved by those circumstances which usually accompany such a connection." In *Honyman v. Campbell*, 2 Dow. & C. 232, the Lord Chancellor said: "I deny that courtship, or an intention to marry however plainly made out, can constitute, or, in the language of the Scotch law, is equipollent to a promise. There must be a promise, and the promise must be mutual and binding on both parties; for the law attaches on the promise and not on the intention. But still, courtship is a most material circumstance, when we have to consider whether there was a promise. When we consider how natural it is that lovers should marry, and that marriage is usually the result of courtship, and that in these cases mutual promises are so common, although courtship, or intention, will not supply the place of a promise, yet they come so near, that if these are once made out, we get on a good way towards our journey's end." See also, *Southard v. Rexford*, 6 Cowen, 264; *Weaver v. Bachert*, 2 Penn. St. 80.

(i) *Daniel v. Bowles*, 2 C. & P. 553.

(j) *Cole v. Cottingham*, 8 C. & P. 75.

(k) *Potter v. Deboos*, 1 Stark. 82.

under the clause in the 4th section of the statute of frauds, which provides that no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage; but the courts of England, after once so deciding, (*l*) have since taken a distinction, which is certainly a very nice one, be-

tween promises to marry, and promises in consideration of marriage. (*m*) This clause is not generally * contained in the statutes of frauds of our States; but it has been held in this country, that a promise to marry at the end of five years, is within that clause of the statute which requires that a promise not to be performed within one year from the making shall be in writing. (*n*)¹

A contract to marry, without specification of time, is, as we have seen, a contract to marry within a reasonable time; each party having a right to reasonable delay, but not to indefinite postponement; nor to delay without reason or beyond reason.² If both parties delay the fulfilment of the contract unreasonably, it may be considered as abandoned by mutual consent, in the absence of evidence to negative this inference.³

These contracts, like most others, may be on condition, and if the condition be legal and reasonable, the liability of the parties under it attaches as soon as the condition is satisfied. (*o*) But it may easily happen that the condition shall be such as to be void, leaving the contract valid; as if it be frivolous or impossible, and evidently introduced by one party in fraud of the other. And it may also happen that the condition shall make the contract void. Thus contracts to marry at the death of parents or relations from whom money is expected, and who are kept in ignorance of the contract, are regarded with great dislike by courts, and would probably be declared void, unless the circumstances cleared them from suspicion. (*p*) And if the condition were

(*l*) *Philpot v. Wallet*, 8 Lev. 65.

(*m*) *Cork v. Baker*, 1 Stra. 84; *Harrison v. Cage*, 1 Ld. Raym. 887.

(*n*) *Derby v. Phelps*, 2 N. H. 515.

(*o*) *Cole v. Cottingham*, 8 C. & P. 75; *Atchinson v. Baker, Peake, Ad. Cas.* 103.

(*p*) *Woodhouse v. Shepley*, 2 Atk.

539; *Drury v. Hooke*, 1 Vern. 412, was

a bill for relief from a marriage brokerage bond. The marriage had been brought about without the consent of the woman's parents. The Chancellor "for that reason alone decreed the bond to be delivered up, terming it a sort of kidnapping."

¹ See *Short v. Stotts*, 58 Ind. 29.

² After a reasonable time elapses, and one party without cause refuses to perform, the other is justified in breaking the engagement and bringing suit. *Bennett v. Bean*. 42 Mich. 346.

³ *Wagenseseller v. Simmers*, 97 Penn. St. 465.

entirely uncertain, or very remote, the contract might be regarded as made in restraint of marriage, as it might prevent either party from marrying for a very long, or for an indefinite period; and it would be held void on that ground. (q)

If the promise is to marry on request, a request should be * alleged and proved; but this is not necessary when the defendant is incapacitated from marrying by his or her own act. (r)

The defences which may be urged against an action to enforce a promise to marry are very numerous. Consanguinity within the Levitical degrees in England, (s) and in this country, those within which marriage is prohibited by the statutes of the several States. So, the bad character of the plaintiff, or his or her lascivious conduct.¹ The cases generally exhibit this defence where the woman is plaintiff; but it ought with equal justice, and on moral as well as on public grounds, to be permitted to the woman when she is defendant; it was so held in the case of *Baddeley v. Mortlock*, (t) and undoubtedly would be so held in this country. If the defence be general bad character, evidence of reputation is

(q) *Hartley v. Rice*, 10 East, 22. This was an action on a wager that the plaintiff would not be married in six years. It was endeavored to distinguish this from other contracts in restraint of marriage, on the ground that it was not for life, but for a time certain; it was held, however, that a restraint for a time certain falls within the same policy of the law, and makes the contract void.

(r) *Short v. Stone*, 8 Q. B. 358; *Caines v. Smith*, 15 M. & W. 189; *Harrison v. Cage*, 1 Ld. Raym. 386; *Millward v. Littlewood*, 1 E. L. & E. 408; s. c. 5 Exch. 775.

(s) In *Harrison v. Cage*, 1 Ld. Raym. 387, it is said, that consanguinity within the Levitical degrees may be pleaded in bar or given in evidence under non-assumpit. It has been sometimes intimated that previous marriage would be a defence. This must be on the ground that the promised marriage would in that case be unlawful, as in the case of consanguinity. But I take the true rule to be, that if the marriage would be unlawful, and this unlawfulness was known to the plaintiff when making the contract, then the plaintiff can sustain no action for the breach of it. Now consanguinity within the prescribed degrees may be presumed to be known to both parties. Not

so with previous marriage. And certainly a married man who promised to marry a single woman, who did not know his marriage, is liable to an action for the breach of his promise, for it was his own fault that he promised what he could not perform. This seems to be taken for granted by court and counsel in *Daniel v. Bowles*, 2 C. & P. 553.

(t) *Holt*, 151. In this case it was proved that charges had been made against the moral character of the plaintiff, which he did not clear away, and the defendant thereon refused to marry him. *Gibbs*, C. J., said: "Having promised the plaintiff marriage, she must absolve herself upon some legal grounds. If a woman improvidently promises to marry a man, who turns out upon inquiry to be of bad character, she is not bound to perform her promise. But she must show that the plaintiff is a man of bad character. The accusation is not enough. The facts charged were capable of proof. The existence of the rumor is not sufficient to discharge her from her promise. Without proof that the charges were founded she is not absolved from her contract. But it affects the damages." The jury accordingly returned a verdict for the plaintiff, damages one shilling.

¹ *Van Storch v. Griffin*, 77 Penn. St. 504; *Sprague v. Craig*, 51 Ill. 288.

receivable; for, says Lord *Kenyon*, "character is the only point in issue; public opinion, founded on the conduct of the party, is a fair subject of inquiry." (*u*)¹

If the defence rests on specific allegations of misconduct, these must be strictly proved; (*v*) and if the defendant knew the general bad character, or the specific misconduct, before *making the promise, they constitute no defence. (*w*)

False and injurious language used by plaintiff concerning defendant is a good defence. (*x*) So bad health, if such as to incapacitate from marriage, or render it unsafe or improper. (*y*)²

(*u*) *Foulkes v. Selliway*, 3 Esp. 236. See also, *Morgan v. Yarborough*, 5 La. An. 416.

(*v*) *Baddeley v. Mortlock*, Holt, 151.

(*w*) *Irving v. Greenwood*, 1 C. & P. 350. This was an action of assumpsit on a promise of marriage. The promise and the breach were clearly made out. But the defendant, to bar the action, gave evidence to show that he eventually broke off the match, because he found that the plaintiff was with child by another man. It was admitted, that, after the promise, the plaintiff had had a child, but it was contended that the defendant was its father. *Abbott*, C. J., in his summing up to the jury, said: "If you think that the defendant was not the father of the child, he is entitled to your verdict; for if any man, who has made a promise of marriage, discovers that the person he has promised to marry is with child by another man, he is justified in breaking such promise; and if any man has been paying his addresses to one that he supposes to be a modest person, and afterwards discovers her to be a loose and immodest woman, he is justified in breaking any promise of marriage that he may have made to her; but to entitle a defendant to a verdict on that ground, the jury must be satisfied that the plaintiff was a loose and immodest woman, and that the defendant broke his promise on that account; and they must also be satisfied that the defendant did not know her character at the time of the making of the promise; for if a man knowingly promise to marry such a person, he is bound to do so." In *Bench v. Merrick*, 1 Car. & K. 468, it was proved, that the plaintiff had had a child

some ten years before the promise, and had since sustained an irreproachable character. *Atchery*, Serj., before whom the case was tried, said: "The great question in this case will be, whether you believe that, in the month of February, 1843, the defendant knew the history of the plaintiff in regard to this child. If he did not know it, however great a severity it may be on a woman to rake up the transaction of by-gone times, the defendant's second plea will be sustained, and on that plea the defendant will be entitled to the verdict. There is no imputation whatever on the character of the plaintiff except the transaction of 1831. If the defendant, in your opinion, has not established his defence, there will then be the question of damages; and in that case, in consequence of the misfortune (calling it by no harsher name) in 1831, the plaintiff cannot be said to be entitled to so large a compensation as one on whose reputation no imputation had ever rested." From this we must infer that if the defendant did know this fact when he made the promise which he had broken, still the fact, though no defence, would go to lessen the damages. See also, *Boynton v. Kellogg*, 3 Mass. 189; *Palmer v. Andrews*, 7 Wend. 142.

(*x*) *Leeds v. Cook*, 4 Esp. 256.

(*y*) *Atchinson v. Baker*, Peake, Ad. Cas. 108, 124. In this case the plaintiff was a widower upwards of forty years of age, and the defendant a widow about the same age; when the promise was made, the plaintiff was apparently in good health, but the defendant afterwards discovered that he had an abscess in his breast, and for that reason refused to marry him. Lord *Kenyon* said, that if

¹ *Sprague v. Craig*, 51 Ill. 288.

² The having an incurable disease may be shown in mitigation of damages. *Sprague v. Craig*, 51 Ill. 288. But mere incompatibility of temperament or tastes is no defence. *Coolidge v. Neat*, 129 Mass. 146.

But a plea of the bad health of the defendant, taking place subsequently * to the promise, has been held to be no answer to an action for a breach of promise. (z) Entire deafness or blindness, or other important physical incapacity, occurring after the promise, might be a good defence at law; (a)¹ so would the disposal of her property without the consent of the defendant, and in a manner injurious to his interests. (b) It has been said, also, that if a widow conceals her previous marriage, and betroths herself as a virgin, this would be a fraud, and would avoid the contract. (c) It is going quite far to consider this fact alone as constituting a fraud, but it could seldom occur but under circumstances which would probably determine the character of the concealment; and if this were fraudulent, it must of course have the usual effect of fraud upon the contract; for if obtained by fraud, whatever that fraud may be, the contract is void. A dissolution of the contract by mutual consent would of course be a sufficient defence, but it must be a real and honest consent. (d)² But a pre-engagement by the defendant is no sufficient defence, (e) nor is the fact that the defendant was married at the time of the promise,³ but the plaintiff may bring an action immediately upon discovery. (f) Perhaps it ought to be a

the condition of the parties was changed after the time of making the contract, it was a good cause for either party to break off the connection; that Lord Mansfield had held, that if, after a man had made a contract of marriage, the woman's character turned out to be different from what he had reason to think it was, he might refuse to marry her without being liable to an action, and whether the infirmity was bodily or mental the reason was the same; it would be most mischievous to compel parties to marry who could never live happily together. The plaintiff was nonsuited, on the ground of a variance; but afterwards brought a fresh action, and rebutted the defendant's testimony as to the abscess, and recovered £4,000 on proof that the defendant had promised to settle £5,000 of her fortune on him, and the residue, £18,000, on herself. A motion was then made for a new trial, on the ground of excessive damages, but the cause was

compromised. See also, *Baker v. Cartwright*, 100 Eng. C. L. 124, as to insanity of the plaintiff before the promise was entered into.

(z) *Hall v. Wright*, 96 Eng. C. L. 745.

(a) *Short v. Stone*, 8 Q. B. 369. Lord Denman. A rape wholly without the fault of the woman, would discharge the man from his obligation. *Addison on Cont.* 584. And in France it seems that loss of a nose would be sufficient. At common law it would hardly be held that a misfortune, which merely affected personal beauty, was a sufficient defence. *Id.*

(b) *Taylor v. Pugh*, 1 Hare, 114.

(c) *Addison on Cont.* 581.

(d) See *Southard v. Rexford*, 6 Cowen, 284; *Kelly v. Renfro*, 9 Ala. 325.

(e) *Harrison v. Cage*, 1 Ld. Raym. 387. By Holt, C. J. "Precontract is a disability, but it will not avoid the performance of your promise, because it proceeds from your own act."

(f) *Wild v. Harris*, 7 C. B. 909; *Mill-*

¹ Where by a statute the marriage of an impotent person is void, a breach of such a one's promise to marry is not actionable. *Gulick v. Gulick*, 12 Vroom, 13. See *Sprague v. Craig*, 51 Ill. 288.

² *Dean v. Skiff*, 128 Mass. 174. See *Shellenbarger v. Blake*, 67 Ind. 75.

³ If the plaintiff was ignorant of that fact, *Kelley v. Riley*, 106 Mass. 339; but an

good defence, that the plaintiff, when making the contract for the breach of which the action is brought, was under an engagement to another party. For instance, if a woman sues a man for a breach of promise of marriage, she must of course show that the promise was reciprocated by her; and if the defendant could then show, that when she made this promise to him she

was bound by a previous promise to another, it would
* 68 * seem to be just that she should not recover for the violation

of a contract, her entering into which was a precisely similar violation of contract. But this question does not appear to have been settled by adjudication. It would seem, however, that where there was a fraudulent concealment of the prior contract by the plaintiff, the fraud being sufficiently pleaded, the defence would be held good. (g) The contract with a woman divorced for her own fault would be invalid in a State where such woman cannot legally marry. (gg)

An offer to renew or execute the contract after a refusal should be no defence; nor a change of feeling, nor the fact that another had supplanted the plaintiff in the affections of the defendant.¹ But it would seem, on general principles, to be a good defence, that the promise was made on condition that the plaintiff would commit fornication with the defendant; for such a promise might be void as founded upon an illegal consideration. (h)² But

ward *v.* Littleword, 1 E. L. & E. 408; s. c. 5 Exch. 775. The consideration was said to be that the plaintiff would remain unmarried. Pollock, C. B., said that the defendant impliedly promised that there was no impediment to his performing his promise. This doctrine was also held in the case of Blattmaker *v.* Saul, which was decided in Brooklyn, N. Y. in October, 1858.

(g) Beachey *v.* Brown, 96 Eng. C. L. 796.

(gg) Haviland *v.* Haviland, 34 N. Y. 648.

(h) This would seem to be doubtful from Morton *v.* Fenn, 3 Doug. 211. This was an action for breach of promise

of marriage, tried before Lord Mansfield. The evidence was, that the defendant, who was a man of fortune in Jamaica, aged seventy, promised to marry the plaintiff, a widow of fifty-three, if she would go to bed to him that night, which she did, and lived afterwards with him a considerable time. It appeared also that the defendant several times afterwards repeated his resolution to marry her, but that he afterwards married another woman. The jury found a verdict for the plaintiff, with £2,000 damages.

A rule *nisi* for a new trial having been obtained, on the ground that it was *turpis contractus*, being on condition of the plaintiff going to bed with the defendant,

engagement to marry between a woman and a married man, known to her to be such, as soon as his wife should die or be divorced, is void as against public policy. Noice *v.* Brown, 9 Vroom, 228; 10 Vroom, 133; Paddock *v.* Robinson, 63 Ill. 99.

¹ Nor a feeling that the proposed marriage would not tend to the parties' happiness. Coolidge *v.* Neat, 129 Mass. 146.

² But where illicit intercourse was not the consideration of the promise, a promise to marry at a definite future time, and sooner, should pregnancy occur, is valid, and enforceable as soon as pregnancy happens. Kurtz *v.* Frank, 76 Ind. 594. See Hanks *v.* Naglee, 54 Cal. 51.

it is certainly no defence that the promise was made after fornication, if made with no view to a repetition of the offence, or before fornication, if that were not the consideration of the promise. If the defendant promised that another person should marry the plaintiff, it is no defence that such other person refuses; because the defendant promised on his own responsibility that which another person might prevent from being done.

Damages are peculiarly within the power of the jury in cases of this kind;¹ for courts, both in England and in this country, are very unwilling to set aside a verdict in these cases on the * ground of excessive damages. (*i*) And if the defendant has undertaken to rest his defence, in whole or in part, on the general bad character, or the criminal conduct of the plaintiff, and fail altogether in the proof, it has been distinctly held that the jury may consider this in aggravation of damages. (*j*).²

Lord Mansfield said: "I thought the objection would not lie on two grounds. 1. That before the marriage act this would have been a good marriage, and the children legitimate by the rules of the common law. 2. I thought so, because the parties were not in *pari delicto*, but this was a cheat on the part of the man." After argument, the court took time to consider, and in the meanwhile recommended the parties to agree that the defendant should pay the plaintiff £500, and on a subsequent day Wallace informed the court that the parties had consented to that arrangement. See also, *Baldy v. Stratton*, 11 Penn. St. 316.

(*i*) This is very strongly asserted in the case of *Smith v. Woodfine*, 1 C. B. (n. s.) 680.

(*j*) *Southard v. Rexford*, 6 Cowen, 254. This was an action of assumpsit for breach of promise of marriage. The plea was the general issue, with notice that the defendant would prove in his defence,

that the plaintiff had, at various times, and with various persons, specifying them, committed fornication after the alleged promise. At the trial, the defendant attempted to prove this defence, but failed. The case was tried before Walworth, Circuit Justice. The learned judge, in charging the jury in reference to the damages, said: "In cases of this kind the damages are always in the discretion of the jury; and in fixing the amount they have a right to take into consideration the nature of the defence set up by the defendant. In his defence he has attempted to excuse his abandonment of the plaintiff on the ground that she is unchaste, and has committed fornication with different individuals. But it appears from the testimony of his own witnesses, that her character in that respect has not been tarnished even by the breath of suspicion. With such a defence on the record, a verdict for nominal or trifling damages may be

¹ The money value or worldly advantage of a marriage in giving a woman a permanent home and advantageous establishment, the wound to her affections, the mortification and distress of mind she suffered from the defendant's refusal to perform, taking into account the time the engagement had subsisted, it was declared, in *Coolidge v. Neat*, 129 Mass. 146, might all be taken into account by the jury. See *Sheahan v. Barry*, 27 Mich. 317. The property and social standing of the defendant may be shown. *Bennett v. Bean*, 42 Mich. 346; *Hunter v. Hatfield*, 68 Ind. 416.—That the defendant may inspect his love-letters in the plaintiff's possession on the question of damages, see *Pape v. Lister*, L. R. 6 Q. B. 242.

² The failure to prove baseless allegations of the plaintiff's lack of chastity will aggravate, *Leavitt v. Cutler*, 37 Wis. 46; *Reed v. Clark*, 47 Cal. 194; while the bad habits, drunkenness, incontinence, &c., of the plaintiff, or that she was after his money merely, will mitigate damages, *Van Storch v. Griffin*, 77 Penn. St. 240; *Hunter v. Hatfield*, 68 Ind. 416; *Williams v. Hollingsworth*, 6 *Baxter*, 12; *Miller v. Rosier*, 31 Mich. 475. See also *Miller v. Hayes*, 34 Ia. 496.

And it sometimes happens that a jury who are obliged by
 * 70 the rules of law * to give a verdict for the plaintiff, render
 that of no avail, by finding only nominal damages. (k)

The promise is so far of a personal nature, that the breach
 of it gives no action to the personal representative of the party
 injured, unless perhaps, special damage to the estate of the dece-
 dent is alleged and proved. (l)¹ Nor does it survive against the
 administrator of the promisor. (m)

Whether in an action to recover damages for the breach of
 a promise of marriage, damages for seduction may be recovered,
 has been much questioned. (n)² By the strict rules of law, they

worse for her reputation than a general
 verdict for the defendant. If the defend-
 ant has won her affections and promised
 her marriage, and has not only deserted
 her without cause, but has also spread
 this defence upon the record, for the pur-
 pose of destroying her character, the jury
 will be justified in giving exemplary dam-
 ages." And *Sutherland*, J., in delivering
 the opinion of the Supreme Court, said :
 "Upon the question of damages, the
 charge of the judge appears to me to be
 unexceptionable. There can be no set-
 tled rule by which they are, in every
 case, to be regulated. They rest in the
 sound discretion of the jury, under the
 circumstances of each particular case ;
 and where the defendant attempts to jus-
 tify his breach of promise of marriage by
 stating upon the record, as the cause of
 his desertion of the plaintiff, that she had
 repeatedly had criminal intercourse with
 various persons, and fails entirely in
 proving it, this is a circumstance which
 ought to aggravate the damages. A ver-
 dict for nominal or trifling damages,
 under such circumstances, would be fatal
 to the character of the plaintiff ; and it
 would be matter of regret, indeed, if a
 check upon a license of this description
 did not exist in the power of the jury to
 take it into consideration in aggravation
 of damages." In *Gough v. Farr*, 1 Y. &
 J. 477, it is decided, that the court will
 not, in an action for a breach of promise
 of marriage, grant a new trial on the
 ground of excessive damages, unless they
 be so large as to induce the court to infer
 that the jury were actuated by undue
 motives, or acted upon a misconception
 of the facts. And *Hullock*, B., said : "The

principle which governs the courts in
 cases of this description is, not whether
 they think the damages too large, but
 whether they be so large as to satisfy the
 court that the verdict was perverse, and
 the result of gross error, misconception,
 or undue motives. There are, I think,
 no circumstances in this case to warrant
 such a conclusion. Poverty is pleaded as
 a ground for inducing the court to inter-
 fere ; I am not, from the evidence, satis-
 fied that the defendant is unable to pay
 the damages ; but even if he were, that
 would not, I apprehend, be a ground for
 disturbing the verdict. These are ques-
 tions which must depend upon the cir-
 cumstances of each particular case : if
 there were an imputation upon the char-
 acter of the plaintiff, and the damages
 were excessive, the court might interfere ;
 nothing of that sort, however, appears in
 this case." In *Goodall v. Thurman*, 1
 Head, 209, the rule is said to be, that the
 amount of damages rests in the sound
 discretion of the jury, who are to look to
 the rank and condition of the parties, the
 estate of the defendant, and to all the
 facts proven in the case, and award dam-
 ages commensurate with the injury in-
 flicted.

(k) See *Baddeley v. Mortlock*, Holt,
 151, cited *ante*, p. * 65.

(l) *Chamberlain v. Williamson*, 2 M.
 & Sel. 408.

(m) *Stebbins v. Palmer*, 1 Pick. 71 ;
Smith v. Sherman, 4 Cushing. 408.

(n) *Perkins v. Hersey*, 1 R. I. 493, does
 not permit seduction to be shown in ag-
 gravation of damages. So *Burks v.
 Shain*, 2 Bibb, 341 ; *Weaver v. Bachert*,
 2 Penn. St. 80. *Contra*, *Paul v. Frazier*, 3

¹ *Wade v. Kalbfleisch*, 58 N. Y. 282 ; *Grubb v. Sult*, 32 Gratt. 203. See *Shuler v. Millaps*, 71 N. C. 297, *contra*.

² In *Giese v. Schultz*, 53 Wis. 462, damages were allowed for loss of virtue and reputa-
 tion, and for mental suffering, but not for loss of time or for medical expenses.

should, we think, be excluded, where the plaintiff was in actual or constructive service, or lived in a State in which the statute law gave her an action for the seduction, and not otherwise; and the weight of authority seems to be so. Where courts hold to this rule they would exclude evidence of seduction as irrelevant. But in most cases it would be difficult to exclude this entirely, so as to keep the fact entirely from the jury, without excluding other evidence to which the plaintiff would certainly be entitled. And if the jury were made cognizant of the fact, they would probably regard it in estimating damages; and probably courts would now seldom set aside a verdict on this ground under any ordinary circumstances; especially if the seduction followed the promise and was effected by means of it. (*nn*)¹ And it has recently been held in England, that the court might direct the jury in assessing damages, to consider the altered position of the plaintiff by reason of the seduction. (*no*) It has been held in England, that a father cannot maintain an action, "*per quod servitum amisit*" for the seduction of his daughter; unless she * was in service to him, or owing him service, at the * 71 time. (*o*) And it has been held that the service must be real, genuine service, such as a parent, master, or mistress may command, and not such occasional assistance as the daughter out

Mass. 73; *Conn v. Wilson*, 2 Overt. 233; *Matthews v. Cribbett*, 11 Ohio St. 330; *Goodall v. Thurman*, 1 Head, 209. In *Baldy v. Stratton*, 11 Penn. St. 316, it is held, that though seduction cannot be given in evidence in an action for breach of promise of marriage, the improper conduct of the defendant, in which the plaintiff did not participate, may be so given in aggravation of damages. So loss of time, and expenses incurred in preparations for marriage, are grounds of damage, directly incidental to the breach of a promise of marriage, but not of special damage. In *Tullidge v. Wade*, 3 Wills. 18, and *Foster v. Schoffield*, 1 Johns. 297, it was held, that in an action for seduction, the promise of marriage could not be given in evidence. But this rule—if it be law—is not usually regarded in practice. In *Wells v. Padgett*,

8 Barb. 324, it is decided, that in an action for breach of promise, the seduction of the plaintiff is to be regarded as a breach of the promise in all cases in which it is followed by abandonment and a refusal to marry, and is to be considered by the jury in estimating the damages. The same doctrine is held in *King v. Kersey*, 2 Cart. (Ind.) 402.

(*nn*) *Espy v. Jones*, 37 Ala. 879.

(*no*) *Berry v. Da Costa*, Law Rep. 1 C. P. 381.

(*o*) In *Postlethwaite v. Parkes*, 3 Burr. 1878, the plaintiff hired herself to the defendant, who seduced her and then turned her away when pregnant, and she returned to her father, and the father brought an action *per quod servitum*; and it was held, that the action was not maintainable.

¹ That the damages will be heavily aggravated where the seduction was on the faith of the promise, see *Kelley v. Riley*, 106 Mass. 339; *Hattin v. Chapman*, 46 Conn. 607; *Sauer v. Schulenberg*, 33 Md. 288; *Bennett v. Beam*, 42 Mich. 346; *Williams v. Hollingsworth*, 6 Baxter, 12. That fact, however, must be alleged. *Leavitt v. Cutler*, 37 Wis. 46; *Cates v. McKinney*, 48 Ind. 562.

at service may be able to render to her parent by permission of the master with whom she lives. (p) But the American law is held, in some cases, not so strictly. (q)¹ In others, there seems a disposition to adopt the severity of the English law. (r)

Evidence that the parents of the defendant disapproved of the engagement has been received in mitigation of damages. (s) A bill in equity has been sustained to compel a party to discover whether he has promised to marry the plaintiff. (t)

• SECTION II.

PROMISES IN RELATION TO SETTLEMENTS OR ADVANCES.

A promise to give to a woman, or settle upon her, a specific sum or estate on her marriage, is valid. Marriage is regarded as one of the strongest considerations in the law, either to raise a use, or to found a contract, gift, or grant. (u)² But such promises are certainly within the statute of frauds, as made "in consideration of marriage," (v) although a promise to marry

(p) *Thompson v. Ross*, 5 H. & N. 16.

(q) See *Ingersoll v. Jones*, 5 Barb. 661; and *Bartley v. Richtmyer*, 2 Barb. 182; *Davidson v. Goodall*, 18 N. H. 423; *White v. Nelis*, 31 N. Y. 405; *Lipe v. Eisenlerd*, 32 N. Y. 229. In *Updegraff v. Bennett*, 8 Ia. 72, held, that the right of a father to recover for the seduction of a minor daughter, has not been changed by the Code, but this rule has been so relaxed, that he may now recover, although such minor daughter be not living with him, and there may be no actual loss. See also *Doyle v. Jessup*, 29 Ill. 460.

(r) *George v. Van Horn*, 9 Barb. 528; *Bartley v. Richtmyer*, 4 Comst. 38; *Dain*

v. Wycoff, 3 Seld. 191; *Mulvehall v. Millward*, 1 Kern. 343. In other American cases, the principle of the English law seems to prevail, as in *Lee v. Hodges*, 13 Gratt. 726; *Roberts v. Connelly*, 14 Ala. 235; *Kendrick v. McCrary*, 11 Ga. 603; *Heinrichs v. Kerchner*, 35 Mo. 378.

(s) *Irving v. Greenwood*, 1 C. & P. 350.

(t) *Vaughan v. Aldridge, Forest*, 42.

(u) *Holder v. Dickeson*, 1 Freem. 98; *Smith v. Stafford*, Hob. 216; *Waters v. Howard*, 8 Gill, 262.

(v) *Randall v. Morgan*, 12 Vea. 67. In this case it is doubted whether a settlement after marriage, founded upon a parol agreement before marriage, could

¹ In *Kennedy v. Shea*, 110 Mass. 147, it was held, that if the father required his daughter, while employed by a third person, to spend a part of every Sunday at home, and while there to work for him, she was his servant, so that he could maintain an action for her seduction.

² Thus a settlement by an insolvent debtor of a large amount of real estate upon a woman was upheld, although she knew that he was financially embarrassed. *Prewit v. Wilson*, 103 U. S. 22; and where no fraud on the husband's creditors can be laid to the wife, a settlement of his whole estate upon her is good, though they had cohabited and had children before the marriage, *Herring v. Wickham*, 29 Gratt. 628. *Gay v. Parpart*, 106 U. S. 679, held the assignment of a mortgage by a man to a woman whom he had married and by whom he had children, after her discovery that he had a wife living at the time of the marriage, is a meritorious act, and not impeachable for immorality of consideration.

is not. * They must therefore be in writing in England, and * 72 in those of our States which have enacted this clause of the statutes of frauds. And the celebration of the marriage is not such part performance of the contract as to take it out of the statute. (w) But the Court of Chancery has frequently interfered where there was a writing, and in some instances where there was none, to compel parties to carry into effect the intentions of such a contract, or the expectations justly raised by the conduct and declarations of relatives and friends. (x) But a mere representation concerning the property or prospects of a party about to be married, if made in good faith, will not bind a party to make it good, even in equity, although the representation be untrue in fact. (y) Letters from parents, or persons standing *in loco parentis*, promising provisions, if sufficiently specific and explicit, have been held to satisfy the requirements of the statute. (z)

Contracts or gifts by way of settlement upon a wife, after marriage, are valid if not in fraud of creditors. (zz)¹ If the husband were insolvent at the time, they would be deemed fraudulent; but they would not be deemed necessarily fraudulent, if he were not insolvent, although he was indebted at the time; but a fraudulent intent might be shown and it would invalidate the settle-

be sustained against creditors. The same question occurred in *Dundas v. Dutens*, 1 Ves. Jr. 196, and Lord Thurlow seemed to think such settlement might be valid. He says to counsel: "I should be glad to hear you support it (that is, his objection to such settlement), though it is mere matter of curiosity, if the first point be against you." This question does not seem to be distinctly settled. Perhaps the courts would take this distinction; where the property was the wife's, and had come to the husband by a marriage made after a promise to secure it to her, a settlement in fulfilment of the promise would be sustained against creditors, because they lose nothing by it; but not so if the property had been originally the husband's.

(w) *Dundas v. Dutens*, 1 Ves. Jr. 196; *Montacute v. Maxwell*, 1 P. Wms. 618; a. c. 1 Stra. 236. In *Simmons v. Simmons*, 6 Hare, 852, it is said, that although a parol agreement by the husband, made before marriage, that the wife should possess certain chattels for her own use, is not binding upon him, yet if the parties

voluntarily place the property under the dominion of trustees as part of the property under trust, the agreement may then be made effectual.

(x) *Hunsden v. Cheyney*, 2 Vern. 150; *Beverley v. Beverley*, id. 131.

(y) *Mereweather v. Shaw*, 2 Cox, 124. (z) *Bird v. Blosse*, 2 Vent. 361; *Seagood v. Meale*, Prec. Ch. 561; *Cookes v. Mascall*, 2 Vern. 200; *Moore v. Hart*, 1 id. 110. In *Wankford v. Fotherley*, 2 id. 322, £3,000 were decreed to be paid on the strength of a letter written by the father's direction, wherein he offered to give £8,000 portion with his daughter. He was afterwards privy to the marriage, and seemed to approve thereof. See *Ayliffe v. Tracy*, 2 P. Wms. 65. In *Douglas v. Vincent*, 2 Vern. 201, an uncle promised by letter to give his niece £1,000, "but in the same letter dissuaded her from marrying the plaintiff;" and the court refused to decree payment, but left the plaintiff to his action at law.

(zz) *Williams v. Avery*, 88 Ala. 115; *Belford v. Crane*, 1 Green, 265; *Woolston's Appeal*, 51 Penn. 452.

¹ *Patrick v. Patrick*, 77 Ill. 555; *Lloyd v. Fulton*, 91 U. S. 479.

ment. (*za*) If those who were creditors at the time fail to receive their debts, this would go far to prove legal fraud; and hence it is said that a voluntary conveyance by a husband to or for his wife cannot be sustained against existing creditors. (*zb*)

Contracts have been frequently declared void, on the ground that they were in fraud of settlements and marriage portions, or promises thereof. As where a private bargain was made with the

husband, or even with husband and wife, to pay back a part * 78 of the wife's portion; (*a*) or to return a part of an * annuity or other provision apparently given to a son to enable him

to marry; (*b*) or to restore money given to impart to one an appearance of wealth by which he or she may induce another to marry him. (*c*) A note given fraudulently to induce a marriage contract is good against the maker. (*d*) So creditors who conceal or deny debts due to them from a man about to be married, that their debtor may get the consent of the woman or her parents to the marriage, are bound by such representations as effectually as by a release. (*e*) Any private agreement impairing or avoiding an open and public treaty of marriage, is considered fraudulent; and it is sometimes laid down as a principle, that whoever acts fraudulently in such cases shall not only not gain, but shall lose by his fraud.

How far a direct gift or transfer, without consideration, of land from husband to wife is valid,¹ and in what way it may be made

(*za*) Larkin v. McMullin, 49 Penn. St. 29; Clayton v. Brown, 30 Ga. 490; Clawson v. Clawson, 25 Ind. 229; Moritz v. Hoffman, 35 Ill. 553.

(*zb*) Sargent v. Chubbuck, 19 Ia. 37.

(*a*) Thurton v. Benson, 1 P. Wms. 496; s. c. 2 Vern. 764; Pitcairn v. Ogbourne, 2 Ves. Sen. 375. See also Jackson v. Duchaire, 3 T. R. 552.

(*b*) Peyton v. Bladwell, 1 Vern. 240; Palmer v. Neave, 11 Ves. 165; Morisone v. Arbutnott, 8 Bro. P. C. 247.

(*c*) Scott v. Scott, 1 Cox. 357; Thomson v. Harrison, id. 344. In this last case

Lord Thurlow says: "It is a rule, in cases of frauds on marriage, that although the husband be a party to such fraud, yet his interest is not to be affected, since it is impossible to make him liable in respect thereof, without involving the wife and children, and the family upon whom the deceit has been practised." See also Gale v. Lindo, 1 Vern. 475.

(*d*) Monteflori v. Monteflori, 1 W. Bl. 363.

(*e*) Redman v. Redman, 1 Vern. 348; Neville v. Wilkingson, 1 Bro. Ch. 543.

¹ Gifts or conveyances are, however, good as between the husband and wife themselves, Kitchen v. Bedford, 13 Wall. 413; Hunt v. Johnson, 44 N. Y. 27; Sims v. Rickerts, 38 Ind. 181; such as *chooses in action*, Campbell v. Galbreath, 12 Bush, 459; an assignment of a claim, Seymour v. Fellows, 77 N. Y. 178; a deposit in a savings-bank to her account, Spelman v. Aldrich, 126 Mass. 113; see Way v. Peek, 47 Conn. 23; and rents and profits of land, Hutchison v. Mitchell, 39 Tex. 487. Neither a child, not dependent, Horder v. Horder, 23 Kan. 391; nor his heirs can impeach such a gift or conveyance if reasonable, Crooks v. Crooks, 34 Ohio St. 610; Majors v. Everton, 89 Ill. 56. A wife may encumber or dispose of land so conveyed. McMillan v. Peacock, 57 Ala. 127; Myers v. James, 2 Lea, 159.

effectual, must depend in each State upon the present condition of the statute law in that State in relation to the rights and powers of husband and wife, and of the adjudication on this subject. At common law, and now therefore wherever the common law is unchanged, such gift or transfer, unless through the medium of a trustee, would be void. Recent decisions have held, in Ohio, that the conveyance is void both in law and equity; (*ee*) in Arkansas, that it is void at law, but (being *bond fide*) will be sustained in equity; (*ef*) and in Michigan, that a husband may make such conveyance at law. (*eg*) Although the husband be insolvent or bankrupt, he may give the wife whatever neither his creditors, nor assignees could take. (*eh*)

SECTION III.

CONTRACTS IN RESTRAINT OF MARRIAGE.

These contracts are wholly void.¹ It has been held, that a promise to a woman to marry no one but her was such a contract. (*f*) So a bond by a widow not to marry again. (*g*) So a wagering contract that the party would not marry within six years. (*h*) But a promise by one with whom a woman had cohabited, to pay her an annuity for life provided she remained single, was held to be good. (*i*)

* There are certain contracts spoken of in English books * 74 as "marriage brocage (or brokerage) contracts." They are contracts for payment of money, or some other compensation, for the procuring a marriage; and they are held to be void, both in law and equity, as against policy and morality. Courts in Eng-

(*ee*) *Fowler v. Trebein*, 16 Ohio, 498.

nickson, 2 *Southard*, 756, a bond to pay

(*ef*) *Eddins v. Buck*, 23 Ark. 507.

\$1,000, if the obligee (the plaintiff) were

(*eg*) *Burdeno v. Amperse*, 14 Mich. 91.

not married within six months, was de-

(*ch*) *Smith v. Allen*, 89 Miss. 469.

clared void.

(*f*) *Lowe v. Peers*, 4 *Burr.* 2225.

(*i*) *Gibson v. Dickie*, 8 *M. & Sel.* 463.

(*g*) *Baker v. White*, 2 *Vern.* 215.

See also *Lloyd v. Lloyd*, 10 *E. L. & E.*

(*h*) *Hartley v. Rice*, 10 East, 22, cited
ante, p. *64, note (*q*). In *Sterling v. Sin-*

189.

¹ A gift or legacy conditioned on the donee's or legatee's remaining unmarried, is void, both as to capital and income, *Bellairs v. Bellairs*, L. R. 18 Eq. 510; but valid if made or left to a widow or widower, *Allen v. Jackson*, 1 Ch. D. 399. *Arthur v. Cole*, 56 Md. 100, was to the effect that a conveyance to one's sister to hold "so long as she shall remain unmarried," is valid.

land are very hostile to any contract of this nature or effect; particularly if made with a guardian, or with a servant, or one to whose selfish and injurious influence the party would be much exposed. Such a contract is set aside, without reference to the propriety or expediency of the marriage. (j)

SECTION IV.

CONTRACT OF MARRIAGE.

The relation of marriage is founded upon the will of God and the nature of man; and it is the foundation of all moral improvement, and all true happiness. No legal topic surpasses this in importance; and some of the questions which it suggests are of great difficulty.

The first which presents itself is, What constitutes a legal marriage? It is impossible that any question should be more important to any one in itself, or in the consequences which it involves, than whether he or she is or is not a husband, or a wife; and yet some uncertainty may often rest upon it, not merely from the peculiar facts of individual cases, but from a * want of precision and certainty in the principles or rules which decide this question.

The Roman civil law declared, that "*sufficit nudus consensus ad constituenda sponsalia.*" (k) Chancellor Kent quotes another passage from the Digest, "*Nuptias, non concubitus, sed consensus facit,*" and adds: "This is the language equally of the common and canon law, and of common reason." (l) If this means that

(j) *Stribblehill v. Brett*, 2 Vern. 445. In this case a lease was set aside, "upon surmise that the consideration of the lease was Col. Brett's (the lessee's), undertaking to procure a marriage to be had between Mr. Thynn (the lessor) and the Lady Ogle," although the lease was not made until six months after the marriage; as appears from the case as reported in 1 Bro. P. C. 57. See also, *Hall v. Potter*, 8 Lev. 411; s. c. Show. P. C. 76. This too arose from Mr. Thynn's desire to marry Lady Ogle. He gave an obligation to Mrs. Potter for £1,000, conditioned to pay £500 within three months after he should marry Lady Ogle. A

bill was brought by Thynn's executors for relief against the bond. Their ground was, that Mrs. Potter only advised Thynn to apply to Brett, so that she did nothing to earn the money, and next that such contracts were of dangerous consequence. The defence was, that the "marriage was suitable in respect of their estates," and "that Thynn's estate was £10,000 a-year, and he a gentleman of a great family, though not of the nobility." But the bond was declared void by the Lords reversing the decree in Chancery. See also *Smith v. Bruning*, 2 Vern. 392.

(k) Dig. lib. 28, tit. 1, § 4.
(l) 2 Kent. Com. 87.

the consent of the parties is the essence of marriage, and that the ceremonies of celebration are but its form, it is undoubtedly true. But it is said consent *suffices* for marriage, *makes* marriage; and if this be literally taken, we suppose it open to doubt whether this be law in any of the countries of Christendom, at this moment. Even the Roman civil law says, “*justas autem nuptias inter se cives Romani contrahant, qui secundum precepta legum coeunt.*” (m) In Scotland it is, or was, the law, that consent, manifested by declaration before witnesses, and followed by consummation, constituted a legal marriage. (n) Hence the practice of resorting, by those in England who wished to escape the marriage laws of that country, to Gretna Green, which was the village in Scotland most accessible from England. But even this was “*consensus et concubitus;*” not “*consensus non concubitus.*” In England the common law provided no special form or mode, but the whole matter was under the ecclesiastical or canon law; but the statutes of England are, and for some time have been, precise and stringent, if not, as some there have thought, severe. In all Christian countries of which we have any knowledge, and as we suppose in all civilized countries, certain ceremonies are prescribed for the celebration of marriage, either by express law, or by a usage which has the force of law. And the question is, whether a mere consent of the parties, even with mutual promises, but without any use of or reference to any of these ceremonies, is sufficient to constitute a valid marriage. In the * case of * 76 Milford *v.* Worcester, (o) the Supreme Court of Massachu-

(m) Inst. lib. 1, tit. 10.

(n) It is not quite certain that cohabitation was necessary by the Scotch law to constitute a legal marriage, if the contract were *per verba de presenti*. For a very full and learned discussion of the law of Scotland concerning marriage, see Darlymple *v.* Dalrymple, 2 Hagg. Cons. 64, and the appendix to that volume.

(o) 7 Mass. 48. In this case, Parsons, C. J., said: “Marriage being essential to the peace and harmony, and to the virtues and improvements of civil society, it has been, in all well-regulated governments, among the first attentions of the civil magistrate to regulate marriages, by defining the characters and relations of parties who may marry, so as to prevent a conflict of duties, and to preserve the purity of families; by describing the solemnities by which the contract shall be executed, so as to guard against fraud,

surprise, and seduction; by annexing civil rights to the parties and their issue, to encourage marriage, and to discountenance wanton and lascivious cohabitation, which, if not checked, is followed by prostration of morals, and a dissolution of manners; and by declaring the causes and the judicature for rescinding the contract, when the conduct of either party and the interest of the State authorize a dissolution. A marriage contracted by parties authorized by law to contract, and solemnized in the manner prescribed by law, is a lawful marriage; and to no other marriage are incident the rights and privileges secured to husband and wife, and to the issue of the marriage. . . . Where the laws of any State have prescribed no regulations for the celebration of marriages, a mutual engagement to intermarry, by parties competent to make such a contract,

sets give a somewhat elaborate statement of the reasons which led them to the conclusion that a marriage is not valid if it do not conform to the statutory requirements. In New Hampshire, in the case of *Clark v. Clark*, (*p*) the court say : "But in most governments the contract is held to be valid and binding, notwithstanding it is entered into with no rites or ceremonies." But they had said before "it is a contract and relation — to be regulated — not by the mere will of the parties, but by the general provisions of the municipal law." But how can a contract be said to be *regulated*, *not* by the mere will of the parties, but by the provisions of law, if the mere will of the parties controls these * 77 provisions, and they have no * force or effect whatever, if only the parties choose to disregard them ?

That evidence of marriage, from cohabitation, acknowledgment by the parties, reception by the family, connection as man and wife, and general reputation, is receivable in nearly all civil cases, has been distinctly held. (*q*)¹ This, however, proceeds upon the

would in a moral view be a good marriage, and would impugn no law of the State. But when civil government has established regulations for the due celebration of marriages, it is the duty, as well as the interest, of all the citizens, to conform to such regulations. A deviation from them may tend to introduce fraud and surprise in the contract; or, by a celebration without witnesses, the vilest seductions may be practised under the pretext of matrimony. When, therefore, the statute enacts that no person but a justice or a minister shall solemnize a marriage, and that only in certain cases, the parties are themselves prohibited from solemnizing their own marriages by any form of engagement, or in the presence of any witnesses whatever. If this be not a reasonable inference, fruitless are all the precautions of the legislature. . . . A marriage, merely the effect of a mutual engagement between the parties, or solemnized by any one not a justice of the peace, or an ordained minister, is not a legal marriage, entitled to the incidents of a marriage duly solemnized." In *Fenton v. Reed*, 4 Johns. 54, the court say : "No formal solemnization of marriage is requisite. A contract of marriage made *per verba de presenti* amounts to an actual marriage, and is as valid as if made in *facie ecclesiae*." The

opinion was probably given by Mr. Chief Justice Kent, who uses the same language in the first edition of his *Commentaries*. But the remark is somewhat *obiter*, and perhaps did not receive the particular attention of the court; the case being decided on the ground that the circumstances of the case warranted an inference of actual marriage.

(*p*) 10 N. H. 383.

(*q*) *Read v. Passer*, 1 Esp. 213; *s. c.* *Peake, Cas. 231*; *Hervey v. Hervey*, 2 W. Bl. 877; *Leader v. Barry*, 1 Esp. 353. In *Morris v. Miller*, 4 Burr. 2068, Lord *Manfield* held, that proof of marriage from cohabitation, name, and reception of the woman by everybody as the man's wife, was certainly receivable in all cases except two; one a prosecution for bigamy, and the other an action for criminal conversation; and this last, he says, is a sort of criminal action. And in *Northfield v. Vershire*, 33 Vt. 110, the exception to the general rule as to evidence is limited to the action for criminal conversation alone. See also, *Niles v. Sprague*, 18 Ia. 198, where the sufficiency and weight of evidence tending to show marriage, is much considered and discussed; and *Craufurd v. Blackburn*, 17 Md. 49, which admits declarations of deceased members of the family as to marriage, birth, relationship, and death.

¹ Copula is evidence of, but no part of, marriage. *Peck v. Peck*, 12 R. I. 485; *Port v. Port*, 70 Ill. 484.

ground of the actual probability of a regular marriage, where such evidence exists. In New York this presumption has been pushed very far. (r)

Mr. Chancellor *Kent*, in the fifth and subsequent editions of his Commentaries, says: "If the contract be made *per verba de praesenti*, and remains without cohabitation, or if made *per * verba de futuro*, and be followed by consummation, it * 78 amounts to a valid marriage, *in the absence of all civil regulations to the contrary.*" (s) In his first four editions he omitted the words which we have italicized. But these words seem to us extremely material. They make the statement accurate and certain. They leave, however, the real question undecided for all practical purposes; for in what civilized land is there an absence of all civil regulations to the contrary? In the case of *Jewell's Lessee v. Jewell*, which came before the Supreme Court of the United States, (t) on error from the Circuit Court for the District of South Carolina, this precise question came up. The court below cited the above passage from *Kent*, but from an early edition, and therefore without the very material clause we italicized.

(r) *Fenton v. Reed*, 4 Johns. 52. The only point in controversy in this case was, whether the defendant was the widow of one William Reed. It appeared that in the year 1786 she was the lawful wife of one John Guest. Some time in that year Guest left the State for foreign parts, and continued absent until some time in the year 1792, and it was reported and generally believed that he had died in foreign parts. During the year 1792 the defendant was married to Reed, and afterwards in the same year Guest returned to the State of New York, and continued to reside therein until June, 1800, when he died. He did not object to the connection between the defendant and Reed, and said that he had no claim upon her, and never interfered to disturb the harmony between them. After the death of Guest, the defendant continued to cohabit with Reed until his death in September, 1806, and sustained a good reputation in society; but no solemnization of marriage was proved to have taken place between the defendant and Reed subsequent to the death of Guest. Upon these facts the court held, that the marriage of the defendant with William Reed, during the lifetime of John Guest, was null and void; that she was then the lawful wife of Guest, and continued so until his death in 1800; but that the facts and

circumstances of the case were sufficient to authorize a jury to infer that an actual marriage took place between the defendant and Reed subsequent to the death of Guest. See also *Starr v. Peck*, 1 Hill (N. Y.), 270. In this case, on a question as to the legitimacy of A, it appeared, that her parents had been intimate in the way of courtship for nearly a year before her birth—that they intended to be married—that the father, being a seafaring man, left on a voyage, and was accidentally detained longer than he expected—that A was born a few days before his return—that within a week or so afterwards they were publicly married by a clergyman—that they subsequently cohabited as husband and wife for many years, and until their separation by death, always treating A as their legitimate child. The court held, that these facts were sufficient to warrant a jury in finding that a marriage in fact existed previous to A's birth, notwithstanding the ceremony which took place afterwards. *Bronson*, J., dissented. See also *Piers v. Piers*, 2 H. L. Cas. 381; *Clayton v. Wardell*, 4 Comst. 230.

(s) 2 Kent, Com. 87.

(t) 1 How. 219, 284. In this case and in *Londonderry v. Chester*, 2 N. H. 268, all the leading authorities upon this difficult question are cited.

cize, and instructed the jury that this was law. Exceptions were taken, and the case was carried to the Supreme Court of the United States, where *Taney*, C. J., in giving the opinion of the court, refers to this instruction and says: "Upon the point thus decided, this court is equally divided; and no opinion can therefore be given." (*u*) In consequence of this decision, Mr. *Kent* added in his next and subsequent editions the words we have italicized in the extract from his Commentaries; and also, from a cautiousness that was certainly carried to an extreme, stated in a note, that "the Supreme Court were equally divided in respect to the above paragraph or proposition in the text;" but the precise proposition in the text, that is, as it now stands, with the added

clause, was never before the court; nor do we think that any
* 79 court * would have been divided upon it; for where there

are no civil regulations to the contrary, what is to prevent parties from marrying in any way they prefer? Their division was upon the question whether such a contract of marriage be valid without reference to the presence or absence of municipal regulations, and this question must therefore be considered as an open one. In *Clayton v. Wardell*, (*v*) it is declared to be the rule of the common law, that a "valid marriage may exist without any formal solemnization;" but the marriage in that case was denied for other reasons; and we know of no case in which a mere agreement to marry, with no formality and no compliance with any law or usage regulating marriage, is actually permitted to give both parties and their children all the rights, and lay them under all the obligations and liabilities, civil and criminal, of a legal marriage. (*w*)¹ It must, however, be admitted that some

(*u*) In the case of *Regina v. Millis*, 10 Cl. & F. 534, on appeal from Ireland to the House of Lords, the Lords were equally divided on the same question; Lord *Brougham*, Lord *Denman*, and Lord *Campbell*, being in favor of the validity of the marriage at common law, and Lord *Lyndhurst*, Lord *Cottenham*, and Lord *Abinger*, against it. The question had been referred by the lords to the judges, and *Tindal*, C. J., in behalf of the judges, gave their unanimous opinion against the validity of the marriage, and held, that by the law of England, as it existed at the time of the marriage act, a contract of marriage *per verba de presenti* was

indissoluble between the parties themselves, and afforded to either of them, by application to the spiritual court, the power of compelling the solemnization of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders. The civil contract and the religious ceremony were both necessary to a perfect marriage by the common law.

(*v*) 4 Comst. 280; and see *White v. Lowe*, 1 Redfield, 376; *Davis v. Brown*, 1 Redfield, 259.

(*w*) It would be impossible to discuss

¹ As to informal marriages, see *Port v. Port*, 70 Ill. 484; *Hutchins v. Kimmell*, 31 Mich. 136; *Dyer v. Brannock*, 66 Mo. 391; *Dickerson v. Brown*, 49 Miss. 357; *Lewis*

recent decisions seem to tend strongly in that direction. Such is a late case in Pennsylvania. (*ww*) It would seem that in California and Oregon, the marriage is not legal unless the contract be declared before a person authorized to solemnize marriages, and in the presence of two witnesses. (*wx*) But in New York it has been held that an agreement to enter into the marriage relation constitutes marriage, if made in words of the present tense, with no especial form or ceremony, and without witnesses. It is a civil contract, and may be proved as any other contract may. (*wy*) A view substantially similar seems to be taken in Alabama. (*wz*)

It may be remarked, that the practice of the courts in this country, in one respect, seems directly opposed to the rule that "if the contract be made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, and is equally binding as if made *in facie ecclesiae*." (*x*) For a very large proportion of the cases in which an action is brought for breach of promise of marriage come within this definition. The man promised marriage, the woman accepted and returned the promise, and thereupon yielded to his wishes. It is a question, which we have already considered, how far the seduction may be given in evidence, in this action, to swell the damages; but in some way or other, if the fact

this subject fully, either in the text or in the notes, without occupying too large a space. I would refer, therefore, to a very elaborate, and, as I think, accurate investigation of the authorities and the law, in Jacop's *Addenda* to Roper on Husband and Wife, Vol. II. pp. 445-475. I cannot but think that he places upon strong grounds his conclusion that a contract of marriage *per verba de presenti*, without ceremony or celebration of any kind, does not constitute a valid marriage at common law.

(*ww*) In this case it is *held*, that the contract of marriage must be evidenced by words in the present tense, uttered for the purpose of effecting a marriage; but no particular form of solemnization before officers of Church or State is required. Commonwealth *v.* Stamp, 53 Penn. St. 132. But in the absence of all proof of a marriage ceremony, cohabitation as man and wife was not allowed to

establish a marriage, in Goldbeck *v.* Goldbeck, 3 Green, 42.

(*wx*) Holmes *v.* Holmes, 1 Abb. U. S. 585.

(*wy*) Bissell *v.* Bissell, 55 Barb. 325; 7 Abb. (N. Y.) Pr. (n. s.) 16. See also on this subject, Guardians of the Poor *v.* Nathans, 2 Brews. 149; Physick's estate, id. 179.

(*wz*) Campbell *v.* Gullatt, 48 Ala. 57.

(*x*) In Regina *v.* Millis, 10 Cl. & F. 584, it seemed to be the universal opinion that marriage, *per verba de futuro cum copulâ*, and marriage *per verba de presenti*, have absolutely the same validity, force, and effect, whatever that may be. Pratt, J., in Clayton *v.* Wardell, denies this. In Starr *v.* Peck, 1 Hill (N. Y.), 294, there is a *dictum* to the effect that a mere agreement to marry, *cum copulâ*, is a valid marriage; but this is overthrown in Cheney *v.* Arnold, 15 N. Y. 345.

v. Ames, 44 Tex. 319. Such are repudiated in Maryland, Denison *v.* Denison, 35 Md. 361; and elsewhere by statute, Commonwealth *v.* Munson, 127 Mass. 459; State *v.* Miller, 23 Minn. 352. An illicit connection can be changed into a formal or informal marriage only by an express agreement and a ceremony, or some open change in the habits and relations of the parties. Barnum *v.* Barnum, 42 Md. 251; Williams *v.* Williams, 46 Wis. 464; Hunt's Appeal, 86 Penn. St. 294; Floyd *v.* Calvert, 53 Miss. 37.

exists, it is usually brought out. Then it becomes a case of * 80 marriage, if it be indeed law, that an * agreement to marry, *per verba de futuro*, followed by consummation, constitutes marriage. But such a defence was never made by the party, nor interposed by the court. It is true that the man would not be likely to make this defence, for that would be to acknowledge himself the husband of the plaintiff. But if, in such an action, it should appear that the parties had celebrated a regular marriage, *in facie ecclesiae*, and were unquestionably husband and wife, certainly the court would not wait for the defendant to avail himself of that fact, but as soon as it was clearly before them would stop the case. For if they were once married, no agreement of both parties, and no waiver of both or either, would annul the marriage. And the circumstance that this objection is never made, where it appears that there was a mutual promise and subsequent cohabitation, would go far to show that the courts of this country do not regard such a contract, although followed by consummation, as equivalent to a marriage in which the formalities sanctioned by law or usage are observed. It might be added, that such a provision as that contained in the Revised Statutes of Massachusetts (y) (which has been elsewhere enacted), would seem to be wholly unnecessary, if words of present contract, with consummation, were all that is needed to render marriage valid.

In a case in Massachusetts, (z)¹ the court say: "But in the absence of any provision declaring marriage not celebrated in a prescribed manner or between parties of a certain age absolutely void, it is held, that all marriages regularly made according to the common law, are valid and binding, although had in violation of the specific regulations imposed by statute." This lan-

(y) C. 75, § 24. The provision contained in that section is as follows: "No marriage solemnized before any person professing to be a justice of the peace, or a minister of the gospel, shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected, on account of any want of jurisdiction or authority in such supposed justice or minister, or on account of any

omission or informality in the manner of entering the intention of marriage, or in the publication of the banns; provided that the marriage be in other respects lawful, and be consummated with a full belief, on the part of the persons so married, or of either of them, that they have been lawfully joined in marriage."

(z) Parton v. Hervey, 1 Gray, 119.

¹ In Massachusetts, the performance of a marriage ceremony solely by the man and woman, no minister or magistrate being present and no third person taking part, neither party being a Quaker, does not make a valid marriage. Commonwealth v. Munson, 127 Mass. 459. See Meister v. Moore, 96 U. S. 76. Hutchins v. Kimmell, 31 Mich. 126, was to the effect that such a marriage is valid if that is the parties' belief.

guage differs somewhat from any used elsewhere, but it leaves the question undetermined, because it does not decide how marriages are to be "regularly made according to the *common law;" and what is more important, the words of *81 the court must be considered in reference to the case before them, which was whether a marriage otherwise valid, could be avoided by the fact that the wife being but thirteen years of age was married without the consent of her parents, which marriage the magistrate was on that account prohibited from solemnizing, under a penalty. The court determined, that in Massachusetts, the common law rule which fixes twelve as the age of consent of females, and fourteen of males, prevails. It has been held in Michigan, that if a man marries a woman who is under the age of consent, the marriage is not void unless they separate before she reaches that age, by mutual consent, or unless after reaching it she refuses further cohabitation. (zz)

But a precise compliance with all the requirements of law has not been deemed necessary; and as to some important provisions it has been held that a disregard of them was punishable, but did not vitiate the marriage; as the want of consent of parents or guardians where one party is a minor, or an omission of the publication of banns. The essential thing seems to be the declaration of the consent, by both parties, before a person authorized to receive such a declaration by law. (a)¹

It is held in Illinois, that where persons cohabit as man and wife, the presumption of law is that they are married, to be valid until overthrown by evidence. (aa)

Consent is the essence of this contract, as of all others. It cannot be valid, therefore, if made by those who had not sufficient minds to consent; as by idiots or insane persons. (b)² Such

(zz) *People v. Slack*, 15 Mich. 193.

(a) *Parton v. Hervey*, 1 Gray, 119; *Milford v. Worcester*, 7 Mass. 48; *Ligonia v. Buxton*, 2 Greenl. 102; *Londonderry v. Chester*, 2 N. H. 268.

(aa) *Myatt v. Myatt*, 44 Ill. 473.

(b) *Elliott v. Gurr*, 2 Philim. 19; *Browning v. Reane*, id. 69; *True v. Ranney*, 1 Foster (N. H.), 52. But it is said in *Vin. Abr. Marriage* (D), pl. 3: "If an

idiot contracts marriage it shall bind him," and authorities are cited to that effect. And in *Shafner v. The State*, 20 Ohio, 1, it was held, that marriages by boys under 18 and girls under 14 years of age are invalid unless confirmed by cohabitation subsequent to those ages, and do not subject the parties marrying to the punishment of bigamy upon remarrying.

¹ A mock marriage in jest is no marriage. *McClurg v. Terry*, 6 C. E. Green, 225.

² *Waymire v. Jetmore*, 22 Ohio St. 271; but a valid marriage may be entered into during a laciid interval. *Banker v. Banker*, 63 N. Y. 409; *Smith v. Smith*, 47 Miss. 311.

marriages are said to be void at common law, and by the statutes of many States. But it is also held that the marriage is only voidable; and if it be not set aside during the husband's life, the wife becomes entitled at his death to the rights of a widow. (*bb*) It is certainly better that the marriage should be declared void by a competent tribunal, after a judicial ascertainment of the facts. Courts having full equity powers may make this inquiry and decree. (*c*) But some of the States have provided for doing this by common-law courts.

From the same necessity of consent, a marriage procured * 82 by * force or fraud is also void; but the force and fraud

must be certain and extreme. (*d*)¹ So if another husband or wife of either of the parties be living. (*e*) Bigamy, or, as it should be called, polygamy, is an indictable offence in all the States; but exceptions are made in cases of long absence, with belief of the death of the party, &c. But these exceptions to the criminality of the act leave the question as to the validity of the second marriage as it was before. (*f*)² So if the parties are within the prohibited degrees of kindred. (*g*) The age of

(*bb*) *Wiser v. Lockwood*, 42 Vt. 720.

(*c*) *Wightman v. Wightman*, 4 Johns. Ch. 343. In *True v. Ranney*, 1 Foster (N. H.), 52, the court assumed the power of declaring a marriage null for imbecility of the woman, on a petition of her next friend. So also in a case of insanity of the wife which was kept concealed from her husband by her friends. *Keyes v. Keyes*, 2 Foster (N. H.), 564.

(*d*) *Dalrymple v. Dalrymple*, 2 Hagg. Cons. 104; *Sullivan v. Sullivan*, id. 246.

(*e*) *Riddleston v. Wogan*, Cro. E. 858; *Pride v. Earle of Bath*, 1 Salk. 120; *Martin's Heirs v. Martin*, 22 Ala. 86.

(*f*) So at least say the court in *Fenton v. Reed*, 4 Johns. 53.

(*g*) *Sutton v. Warren*, 10 Met. 451. In this case it was held, that the intermarriage of a man and his mother's sister,

though void by the law of Massachusetts, is not incestuous by the law of nature, and was not void by the law of England before the Statute of 6 Wm. IV. c. 54, though it was voidable by process in the ecclesiastical court. In *Bonham v. Badgley*, 2 Gilman, 622, it was decided, that a marriage between a man and the daughter of his sister, although within the Levitical degrees, was not void, but only voidable; that for all civil purposes such marriages are valid until sentence of nullity or separation; and that this sentence can be passed only during the lives of both parties. The children, therefore, of such marriage, after the death of either party, no sentence of nullity having been passed before such death, are legitimate; and if the husband die, the wife may have her dower.

¹ The free consummation of such a marriage, with knowledge of the fraud, prevents relief. *Hampstead v. Plaistow*, 49 N. H. 84. But a marriage of a man under arrest on a bastardy process, to escape prosecution, is valid. *Sickles v. Carson*, 11 C. E. Green, 440; *Honnett v. Honnett*, 33 Ark. 156; *State v. Davis*, 79 N. C. 603; *Johns v. Johns*, 44 Tex. 40. See *Lyndon v. Lyndon*, 69 Ill. 43.

² The innocent party to a bigamous marriage is at liberty to marry again. *Drummond v. Irish*, 52 Ia. 41; *Reeves v. Reeves*, 54 Ill. 332. *Glass v. Glass*, 114 Mass. 563, was to the effect that a form of marriage entered into by the parties in good faith, with a full, but erroneous, belief of the woman's actual husband's death, is void, although he has been absent and not known to her to be alive for seven years, and may be decreed void with a provision legitimating the children begotten before the beginning of the suit.

consent to marriage, by the rules of the common law, as stated by *Coke*, (h) is fourteen for the male, and twelve for the female; these rules are borrowed, perhaps, from the Roman law, with which they agree; although the Roman law appears to have provided also that parties were marriageable whenever they had arrived at puberty. If the marriage take place when one is of sufficient age—as the husband of fifteen—and the other within the age of consent,—as the wife of ten,—when the wife reaches twelve, the husband may disagree and annul the marriage. Such, at least, is the rule as laid down by *Coke*. (i) He adds, that they cannot disagree before the age of consent; but this may be doubted; and the General Statutes of Massachusetts seem to assume that they may disagree within nonage. (ii)

The consent of parents or guardians, to the marriage of minors, is required by the Roman law, the marriage acts of England, and by the statutes of some of our States; but not by common law, nor in England until the Statute of 26 Geo. II. c. 33. The English statute makes the marriage of minors, without such consent, absolutely void. In this country that would depend upon the statutes of the several States. Generally, if not universally, the marriage would be held valid, although the person celebrating it might be punishable. (j)

It has been held in England, that a marriage, not lawfully celebrated, by reason of the fraud of one of the parties, shall yet be held valid in favor of the innocent party. As in case of a misnomer of the wife by the husband's fraud. (k) So where the husband falsely imposed upon the wife a forged or unauthor-

(h) Co. Lit. 78 b. And see *Parton v. Hervey*, 1 Gray, 119.

(i) Co. Lit. 79 b.

(ii) Ch. 107, § 3.

(j) It has been so decided in Massachusetts. *Parton v. Hervey*, 1 Gray, 119.

(k) *King v. Wroxton*, 4 B. & Ad. 640. It is held in this case that a marriage is not void because the banns were published under false names, unless both parties were privy to such false publication. See also *King v. Billingshurst*, 3 M. & Sel. 250. In a note to this case are given at length *Frankland v. Nicholson*, *Pougett v. Tompkins*, and *Mather v. Ney*, decided by Sir W. Scott, in all of which the banns were erroneous in the name of one of the parties, and the marriage was

declared void *ab initio*. But in the two first cases there were circumstances of fraud. *Heffer v. Heffer*, *Tree v. Quin*, and *Mayhew v. Mayhew*, decided by the same judge, are also cited in the same note. In these there was an error of the name, but the marriages were not annulled. From all the cases taken together, it might perhaps be inferred, that a mere error in the name would not make a marriage void (especially if a name acquired by reputation were used), unless there were circumstances of fraud, or other objection. But in *Cope v. Burt*, 1 Hagg. Cons. 438, Sir W. Scott seems to insist that it is essentially necessary that the banns should be published in the true names.

ized license, and a pretended clergyman. (*l*) In the statutes of some of the States there are provisions to the same effect.

The operation of the *lex loci* upon marriage and the rights of the married parties, has given rise to some questions which we shall consider when we treat of the Law of Place.

SECTION V.

DIVORCE.

Neither the courts of common law nor the equity courts of England, decree divorce. Almost all questions of marriage were, until recently, decided by the spiritual courts, having been originally under the cognizance and jurisdiction of the

* 84 bishops. The * spiritual courts sometimes decreed that a marriage was void *ab initio*, and sometimes granted a divorce from bed and board, but never a divorce from the bond of marriage. This complete divorce formerly occurred in England only when Parliament, by a private act made for the case, annulled a marriage. But in 1857, by the Statute of 21 Vict. ch. 85, a new court was established, under the name of "The Court for Divorce and Matrimonial Causes." To this court is given the power exercised by Parliament of granting divorces, and all the jurisdiction over matrimonial questions formerly vested in the ecclesiastical courts. The statute also prescribes the grounds on which divorces may be granted; and it permits the husband to obtain a divorce for the wife's adultery; but the wife can obtain divorce only when the husband's adultery is accompanied with cruelty, or other aggravations which the statute specifies.

Very early in the settlement of New England, as we learn from Mather's *Magnalia*, the question was put to the clergy whether adultery was a sufficient cause for divorce; and they answered that it was. The courts of law thereafter decreed divorce in such cases, and this law and practice became nearly universal through this country. For many years, however, a divorce *a vinculo* was granted for no other cause than adultery, the law being made to

(*l*) *Dormer v. Williams*, 1 Curteis, 870; *Lane v. Goodwin*, 4 Q. B. 361; *Clowes v. Clowes*, 3 Curteis, 185.

conform to what was regarded as the positive requirement of Scripture. At length, however, the severity of this rule was modified. Divorce *a vinculo* was permitted for other causes; as desertion, cruelty, sentence to long imprisonment, and the like. The law and practice in this respect differ in the different States, being precisely alike in no two of them. (m)¹ And in some, the facility of obtaining a divorce has certainly been carried quite far enough.

In nearly if not quite all the States, desertion for a longer or shorter period (sometimes called abandonment) is a ground of divorce. Mere absence is not enough, as the desertion must be wilful. (mm)² In California it is held that absence implies desertion, if unexplained. (mn) Generally, there must be affirmative proof of its character. Hence, an agreement to separate, either express, or inferable from conduct or language, is a bar to the divorce. (mo) So conduct which would naturally lead to a separation, or would justify it, is also a bar. (mp) But if, after such consent, there is an honest desire for a restitution of conjugal relations, duly expressed and manifested, the earlier consent to separation does not bar the divorce. (mq) And a refusal to accompany the husband in a change of residence, would bar him

(m) Under the statute of Pennsylvania, allowing divorce to the wife when the husband has "offered such indignities to her person as to render her condition intolerable, and life burdensome, and thereby forced her to withdraw from his home and family," it has been held, that a single act of violence, such as pulling or twisting her nose, though done in rudeness and anger, does not bring the husband within the provisions of the act. Richards *v.* Richards, 37 Penn. St. 225.

(mm) Cook *v.* Cook, 2 Beasley, 263; Pidge *v.* Pidge, 3 Met. 255; McCoy *v.* McCoy, 3 Ind. 566; Ingersoll *v.* Ingersoll,

18 Wright, 249; Word *v.* Word, 29 Ga. 281.

(mn) Morrison *v.* Morrison, 20 Cal. 431.

(mo) Jones *v.* Jones, 18 Ala. 145; Simpson *v.* Simpson, 31 Mo. 24; Crow *v.* Crow, 28 Ala. 583.

(mp) Wood *v.* Wood, 5 Iredell, 661; Fellows *v.* Fellows, 31 Me. 342; Sykes *v.* Halstead, 1 Sandf. 488; Levering *v.* Levering, 16 Md. 213.

(mq) Fishli *v.* Fishli, 2 Litt. 327; Fulton *v.* Fulton, 36 Miss. 517; Hanbury *v.* Hanbury, 29 Ala. 719.

¹ As to what cruelty will justify a divorce, see Kennedy *v.* Kennedy, 73 N. Y. 369; Cook *v.* Cook, 5 Stewart, 475; McClung *v.* McClung, 40 Mich. 493; Beyer *v.* Beyer, 50 Wis. 254; Johns *v.* Johns, 57 Miss. 530; and as to what will not, Soper *v.* Soper, 29 Mich. 305; Small *v.* Small, 57 Ind. 568; Miller *v.* Miller, 43 Ia. 325; Miller *v.* Miller, 78 N. C. 102; Faller *v.* Faller, 10 Neb. 144. Violence to the person need not exist. Black *v.* Black, 3 Stewart, 215; Wheeler *v.* Wheeler, 53 Ia. 511. See Close *v.* Close, 10 C. E. Green, 526; Latham *v.* Latham, 30 Gratt. 307.

² If a wife leaves her husband because he is unable to support her, Bennett *v.* Bennett, 43 Conn. 313; because he gambles, Sandford *v.* Sandford, 5 Stewart, 420; because he lied to her, Angelo *v.* Angelo, 31 Ill. 251; or because he fails to maintain her authority over the servants, Harris *v.* Harris, 31 Gratt. 13,—it is not desertion on his part. If the party leaving would have returned if invited, it is not desertion, Thorpe *v.* Thorpe, 9 R. L. 57; but the invitation need not be extended if known that it will be ineffectual, Trall *v.* Trall, 5 Stewart, 281. See also Schanck *v.* Schanck, 6 Stewart, 363; Childs *v.* Childs, 49 Md. 509.

from obtaining a divorce on account of the separation, if the refusal were reasonable; but otherwise it would be desertion. (*mr*)¹ In a late English case, desertion was held to begin not when co-habitation actually ceased, but when the husband determined to abandon his wife and live with another woman. (*ms*)²

A divorce *a vinculo* annuls the marriage altogether; and it restores the parties to all the rights of unmarried persons, and relieves them from all the liabilities which grew out of the marriage, except so far as may be provided by statute, or made a part of the decree of divorce by the courts. Thus, it is a provision of some of our State statutes on this subject, that the guilty party shall not marry again.³ And the court generally have power to decree *terms* of separation, as to alimony, care and possession of children, and the like; and this decree is subject to subsequent modification. (*mt*)

As to the cruelty for which divorce will be granted, while it seems to be generally held that it must be a cruelty which affects "life or limb or health," it is also held that this may be by any treatment, or even mere words, which are such as may affect the health. (*mu*)⁴ In practice, proper precautions are used to prevent a divorce from being obtained by collusion; it not being granted merely upon the consent or on the default of the party charged, but only on proof of the cause alleged. (*n*)

(*mr*) Gleason *v.* Gleason, 4 Wisc. 64; Hardenburgh *v.* Hardenburgh, 14 Cal. 654.

(*ms*) Gatehouse *v.* Gatehouse, Law Rep. 1 P. & D. 331. So also in Phelan *v.* Phelan, 12 Fla. 449.

(*mt*) Cox *v.* Cox, 26 Ind. 303.

(*mu*) Bailey *v.* Bailey, 97 Mass. 591; Odour *v.* Odour, 86 Ga. 286.

(*n*) Indeed, so careful are the courts to guard against any collusion between the parties, one of whom has applied for a divorce, that although the respondent be defaulted, yet the alleged cause of divorce must be as distinctly and satisfactorily proved as in other instances. So likewise must the fact of marriage. Williams *v.* Williams, 8 Greenl. 185. And a divorce *a vinculo*, for the adultery of the husband, has been frequently refused where the *only* proof was the defendant's

admission of the fact. Holland *v.* Holland, 2 Mass. 164; Baxter *v.* Baxter, 1 id. 346. And this is done to avoid the possibility of collusion. But if it distinctly appear that the confessions were given under circumstances showing there was no collusion, the defendant's confessions are held sufficient. Billings *v.* Billings, 11 Pick. 461; Vance *v.* Vance, 8 Greenl. 132; Owen *v.* Owen, 4 Hagg. Ecc. 261. So the record of the conviction of the party upon an indictment for the same offence is admissible after default, and is sufficient proof of the marriage and the crime. Randall *v.* Randall, 4 Greenl. 326; Anderson *v.* Anderson, id. 100. Unless such conviction was had upon the testimony of the wife, as it might have been where the charge in the indictment was an assault and battery upon her. Woodruff *v.* Woodruff, 11 Me. 475.

¹ Hunt *v.* Hunt, 2 Stewart, 96. See Mayer *v.* Mayer, 3 Stewart, 411.

² Hankinson *v.* Hankinson, 6 Stewart, 66.

³ See Bullock *v.* Bullock, 122 Mass. 3; Commonwealth *v.* Lane, 113 Mass. 458; Thompson *v.* Thompson, 114 Mass. 566; Collins *v.* Collins, 80 N. Y. 1.

⁴ Beyer *v.* Beyer, 50 Wis. 254; Wheeler *v.* Wheeler, 53 Ia. 511.

* It has been held very distinctly, (*o*) and quite as emphatically denied, (*p*) that the adultery of the wife, when insane, is a sufficient cause for a divorce *a vinculo*.¹ * 85

A suit or petition for divorce for adultery will not be granted, if there be proof of connivance or collusion, (*pp*)² or of condonation by the petitioning party.³ The general meaning of condonation, as an English word, is forgiveness; but it has, as a law term and used in this connection, a technical meaning; it is, forgiveness proved by the continued cohabitation of the parties after the guilt of the defendant is made known to the petitioner. It would seem only just to apply this rule with much less severity to the wife, who may be constrained by many reasons to continue for a time with the guilty husband; whereas a husband is under no such necessity, and should renounce all cohabitation with a wife whom he knows to be an adulteress; and that a disregard of this requirement would bar his divorce is well settled. (*pg*)

The courts may also decree a divorce *a mensa et thoro*; and this kind of divorce was once the most common. But most of the causes which formerly only sufficed for a divorce from bed and board, are now very generally made sufficient for a divorce from the bond of marriage. In general, a woman divorced from the bed and board of her husband, acquires the rights, as to property, business, and contracts, of an unmarried woman. And her husband is freed from his general obligation to maintain her, the courts having power, which they usually exercise, of decreeing such maintenance from the husband as his means, and the character and circumstances of the case render proper. (*q*)

(*o*) *Matchin v. Matchin*, 6 Penn. St. 832.

(*p*) *Nichols v. Nichols*, 31 Vt. 828.

(*pp*) There is a strong recent case on this subject in *Adams v. Adams*, Law Rep. 1 P. & D. 388. See also *Baylis v. Baylis*, Law Rep. 1 P. & D. 395.

(*pg*) *Turnbull v. Turnbull*, 28 Ark. 615; *Thomas v. Thomas*, 2 Cold. 123.

(*q*) *Dean v. Richmond*, 5 Pick. 461, where it was held, that a wife divorced *a mensa et thoro* may be sued, or sue, as a *feme sole*. *Parker, C. J.*, in delivering the opinion of the court, after quoting from 2 Kent, Com. 186, as "a recently published book, which I trust, from the eminence of its author, and the merits of the work, will soon become of common refer-

¹ Insanity following the offence is no bar. *Mordaunt v. Moncreiffe*, L. R. 2 H. L. Sc. & Div. 374. As to the insanity of both parties, see *Garnett v. Garnett*, 114 Mass. 379.

² Thus a note given towards procuring a divorce is void as between the parties, *Kilborn v. Field*, 78 Penn. St. 194; as well as an agreement for alimony, *Adams v. Adams*, 25 Minn. 72. See *Cairns v. Cairns*, 109 Mass. 408; *Baugh v. Baugh*, 37 Mich. 59; *Hopkins v. Hopkins*, 39 Wis. 167; *Sickles v. Carson*, 11 C. E. Green, 440; *Everhart v. Puckett*, 73 Ind. 409.

³ See as to condonation, *Sewall v. Sewall*, 192 Mass. 156; *Rogers v. Rogers*, 122 Mass. 428; *Warner v. Warner*, 4 Stewart, 225; *Farnham v. Farnham*, 73 Ill. 497; *Clouser v. Clapper*, 59 Ind. 548.

The law applying to foreign divorces is considered in our chapter on the Law of Place.

ence in our courts," says: "So far as this opinion relates to the case of divorce, we fully concur with him, and are satisfied that, although the marriage is not to all purposes dissolved by a divorce *a mensa et thoro*, it is so far suspended that the wife may maintain her rights by suit, whether for injuries done to her person or property, or in regard to contracts express or implied arising after the divorce; and that she shall not be obliged to join her husband in such suit; and to the same extent she is liable to be sued alone, she being to all legal intents a *feme sole* in regard to subjects of this nature. Such,

however, is not the law of England, it having been recently decided that *cōverture* is a good plea, notwithstanding a divorce *a mensa et thoro*. *Lewis v. Lee*, 3 B. & C. 291. But the difference in the administration of their law of divorce and ours, and the power of the Court of Chancery there to protect the suffering party, will sufficiently account for the seeming rigor of their common law on this subject. If the husband is not liable for the debts of the wife, after a divorce *a mensa*, the chief reason for denying her the right to sue alone fails." See also *Pierce v. Burnham*, 4 Met. 303.

* CHAPTER XI.

*86

BAILMENT.

THE Law of Bailment has received in modern times a more systematic arrangement than formerly, and a more profound and accurate investigation into its principles. But it was always, though not under the same name, a branch of the common law, and some of its principles are as ancient as any part of that law. Sir *William Jones* speaks of it as referred to in the books of Moses, and as quite fully developed among the Greeks. But, in fact, much law on the topics which are now considered under the head of Bailment, must exist in all nations who make any approach to civilization. For there must always be something of borrowing, lending, hiring, and of keeping chattels, carrying or working upon them, for another; and all this is embraced within Bailment. The word is from the Norman-French *bailler*, to deliver. Whatever is delivered by the owner to another person, in any of the ways or for any of the purposes above mentioned, is bailed to him; and the law which determines the rights and duties of the parties, in relation to the property and to each other, is the law of Bailments.

Sir *William Jones*, in 1781, published his brief essay on the Law of Bailments. This work first gave to the subject systematic form. It was at that time eminently useful, and has always been celebrated. As a literary and philosophical production, manifesting much learning in the Roman civil law, it has great merit; but, as a law-book for present use, it now possesses less value. In the 2 Anne, Lord *Holt*, in the case of *Coggs v. Bernard*, (a) laid the foundations of this system of *law, build- *87

(a) 2 Ld. Raym. 909. This celebrated case is referred to in the great majority of subsequent cases which relate to the responsibility of a bailee. In this case, that eminent judge, Sir *John Holt*, may be said to have laid the foundation of the

Law of Bailment for England. He borrows most, perhaps all, of his principles from the civil law. And he gave at once a proof of the wisdom of that law, and of his own sagacity in seizing those of its principles which had been adopted by

ing it, however, on principles deducible from or harmonizing with existing English jurisprudence, although he used an arrangement and nomenclature borrowed from the civil law.

A bailee is always responsible for the property delivered to him; but the degree and measure of this responsibility vary from one extreme to another. He is bound to take care of the property; but the question always occurs, What care? It is obviously impossible to measure the requirement of *care* with exact precision. But, for their assistance in doing this, courts have established three kinds or degrees of care, as standards. There is, perhaps, no better definition of these, than that given by Sir *William Jones*. First, slight care, which is that degree of care which every man of common sense, though very absent and inattentive, applies to his own affairs; secondly, ordinary care, which is that degree of care which every person of common and ordinary prudence takes of his own concerns; thirdly, great care, which is the degree of care that a man remarkably exact and thoughtful gives to the securing of his own property. It is obvious that the degree of care required measures the degree of negligence which makes the bailee responsible for loss of or injury to the thing bailed. There are, therefore, three degrees of negligence. The absence of slight care constitutes gross negligence; the absence of ordinary care constitutes ordinary negligence; the absence of great care constitutes slight negligence. The general purpose of the Law of Bailment is to ascertain whenever loss of or injury to a thing bailed occurs, to what degree of care the bailee was bound, and of what degree of negligence he has been guilty. (b)

For this purpose bailees are sometimes distributed into three general classes, corresponding with the three degrees of care and negligence already referred to. The *first* of these is, where

* 88 * the bailment is for the benefit of the bailor alone. In this class but slight care is required of the bailee, and he is responsible only for gross negligence. The *second* is, where the bailment is for the benefit of the bailee alone. In this class the greatest care is required of the bailee, and he is responsible for

or were applicable to the common law, and in stating them with great accuracy of definition, and with the modifications required to adapt them to the common law. So that they have passed through all subsequent adjudications with but little essential change.

(b) For an able criticism upon the definitions and classifications of negligence, see *Steamer New World v. King*, 16 How. 469. See also, *Blythe v. Waterworks*, 36 E. L. & E. 506; s. c. 11 Exch. 781.

slight negligence. The *third* is, where the bailment is for the benefit both of bailor and bailee. In this class, ordinary care is required of the bailee, and he is responsible for ordinary negligence. We shall also see, presently, that there are bailees of whom the utmost possible care is required, and who are responsible for the slightest possible negligence, and others who are responsible when guilty of no negligence whatever.

Courts and writers have sometimes spoken of gross negligence as the same thing as fraud; but this is inaccurate. (*c*)¹ There are bailees who should not be held responsible but for the grossest negligence, and it is often difficult to distinguish between such cases and those where there is reasonable suspicion of fraud; for such negligence generally justifies such suspicion. But that the law makes this distinction is certain.

There have been many different classifications of the kinds of bailments; (*d*) but we prefer and shall use that of Sir *Wil-*

(*c*) In the case *In re Hall & Hinds*, 2 Man. & G. 852, *Tindal*, C. J., says: " *Lata culpa* or *crassa negligentia*, both by the civil law and our own, approximates to, and in many instances cannot be distinguished from, *dolus malus* or misconduct." There may be instances in which these cannot be discriminated in *fact*, but they are entirely distinct in *law*. In *Wilson v. Y. & M. Railroad Co.* 11 Gill & J. 58, 79, the court say: "We do not think that gross negligence would, in construction of law, amount to fraud, but was only evidence to be left to the jury, from which they might infer fraud, or the want of *bona fides*." In *Goodman v. Harvey*, 4 A. & E. 876, Lord *Deeman* says: "Gross negligence may be evidence of *mala fides*, but it is not the same thing." This is quoted with approbation in *Jones v. Smith*, 1 *Hare*, 71, and Vice-Chancellor *Wigram* adds: "The doctrines of law and equity upon this point ought to be concurrent." When Lord *Holt*, in *Coggs v. Bernard*, says, that gross negligence is looked upon as evidence of fraud, he adopts a rule of the civil law; he does not mean that this evidence is conclusive; or, that if it be rebutted, and the negligence cleared from all stain of actual fraud, it will not remain gross negligence. In other words, gross negligence is not fraud by inference of law, but may go to a jury as evidence of fraud.

(*d*) There are two classifications of

the various kinds of bailments which have become very celebrated in the English and American law—that of Lord *Holt*, in the case of *Coggs v. Bernard*, *sopra*, and that of Sir *William Jones*, in his essay on bailments. We shall give them both in their author's own language. Lord *Holt's* is as follows: "There are," says he, "six sorts of bailments. The first sort of bailment is, a bare naked bailment of goods, delivered by one man to another to 'keep for the use of the bailor; and this I call a *depositum*, and it is that sort of bailment which is mentioned in Southcote's case. The second sort is, when goods or chattels that are useful are lent to a friend *gratis* to be used by him; and this is called *commodatum*, because the thing is to be restored in *specie*. The third sort is, when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin *vadium*, and in English a *pawn* or *pledge*. The fifth sort is, when goods or chattels are delivered to be carried, or something is to be done about them, for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is, when there is a

¹ That gross negligence on the part of a gratuitous bailee, though not a fraud, is in legal effect the same thing, was declared in *National Bank v. Graham*, 100 U. S. 699.

* 89 *liam* * *Jones*, which varies somewhat from Lord *Holt's*.

And we shall speak successively of

First, DEPOSITUM or deposit without compensation or reward.

Second, MANDATUM, or gratuitous commission, wherein the mandatary agrees to do something with or about the thing bailed.

Third, COMMODATUM, or loan, where the thing bailed is lent for use, without pay, and is to be itself returned.

Fourth, PIGNUS, or pledge, where the thing bailed is security for debt.

Fifth, LOCATIO, or hiring, for a reward or compensation.

SECTION I.

DEPOSITUM.

Where a thing is placed with a depositary, to be kept for a time, and returned when called for, the depositary to have * 90 no * compensation, the benefit of the transaction is wholly on the side of the bailor, and the bailee is liable only for gross negligence. (e)¹ By the Roman law he was answer-

delivery of goods or chattels to somebody, who is to carry them or do something about them *gratis*, without any reward for such his work or carriage." Upon this classification Sir William Jones has made the following observations: "His division of bailments into six sorts appears, in the first place, a little inaccurate; for, in truth, his fifth sort is no more than a branch of his third, and he might, with equal reason, have added a seventh, since the fifth is capable of another subdivision. I acknowledge, therefore, but five species of bailments, which I shall now enumerate and define, with all the Latin names, one or two of which Lord Holt has omitted. 1. DEPOSITUM, which is a naked bailment, without reward, of goods, to be kept for the bailor. 2. MANDATUM, or commission, when the mandatary undertakes, without recompence, to do some act about the things bailed, or simply to carry them; and hence

Sir Henry Finch divides bailment into two sorts, to keep, and to employ. 3. COMMODATUM, or loan for use; when goods are bailed, without pay, to be used for a certain time by the bailee. 4. PIGNORI ACCEPTUM, when a thing is bailed by a debtor to his creditor in pledge, or as a security for the debt. 5. LOCATUM, or hiring, which is always for a reward; and this bailment is either, 1. Locatio rei, by which the hirer gains the temporary use of the thing; or, 2. Locatio operis faciendi, when work and labor, or care and pains, are to be performed or bestowed on the thing delivered; or, 3. Locatio operis mercium rehendarum, when goods are bailed for the purpose of being carried from place to place, either to a public carrier, or to a private person." See Jones on Bailm. 8d.

(e) This has been the clearly established law ever since the case of *Coggs v. Bernard*. Lord Coke, however, in South-

¹ That national banks have the power to receive special deposits as incidental to their business, and when received gratuitously are liable for gross negligence, see *Pattison v. Syracuse National Bank*, 80 N. Y. 82, where the authorities on the liability of banks for special deposits are collated. To the same effect are *Lyons Bank v. Ocean Bank*, 60 N. Y. 278; *National Bank v. Graham*, 79 Penn. St. 106; *Chattahoochee Bank*

able only for *fraud; for if the bailor thus deposited goods * 91 with a negligent person, he took upon himself the risk of

cote's case, 4 Rep. 83 b, and in Co. Lit. 89 a, laid down a different rule. He stated the law to be, that a gratuitous bailee must answer for the goods delivered to him at his peril, unless he has made a special agreement to take such care of them *only* as he takes of his own goods; "for to be kept and to be safely kept is all one in law." But the profession seem never to have been satisfied with Lord Coke's rule. For it was denied to be law in 33 Car. II. by *Pemberton*, C. J., in the case of *Rex v. Hertford*, 2 Show. 172, and again in 18 Wm. III. by *Holt*, C. J., in the case of *Lane v. Cotton*, 12 Mod. 472, 487; and finally it was expressly overruled by the whole Court of Queen's Bench, in 2 Anne, in the case of *Coggs v. Bernard*. And *Holt*, C. J., in the latter case, said, that the rule stated in the text had always been acted upon at Guildhall, contrary to the opinion of Lord Coke, particularly during all of Chief Justice *Pemberton*'s time, and ever since. The whole matter of the liability of a depositary was much discussed in the case of *Foster v. The Essex Bank*, 17 Mass. 479. The facts in that case were, that the plaintiff's *testator* had deposited at the Essex Bank, for safe keeping, a chest containing a large quantity of gold. Some time after the deposit was made, the gold was taken from the chest and put in a cask, from whence the greater part of it was fraudulently and secretly taken by the cashier and chief clerk, who appropriated it to their own use, and afterwards absconded, having also defrauded the bank of the greater part of its capital. This was done without the knowledge of any of the directors, or members of the corporation. The deposit in question was kept in the vault, in the same manner, and with the same care, as other special deposits, and as the specie of the bank; and the cashier and the clerk sustained fair reputations, until the time of their absconding. The court held, that the bank was not liable. And *Parker*, C. J., said: "The *dictum* of Lord Coke, that the bare acceptance of goods to keep implies a promise to keep them safely, so that the depositary will be liable for loss by stealth or accident, is entirely exploded; and Sir W. Jones insists that such a harsh principle cannot be inferred from

Southcote's case, on which Lord Coke relied; the judgment in that case, as the modern civilian thinks, being founded upon the particular state of the pleadings, from which it might be inferred, either that there was a special contract to keep safely, or gross negligence in the depositary. But as the judges, *Gawdy* and *Clench*, who alone decided that cause, said, that the plaintiff ought to recover, because it was not a *special* bailment, by which the defendant accepted to keep them as his own proper goods, and not otherwise; the inference which Lord Coke drew from the decision, that a promise to keep implied a promise to keep safely, even at the peril of thieves, was by no means unwarranted. But the decision, as well as the *dictum* of Lord Coke in his commentary, were fully and explicitly overruled by all the judges in the case of *Coggs v. Bernard*, and upon the most sound principles. It is so considered in *Hargrave* and *Butler*'s note to Co. Lit. n. (78), and all the cases since have adopted the principle, that a *mere depositary*, without any special undertaking, and without reward, is answerable for the loss of the goods only in case of gross negligence; which, as is everywhere observed, bears so near a resemblance to fraud, as to be equivalent to it in its effect upon contracts. Indeed the old doctrine, as stated in Southcote's case, and by Lord Coke, has been so entirely reversed by the more modern decisions, that, instead of a presumption arising from a mere bailment, that the party undertook to keep safely, and was therefore chargeable, unless he proved a special agreement to keep only as he would his own; the bailor, if he would recover, must, in addition to the mere bailment alleged and proved, prove a special undertaking to keep the goods safely; and even then, according to Sir William Jones, the depositary is liable only in case of ordinary neglect, which is such as would not be suffered by men of common prudence and discretion; so that if goods deposited with one who engaged to keep them safely were stolen, without the fault of the bailee, he having taken all reasonable precautions to render them safe, the loss would fall upon the owner, and not the bailee." See *Gulledge v. Howard*, 28 Ark. 61.

v. Schley, 58 Ga. 369. See also *Scott v. Chester Valley Bank*, 72 Penn. St. 471. *Contra Whitney v. Brattleboro Bank*, 50 Vt. 388; *Wiley v. Same*, 47 Vt. 546. See *Shoemaker v. Hinze*, 53 Wis. 116, where the defendant was held absolutely liable for a sum of money given him to take care of and stolen from him.

negligence. So it seems to have been held by *Bracton*, (f) who copied from the Roman law. But by the English and American law, such bailee is, as we have seen, liable for gross negligence, although he may have been wholly innocent of any fraudulent intent. It is impossible to lay down any rule or principle, which will be in all cases a reliable test as to what constitutes gross negligence. The question must always depend upon several circumstances; such as the nature and quality of the goods bailed and the character and customs of the place where the trust is to be executed. What would amount to more than ordinary diligence in the case of a chattel of great bulk and little value, might be very gross negligence in the case of a bag of gold coin, or a parcel of valuable papers. Again, what would be a sufficient degree of diligence in a thinly peopled country, might be very culpable negligence in a thickly inhabited city. (g) It has been commonly stated by writers, and is said in some cases, that a depositary is not liable, as for gross negligence, if he shows that

he has taken as much care of the goods of the bailor as he
* 92 has of his own; but this is not law, (h) and although * it

(f) Lib. 3, c. 2, fol. 99 b.

(g) It was held, in the case of *Doorman v. Jenkins*, 2 A. & E. 256, after much consideration, that the question of gross negligence was rather a question of fact for the jury than of law for the court. But this does not remove all difficulty from the question, what constitutes gross negligence. For it is obvious that the jury should receive instructions from the court to guide them in forming their judgment.

(h) It seems very clear that this is not a reliable test. For we have already seen that a depositary is liable for gross negligence, though a jury may be satisfied that he is wholly innocent of any fraudulent intent; and it is obvious that persons even who usually exercise great care, may in some instances be guilty of very gross negligence in the management of their own affairs. It seems also to be equally clear upon the *modern authorities* that it is no defence for a depositary who has, by his negligence, lost the goods intrusted to him, that he has been equally negligent in regard to his own property. The first case that we have seen, going to this point, is that of *Rooth v. Wilson*, 1 B. & Ald. 59. That was an action on the case against the defendant for not repairing the fences of a close adjoining that of the plaintiff, whereby a

certain horse of the plaintiff, feeding in the plaintiff's close, through the defects and insufficiencies of the fences, fell into the defendant's close and was killed. The defendant pleaded the general issue, and on the trial it appeared that the horse was the property of the plaintiff's brother, who sent it to him on the night before the accident; that the plaintiff put it into his stable for a short time, and then turned it after dark into his close, where his own cattle usually grazed, and that on the following morning the horse was found dead in the close of the defendant, having fallen from one to the other. The jury having found a verdict for the plaintiff, a rule for setting aside the verdict and granting a new trial was obtained, in support of which it was contended, among other things, that the plaintiff could not maintain the action, because, having taken as much care of the horse as he did of his own cattle, he was not liable over, and so had not sustained any damage. But Lord *Ellenborough* said: "The plaintiff certainly was a gratuitous bailee, but, as such, he owes it to the owner of the horse not to put it into a dangerous pasture; and if he did not exercise a proper degree of care, he would be liable for any damage which the horse might sustain. Perhaps the horse might have

has been thought that the degree of care and diligence to be required of a bailee should be regulated to some * extent * 98

been safe during the daylight, but here he turns it into a pasture to which it was unused, after dark. This is a degree of negligence sufficient to render him liable." The other judges being of the same opinion, the rule was discharged. Afterwards came the case of *Doorward v. Jenkins*, 2 A. & E. 256. The plaintiff, in that case, had intrusted the defendant with a sum of money for the purpose of paying and taking up a bill of exchange. It appeared that the defendant, who was the proprietor of a coffee-house, had placed the money in his cash-box, which was kept in the tap-room; the tap-room had a bar in it; that it was open on *Sunday*, but that the other parts of the premises, which were inhabited by the defendant and his family, were not open on that day; and that the cash-box, with the plaintiff's money in it, and also a much larger sum belonging to the defendant, was stolen from the tap-room on a *Sunday*. The defendant's counsel contended that there was no case to go to the jury, inasmuch as the defendant, being a gratuitous bailee, was liable only for gross negligence; and the loss of his own money, at the same time with the plaintiff's, showed that the loss had not happened for want of such care as he would take of his own property. But Lord *Damnon*, before whom the case was tried, refused to nonsuit the plaintiff, and told the jury that it did not follow from the defendant's having lost his own money at the same time with the plaintiff's that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own; and that the fact relied upon was no answer to the action, if they believed that the loss occurred from gross negligence. The jury having found a verdict for the plaintiff, a rule was obtained to set it aside. The counsel for the defendant, one of whom was Sir J. *Scarlett*, in support of the rule, said, that they did not contend for the absolute proposition, that a gratuitous bailee, who keeps another person's goods as carefully as his own, cannot become liable for the loss, or be guilty of gross negligence. Their objection to the verdict was, that the plaintiff, upon whom the burden of proof lay, did not make out a *prima facie* case of gross negligence. But the court unanimously discharged the rule. And Mr. Justice *Tawson* said: "The defendant receives money to be kept for the plaintiff. What care does he exercise? He puts

it, together with money of his own (which I think perfectly immaterial), into the till of a public-house." The case of *Tracy v. Wood*, 3 Mason, 132, is also a very strong case to the same point. It was an action of assumpait for negligence in losing 764 $\frac{1}{2}$ dollars, intrusted to the defendant to be carried from New York to Boston, as a gratuitous bailee. The gold was put up in two distinct bags, one within the other, and at the trial, upon the general issue, it appeared that the defendant, a money-broker, brought them on board of the steamboat bound from New York to Providence; that in the morning, while the steamboat lay at New York, and a short time before sailing, one bag was discovered to be lost, and the other was left by the defendant on a table in his valise in the cabin, for a few moments only, while he went on deck to send information of the supposed loss to the plaintiffs, there being then a large number of passengers on board, and the loss being publicly known among them. On the defendant's return the second bag was also missing, and after every search no trace of the manner of the loss could be ascertained. The valise containing both bags was brought on board by the defendant on the preceding evening, and put by him in a berth in the forward cabin. He left it there all night, having gone in the evening to the theatre, and on his return having slept in the middle cabin. The defendant had his own money to a considerable amount in the same valise. There was evidence to show that he made inquiries on board, if the valise would be safe, and that he was informed that if it contained articles of value, it had better be put into the custody of the captain's clerk in the bar, under lock and key. *Story*, J., in summing up to the jury, said: "I agree to the law as laid down at the bar, that in cases of bailees without reward, they are liable only for gross negligence. Such are depositaries, or persons receiving deposits without reward for their care; and mandataries, or persons receiving goods to carry from one place to another without reward. The latter is the predicament of the defendant. He undertook to carry the gold in question for the plaintiff gratuitously, from New York to Providence, and he is not responsible, unless he has been guilty of gross negligence. . . . The contract of bailees without reward, is not merely for good

by what may be shown to be his general character in those respects, it would seem to be the better opinion, that the individual character of the bailee is not a legitimate subject of inquiry, unless it can be shown that his character was known to the bailor, and that it was the implied understanding of the parties that the bailee should employ such care and skill as he possessed. (i) If the bailor knows the habits and character of the bailee, and * 94 the place and manner in * which he usually keeps such goods, the bailee is not responsible for any injury resulting from his keeping and treating them in that way. (j)

Sir William Jones thinks the depositary held for less than gross negligence, first, where he makes a special bargain for special care, and secondly, where he spontaneously and officiously proposes to keep the goods of another. (k) But neither of these rules has been determined by adjudication.

faith, but for such care as persons of common prudence in their situation usually bestow upon such property. If they omit such care, it is gross negligence. The present is a case of a mandatary of money. Such property is by all persons, negligent as well as prudent, guarded with much greater care than common property. The defendant is a broker, accustomed to the use and transportation of money, and it must be presumed he is a person of ordinary diligence. He kept his own money in the same valise; and took no better care of it than of the plaintiff's. Still, if the jury are of opinion that he omitted to take that reasonable care of the gold which bailees without reward in his situation usually take, or which he himself usually took of such property, under such circumstances, he has been guilty of gross negligence."

(i) *The William*, 6 Rob. Adm. 816. In this case a vessel had been captured, and was afterwards lost while in the hands of the captor. The capture was justifiable, and the question was whether the captor had used such diligence as a captor is required to use in such cases. Sir W. Scott, in addressing the jury, said: "When a capture is not justifiable, the captor is answerable for every damage. But in this case the original seizure has been justified by the condemnation of part of the cargo. It is therefore to be considered as a justifiable seizure, in which all that the law requires of the captor is, that he should be held responsible for *due diligence*. But on questions of this kind there is one position some-

times advanced, which does not meet with my entire assent, namely, that captors are answerable only for *such care* as they would take of their own property. This I think is not a just criterion in such cases; for a man may, with respect to his own property, encounter risks, from views of particular advantage, or from a natural disposition of rashness, which would be entirely unjustifiable in respect to the custody of the goods of another person, which have come to his hands by an act of force. Where property is confided to the care of a particular person, by one who is, or may be supposed to be acquainted with his character, the care which he would take of his own property might, indeed, be considered as a reasonable criterion." "Certainly it might," says Mr. Justice Story, "if such character was known, and the party under the circumstances might be presumed to rely, not on the rule of law, but on the care which the party was accustomed to take of his own property, in making the deposit. But, unless he knew the habits of the bailee, or could be fairly presumed to trust to such care as the bailee might use about his own property of a like nature, there is no ground to say that he has waived his right to demand reasonable diligence. Why should not the rule of the civil law be applied to such a case? *Latae culpa finis est, non intelligere id quod omnes intelligent.*" Story on Bailm. § 87. See the case of *Wilson v. Brett*, 11 M. & W. 118.

(j) *Knowles v. Atlantic & S. L. R. R. Co.* 38 Me. 55.

(k) Jones on Bailm. 48.

The depositary is bound to deliver the thing as it was, and with it all its increase or profit. But if the bailor was not the rightful owner, and the depositary, in good faith, delivers the thing to the rightful owner on demand from him, this constitutes a good defence against the bailor; (*l*) although, for his own security, he should, if possible, compel the rival claimants to interplead, (*m*) or should obtain security from the party to whom he delivers it.

If the property belongs to two or more bailors, and is capable of partition, he may on demand restore it by division among them. But where it is incapable of division the law seems to be deficient. The ancient action of detinue, with the process of garnishment, would have settled the claim. *Kent* (*n*) thinks equity interpleader adequate, and far better; as it certainly would be if it could be applied to the question; but this, *Story* (*o*) confines to cases of a privity between the parties, as where there was a joint bailment, or joint contract. Upon the whole we prefer *Kent's* opinion.

The duty of the depositary as to the place of delivery has been much questioned. But it may be considered as settled in this country, that a bailee, bound to deliver goods on demand, discharges his obligation by delivering or tendering them where they are, or at his own residence or place of business; (*p*) but the demand may be made on him elsewhere. (*q*)

It is sometimes said that a depositary has a special property * in the deposit; but this is perhaps inaccurate. (*r*) * 95 He has the right of possession, but not the right of property; and may therefore maintain trover, for which possession is enough; (*s*) but not replevin, because that action requires property in the plaintiff. (*t*) If he sell the property, a

(*l*) *King v. Richards*, 6 Whart. 418; *Nelson v. Iverson*, 17 Ala. 210; *Beach v. Berdell*, 2 Duer, 827.

(*m*) *Rich v. Aldred*, 6 Mod. 216.

(*n*) 2 *Kent*, Com. 567.

(*o*) *Story on Bailm.* § 112.

(*p*) *Scott v. Crane*, 1 Conn. 255; *Slingerland v. Morse*, 8 Johns. 474.

(*q*) *Higgins v. Emmons*, 6 Conn. 76; *Dunlap v. Hunting*, 2 Denio, 643.

(*r*) *Hartop v. Hoare*, 3 Atk. 44; *Story on Bailm.* § 98 *et seq.*

(*s*) *Sutton v. Buck*, 2 Taunt. 302; *Burton v. Hughes*, 2 Bing. 178. See also *Webb v. Fox*, 7 T. R. 391; *Giles v. Grover*, 6 Bligh, 277.

(*t*) At least such is the law in Mass-

sachusetts. *Waterman v. Robinson*, 5 Mass. 303. That was an action of replevin. It appeared that the goods repledged, on the 20th of July, 1801, belonged to one Lucas, on which day a commission of bankruptcy issued against the said Lucas, and he being declared a bankrupt, by a warrant from the commissioners, their messengers seized the goods in question, caused them to be appraised and inventoried, and on the 28th day of the same July delivered them to the plaintiff, taking his obligation to redeliver them on demand. While the goods were so in the custody of the plaintiff, the defendant, as deputy-sheriff, attached them as the property of Lucas.

purchaser, although buying in good faith and without notice, acquires no title. (u)

A deposit in a bank has been held to be a loan, not a bailment. (uu)

* 96 * One cannot be made a depositary against his will. (v)

Upon these facts the court held, that the plaintiff could not recover. *Parsons*, C. J., said: "Upon these facts we are to decide whether the property of the goods, so that he might lawfully replevy them, was in the plaintiff. Trover may be maintained by him who has the possession; but replevin cannot be maintained but by him who has the property, either general or special. Admitting the commission, and the proceedings under it, to be regular, what property had the plaintiff in the goods? The general property was in the commissioners until the assignment, and then in the assignee. The messenger, if any person, had the special property, and not the plaintiff, who had no interest in the goods, but merely had the care of them for safe-keeping. If his possession was violated, he might maintain trespass or trover, but he had no special property, by which he could maintain replevin; in which the question is not of possession, but of property, although possession may be *prima facie* evidence of property. On this ground we are of opinion that the plaintiff cannot maintain this action, he not proving that either the general or special property was in himself." So in the case of *Templeman v. Case*, 10 Mod. 24, it is said, that a possessory right is sufficient to maintain an action of trespass or case, though not replevin. In New York, on the other hand, it is held, that replevin will lie in favor of a depositary. See the case of *Miller v. Adsit*, 16 Wend. 385. And the court seem to have entertained a similar opinion in 21 H. 7, 14 b, pl. 28. That case was as follows: "In replevin. The defendant said that the property, &c., was in a stranger. The plaintiff said that the stranger delivered them to him to be redelivered, and before any redelivery the defendant took them. *Marow* said that he would demur upon that plea. For he said it was adjudged in a book, that if one has beasts for a term of years, or to manure his land, there he shall have replevin. And the reason is, he has a good property for the time against the lessor, and shall have an action against him if he retakes them. But where he cannot have an action against the lessor it seems that he shall not have replevin. And here there is only a delivery to redeliver to

the bailor, so that he has not any property. For if one takes them out of the possession of the bailee, the bailor shall have an action of trespass, and if he recovers by this, the bailee shall never have an action for the taking. Wherefore, &c., *Fineux*, C. J. This is not a new case. For a case similar to this has been several times adjudged in our books; as the case of letting beasts for a term of years, and to manure land, &c. And in the case here the bailee has a property against every stranger, for he is chargeable to the bailor. And therefore it is reasonable that he should recover against any stranger who takes them out of his possession. Therefore, when the plaintiff has had conveyed to him such special property, it seems that it is good in maintenance of his action. *Marow* then prayed further time, and said that as he was then advised, he would demur upon that plea. *Fineux*, C. J. And you will not be so well advised to demur upon this plea; but we shall be as well advised to give judgment against you."

(u) See *McMahon v. Sloan*, 12 Penn. St. 229.

(uu) *Robinson v. Gardner*, 18 Gratt. 509.

(v) *Lethbridge v. Phillips*, 2 Stark. 544. It appeared in this case that a person of the name of Bernard, being desirous, for particular reasons of his own, that the defendant should see a picture belonging to the plaintiff, borrowed the picture of the plaintiff for the purpose of sending it to the defendant, and afterwards delivered it to a son of the defendant to be taken to the defendant's house. The defendant's son accordingly took it home, and the picture was, while at the defendant's, much damaged in consequence of having been placed on a mantelpiece near a stove. It appeared that the picture had been sent by Bernard to the defendant without any request on the part of the latter, and without any previous communication between them on the subject. Upon these facts, *Abbott*, C. J., was of opinion that the action could not be supported; that the defendant could not, without his knowledge and consent, be considered as a bailee of the property. In some instances, he said, it had happened, that property of much

He must consent; but the consent may be implied or inferred. A pledgee holding a pledge over after payment of the debt, is a depositary. One finding property need not take charge of it; if he chooses to do so he becomes a depositary, and is liable for loss from gross negligence. (w) It has been said that he may charge the owner for necessary expense and labor in the care of it. (x)

It has been held that one who negligently receives goods not directed to him, is as liable for default as a bailee with compen-

greater value than that in the present case had been left at gentlemen's houses by mistake, and in such cases the parties could not be considered as bailees of the property without their consent.

(w) "When a man doth find goods," says Lord Coke, "it hath been said, and so commonly held, that if he doth dispossess himself of them, by this he shall be discharged; but this is not so, as appears by 12 Edw. 4, 18, for he which finds goods is bound to answer him for them who hath the property; and if he deliver them over to any one, unless it be unto the right owner, he shall be charged for them; for at the first it is in his election whether he will take them or not into his custody; but when he hath them, one only hath then right unto them, and therefore he ought to keep them safely. A man, therefore, which finds goods, if he be wise, will then search out the right owner of them, and so deliver them unto him. If the owner comes unto him, and demands them, and he answers him that it is not known unto him whether he be the true owner of the goods or not, and for this cause he refuseth to deliver them; this refusal is no conversion, if he do keep them for him." Isaac v. Clark, 2 Bulst. 306, 312. The finder of property, for which a specific reward has been offered, has a lien upon it for the payment of the amount of the reward. Wentworth v. Day, 8 Met. 352. It is otherwise if the offer be merely of "a liberal reward." Wilson v. Guyton, 8 Gill, 218.—If a person finds property, which another has cast away and abandoned as entirely worthless, he may hold it against the original owner. McGoon v. Ankeny, 11 Ill. 568.

(x) So said in Story on Bailm. § 121 a, but it seems never to have been expressly adjudged. The case which comes nearest to it is that of Nicholson v. Chapman, 2 H. Bl. 254. In this case, a quantity of timber belonging to the plaintiff was placed in a dock on the bank of a naviga-

ble river, and being accidentally loosened, was carried by the tide to a considerable distance, and left at low water upon a towing-path. The defendant, finding it in that situation, voluntarily conveyed it to a place of safety, beyond the reach of the tide at high-water; and when the plaintiff afterwards sent to demand the timber to be restored to him, the defendant refused to restore it without payment for his trouble and expense. The plaintiff thereupon brought an action of trover; and the court held, that the defendant had no lien upon the timber, and that the action was maintainable. Lord Chief Justice Eyre, however, intimated, in the course of his judgment, that the defendant might recover for his trouble and expense in some form of action. After declaring that the common law gave the defendant no lien in such a case, and that this case could not be likened to a case of salvage, he said: "It is, therefore, a case of mere finding, and taking care of the thing found (I am willing to agree) for the owner. This is a good office and meritorious, at least in the moral sense of the word, and certainly entitles the party to some reasonable recompense from the bounty, if not from the justice of the owner; and of which, if it were refused, a court of justice would go as far as it could go towards enforcing the payment." The learned reporter, in a note to this passage, says: "It seems probable that in such a case, if any action could be maintained, it would be an action of *assumpsit* for work and labor, in which the court would imply a special instance and request, as well as a promise. On a *quantum meruit*, the reasonable extent of the recompense would come properly before the jury." See Baker v. Hoag, 3 Barb. 113; a. c. 7 id. 303. It might be found somewhat difficult, however, on technical grounds, to support such an action. See Bartholomew v. Jackson, 20 Johns. 28. See also vol. i p. *446, note (u).

sation. (*xx*) And that a lending for his own purposes by a bailee without compensation, is a conversion. (*xy*)

* 97 * Perhaps the consent of the finder to take charge of it may be absolutely implied, when the property is forced into his care by extraordinary exigencies, as by fire or shipwreck, and is not at once renounced by him; and from his consent some obligation of care may be implied. We apprehend, however, that no finder is liable for a refusal to take the property into his hands; and has no lien on it or any claim for compensation unless for property derelict at sea, which would be governed by the law of Admiralty. If he has any claim whatever, it cannot go beyond the expense and labor necessary for the preservation of the property. It was decided in England, that the finder of lost property has a valid claim against all the world but the owner; and that the place in which it is found can create no exception to this general rule. (*y*)¹ In Massachusetts, it is held that the finder of a pocket-book left by the owner on a table in a shop, cannot hold it against the shop-keeper. (*yy*) The finder of a chose in action, as a note, check, or lottery-ticket, is not entitled to payment of the money due upon it; and one paying it with the knowledge that the holder came into possession by finding, would be held to pay the amount to the owner. (*z*)

(*xx*) *Newhall v. Paige*, 10 Gray, 366.

(*xy*) *Persch v. Quiggle*, 57 Penn. St. 247.

(*y*) In *Bridges v. Hawkesworth*, 7 E. L. & E. 424, the plaintiff had picked up from the floor of the shop of the defendant a parcel of bank-notes, which he handed to the defendant to keep for the owner. They were advertised by the de-

fendant; no one claimed them; three years elapsed; and the plaintiff demanded them, tendering the cost of the advertisement and an indemnity. The county court gave judgment for the defendant; and the Queen's Bench reversed the judgment.

(*yy*) *M'Avoy v. Medina*, 11 Allen, 548.

(*z*) *McLaughlin v. Waite*, 5 Wend. 404.

¹ A domestic servant in a hotel who finds a roll of bills in the public parlor is entitled to the bills as against the hotel-keeper, the owner not being found, *Hamaker v. Blanchard*, 90 Penn. St. 377; and also a servant in a paper-mill, as against the mill-owner, to money found by him in paper-stock, *Bowen v. Sullivan*, 62 Ind. 281. In *Durfee v. Jones*, 11 R. I. 588, deciding where the owner's agent offered an old safe to keep for sale, with the privilege of using, and the user on examination found a roll of bills between the casing and the lining, that as against the owner, the finder was entitled to retain the money, although the owner first demanded the money, and then the safe with its contents as delivered. *Duggee*, C. J., said that, "Ordinarily the place where lost property is found does not make any difference." The finder of lost goods, to be guilty of larceny, must at the time of finding have formed the intent of appropriating them to his own use, *Griggs v. State*, 58 Ala. 425; and the circumstances apparent at that time must determine whether he believed the owner could be found by reasonable diligence, *Brooks v. State*, 35 Ohio St. 46. See also *State v. Dean*, 49 Ia. 73.

• SECTION II.

• 98

MANDATUM.

When the commission is gratuitous, there also the transaction is for the exclusive benefit of the bailor, and the bailee is held only for gross negligence. In deposit the safe-keeping is the principal matter; in mandate, the work to be done with or about the thing. Hence the first is said to lie in custody, the second in feasance.

The cases are not very numerous either as to deposit or mandate. Perhaps because both are gratuitous; and it is not often that persons undertake to do anything of importance for another without compensation.

The name *mandatum* was first used in England by *Bracton*, who borrowed it from the civil law; afterwards the word commission was commonly used; but in recent times this is generally applied to dealings with factors, brokers, &c., for compensation, or to the compensation itself; and Sir *William Jones* returned to *Bracton's* word, which has since been generally used.

It is an important and difficult question, what is the *ground* of the obligation of any party, who undertakes *gratuitously* to do any thing in relation to any goods. Sir *William Jones* says he is bound to do, and is responsible for not doing. (a) But an examination of the cases would lead to a distinction not always regarded. If one has property intrusted to him, in order that he may do something in or about or with that property, if he accepts the property and the trust, this is a contract on a consideration; and he is liable in an action *ex contractu* for any failure in the discharge of his obligation. But if one be requested to do something in relation to certain property, which * is not put * 99 into his possession, nor any consideration paid him, although he undertake to do what is requested, he is under no obligation;

(a) *Jones on Bailm.* 56. He borrows *suscipere*. *Si susceptum non impleverit, tenetur. Quod mandatum suscepit, tenetur, et si non gessisset.*" *Balfe v. West*, 22 E L. & E. 506; s. c. 18 C. B. 466.

there is no contract, because no consideration. He is therefore not liable for not doing; but if he begins to do, that is, enters upon the execution of his agency (for it is that rather than a mandate at common law), and then fails to do what he undertakes to do, he is liable for malfeasance; but only in an action *ex delicto*, and not *ex contractu*. (b)¹ The case of *Thorne v. Deas*, (c) in fact, rests upon this distinction, and is therefore properly decided; but it is treated as a case of mandate, and an elaborate examination of authorities leads the learned court to the rule that no mandatary is liable, unless he, in addition to his acceptance of the property and the trust, enters upon an execution of it, and then fails therein. This rule, as applicable to the mandatary properly so called, admits much doubt, although we acknowledge that the question is encumbered with some difficulties.

It has indeed been very strenuously insisted upon in several instances, by able and learned writers, that mandates and deposits are not contracts; and that the liability of bailees of this class rests wholly upon the ground of tort. If this were to be taken as the true rule of law, it might occasion serious inconvenience. For it is doubtful whether gratuitous bailees could be made liable in tort in several cases to which it has generally been supposed that their liability extended. But we think there is no insuperable objection to considering mandates and deposits as contracts, and enforcing the obligations arising out of them by the action of assumpsit. It is obvious that the only objection to so considering them is the alleged want of a sufficient consideration. But we regard it as well settled by the authorities, that the delivery and acceptance of the goods constitute a sufficient consider-

* 100 eration. (d) Nor do we regard it as * an unreasonable

(b) *Wilkinson v. Coverdale*, 1 Esp. 74; *French v. Reed*, 6 Binn. 308; *Seller v. Work*, 1 Marsh. on Ins. 290.

(c) 4 Johns. 84. See *infra*, p. * 103, note (f).

(d) This was adjudged for the first

time, we believe, in the King's Bench, in 44 Eliz. in the case of *Riches v. Briggs*, Yelv. 4; s. c. Cro. E. 883. In that case the plaintiff declared, that in consideration of having delivered to the defendant twenty quarters of wheat, the defendant

¹ *Jenkins v. Bacon*, 111 Mass. 373, decided that a gratuitous bailee who bought a bond at the plaintiff's request, which he was to keep for him and collect the coupons for the benefit of the plaintiff's wife, and who subsequently sent the bond to the wife without her or the plaintiff's authority, was liable for its loss without regard to the question of diligence or negligence on his part. *Morton*, J. dissented, relying on *Heugh v. London, &c. Co.* L. R. 5 Ex. 51, on the ground that it was for the jury to say whether under the circumstances the bailee was negligent in undertaking to send, or in the mode of sending, the bond.—That whether a gratuitous bailee has been guilty of gross negligence is a question of fact, not of law, see *Carrington v. Ficklin*, 32 Gratt. 670. See also *Kowing v. Manly*, 49 N. Y. 192.

doctrine upon principle. It is true that the bailee does not ordinarily derive any benefit from such a transaction ; * but * 101

promised upon request to deliver the same wheat again to the plaintiff. And this was adjudged, on a motion in arrest of judgment, to be a good consideration. But the case is said to have been afterwards reversed in the Exchequer Chamber. The same point arose again in 2 Jac., in the case of *Game v. Harvie*, Yelv. 50, and in 6 Jac. in the case of *Pickas v. Guile*, Yelv. 128. In both of these cases, the Court of King's Bench followed the decision of the Exchequer Chamber, reversing *Richee v. Briggs*, but at the same time said that that case was erroneously reversed. Afterwards, in 21 Jac., the same point arose again in the case of *Wheatley v. Low*, Cro. J. 668. In this case the plaintiff declared, that whereas he was obliged to J. S. in forty pounds for the payment of twenty pounds; and the bond being forfeited, he delivered ten pounds to the defendant, to the intent he should pay it to J. S. in part of payment *sine mord*; that in consideration thereof the defendant assumed, &c. The defendant pleaded non-assumpsit, and a verdict having been found for the plaintiff, it was moved in arrest of judgment that this was not any consideration, because it was not alleged that he delivered it to the defendant upon his request; and the acceptance of it to deliver to another *sine mord* could not be any benefit to the defendant to charge him with this promise, *Sed non allocatur*; for, since he accepted this money to deliver, and promised to deliver it, it was a good consideration to charge him. This judgment was affirmed in the Exchequer Chamber on a writ of error. This case was sanctioned to the fullest extent by Lord *Holt*, in *Coggs v. Bernard*. He there says : "There has been a question made ; if I deliver goods to A, and in consideration thereof he promises to redeliver them, if an action will lie for not redelivering them ; and in Yelv. 4, judgment was given that the action would lie. But that judgment was afterwards reversed, and, according to that reversal, there was judgment afterwards entered for the defendant in the like case, Yelv. 128. But those cases were grumbled at, and the reversal of that judgment in Yelv. 4, was said by the judges to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged in 2 Cro. 667, Tr. 21, Jac. 1, in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor

no consideration, in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession." *Wheatley v. Low*, has always been considered as good law from that time to this. We are not aware that any adjudged case has cast any doubt upon it, at least so far as the point in question is concerned. On the other hand, there are numerous cases in which assumpsit has been sustained on no other consideration than what existed in that case. Thus, in the case of *Shiells, assignee of Goodwin v. Blackburne*, 1 H. Bl. 158, the defendant, who was a general merchant in London, having received orders from his correspondent in Madeira to send thither a quantity of leather cut out for shoes and boots, employed Goodwin, the bankrupt, who was a shoemaker, to execute the order. Goodwin accordingly prepared the leather for the defendant, and at the same time prepared another parcel of the same kind of leather on his own account, which he packed in a separate case, to be sent to Madeira on a venture, requesting the recommendation of the defendant to his correspondents in the sale of it. The two cases were sent to the defendant's house, with bills of parcels ; and he, to save the expense and trouble of a double entry at the custom-house, voluntarily and without any compensation, by agreement with Goodwin, made one entry of both the cases, but did it under the denomination of *wrought leather*, instead of *dressed leather*, which it ought to have been. In consequence of this mistake, both cases were seized, and this action was brought by the assignee of Goodwin, to recover the value of the leather which he had prepared on his own account. The first count in the declaration stated, that the bankrupt before his bankruptcy was possessed of a quantity of leather, which he designed to export to the island of Madeira, for which purpose it was necessary that a proper entry of it should be made at the custom-house ; that the defendant, in consideration that the bankrupt would permit him to enter the said leather at the custom-house, undertook to enter it under a right denomination ; that the bankrupt, confiding in the undertaking of the defendant, did permit him to enter

this is not necessary in order to constitute a good consideration. It is sufficient, if an injury accrues or may accrue to the bailor, or if he parts with a present right. That such is the case, it would seem that there could be no doubt. He intrusts his goods to the bailee, and thereby renders them liable to be lost or injured. ~~He parts with his present control over them, and perhaps renders himself unable to give the trust to any one else, or to execute it himself.~~

But although it thus appears that gratuitous bailees may be made liable *ex contractu*, if they have not performed their contract, it is obvious that they may also be made liable *ex delicto*, if they have committed a tort upon the property intrusted to them.

And it is in reference to their liability *ex delicto* that the * 102 * distinction, which has occasioned so much discussion in

it at the custom-house for exportation; that the defendant did not enter it under a right denomination, but, on the contrary, made an entry of it under a wrong denomination, by means whereof, &c. If there can be any possible doubt whether this count is wholly in assumpit, it may be observed, that it was joined with a count for goods sold and delivered, and a count on a *quantum meruit*. In the case of *Whitehead v. Greetham, McClel. & Y.* 206, in the Exchequer Chamber, the declaration stated, that whereas the plaintiff, at the special instance and request of the defendant, retained and employed the defendant to lay out a certain sum of money for the plaintiff, in the purchase of an annuity, to be well and sufficiently secured, he the said defendant undertook to use due and sufficient care to lay out the said sum of money in the purchase of an annuity, the payment whereof should be well and sufficiently secured; and the said plaintiff in fact saith, &c. Judgment having been given for the plaintiff in the King's Bench, a writ of error was brought, and the error relied on was, that no sufficient consideration appeared on the face of the declaration. The ground relied on, however, by *Tindal*, for the plaintiff in error, was, not that the intrusting the defendant with the money was not a sufficient consideration, but that it did not sufficiently appear from the declaration that that was the consideration of the defendant's promise. He said: "It was essential to the establishment of his case that the moving cause of the defendant's promise was the plaintiff's having intrusted him with this money to lay out, and there is nothing in

the count in question to show that." *Sed non allocatur*, for per *Best*, C. J., delivering the judgment of the court: "The count has averred that the plaintiff, at the defendant's request, retained the defendant to lay out a sum of money in the purchase of an annuity, and delivered him £700 for that purpose; and that the defendant undertook, and faithfully promised the plaintiff to use due and sufficient care to advance and lay out that money in the purchase of an annuity, the payment whereof should be well and sufficiently secured. *Coggs v. Bernard* decides, that the mere delivery of the article is abundant consideration. There the consideration was the delivery of brandy. The same consideration exists here, because money was delivered. It is said it does not appear that the delivery was the consideration of the defendant's promise. But the money was delivered by the plaintiff's hand to the defendant, which, in law, raises a responsibility in the defendant for its application; and when that fact is found by the jury, and that immediately after a promise was made by the defendant to the plaintiff, must it not be taken that the promise was in consideration of the delivery?" The case of *Doorman v. Jenkins*, 2 A. & E. 256, is equally in point. That was an action of assumpit, and the declaration was very similar to those that we have already considered, and no objection taken to it. See also *Shillibeer v. Glyn*, 2 M. & W. 143; *Rutgers v. Lucet*, 2 Johns. Cas. 92; *Robinson v. Threadgill*, 13 Ired. L. 39. And see *ante*, vol. i. p. *447; *Eddy v. Livingston*, 35 Mo. 487; *Delaware Bank v. Smith*, 1 Edm. Sel. Cas. 351.

our books, between non-feasance and misfeasance becomes important. It seems sometimes to have been supposed that this distinction has reference to their liability *ex contractu*; that a mandatary does not incur any obligation *ex contractu* until he enters upon the execution of his trust, but that he does incur such obligation when he enters upon the trust, and fails to go through with it or does it badly; and that if the mere delivery of the goods imposes such obligation, it is not on the ground that such delivery with the acceptance constitutes a good consideration, but on the ground that it amounts to a part execution of the trust. This, however, we must regard as erroneous.

It is very difficult to understand how a man can become liable *ex contractu* for not completing a work which he has begun, when he was under no legal obligation to begin it. But when we consider the distinction between non-feasance and misfeasance in reference to liability in tort, it becomes very intelligible. (e) The

(e) The position which we have endeavored to maintain, that the distinction between *misfeasance* and *non-feasance* has exclusive reference to liability sounding in tort, is fully supported by the case of *Benden v. Manning*, 2 N. H. 289. It was an action of assumpsit against a tailor for making a coat in an unskillful and improper manner, which he had contracted to make in a skilful and proper manner. The consideration for the promise laid in the declaration was a certain sum of money in that behalf paid. At the trial, the defendant objected that there was no evidence to prove the consideration so laid. The court instructed the jury that the evidence, if believed, was sufficient to prove the consideration alleged, and the jury having returned a verdict for the plaintiff, the defendant filed a bill of exceptions, and brought a writ of error. And the court having decided that there was no evidence to prove the consideration alleged, the defendant in error contended that the action might be supported on the ground of a misfeasance. But *Richardson*, C. J., said: "It has been contended on the part of the defendant in error that this action is brought to recover damages, not for a mere *non-feasance*, but for a *misfeasance*, and therefore it was unnecessary to allege or prove a consideration. It is very clear that no man can be liable for the mere non-performance of a promise made without consideration; of course, when an action is brought to recover damages for the non-performance of a contract, a consideration must be alleged and proved. But when one man does another an injury, by unskillfully and improperly doing what he had promised to do, an action may be maintained to recover the damage, although there was no consideration for the promise. The reason of this distinction is very obvious, but it is a distinction that cannot avail the defendant in error. His action was assumpsit, founded upon the breach of certain promises alleged to have been made upon certain considerations. The very gist of the action was the breach of a valid contract. But, if the promises were made without consideration, they were mere *nuda pacta*, and no action could be maintained upon them. And if the consideration alleged were not proved, the action was not supported. But if, instead of assumpsit, a special action upon the case had been brought for *misfeasance*, it is very clear that no consideration need have been alleged or proved. The gist of such an action would have been the *misfeasance*, and it would have been wholly immaterial whether the contract was a valid one or not." See also *Elsee v. Gatward*, 5 T. R. 143, which substantially recognizes the same distinction. — If our positions are correct, it follows, that in all cases of proper mandate, that is, where property is intrusted, the bailor may have two remedies for any injury done him by the bailee. He may have an action of assumpsit for a breach of contract on the part of the bailee; or if the conduct of the bailee amounts to an actionable tort, the bailor may waive the contract, and bring an action sounding

* 103 common law looks upon an injury which * accrues from mere *non-feasance* as too remote to lay the foundation for an action of tort; for this purpose it requires that the injury should be the direct and immediate consequence of the conduct complained of. (f)

Bankers are so far mandataries, that they receive notes for collection, and render similar services, without specific pay; but they certainly do this for the sake of the general and indirect benefit they derive from the business, and are undoubtedly liable for negligence in the discharge of the duties they undertake. (g) But a further question has arisen in relation to banks of deposit and collection. It is this: If a notary, another bank, or other agent employed by a bank for collection is negligent or mistaken as to demand or notice, and, by this or any other negligence or error, prevents or retards the collection of the money, is the bank responsible to the holder, and how far? Some courts have held that the bank is only an agent to employ a sub-agent to do what it cannot do itself, and therefore its responsibility should be only

for due care and skill in selecting and employing the sub-
* 104 agent, (h) while others hold that * the bank is an agent

in tort. On the other hand, in cases of mere gratuitous agency, where no property is intrusted, the only remedy which the principal can have against the agent is by an action *ex delicto*. And if the agent has committed no act which amounts to an actionable tort, the principal is without remedy. It should be observed, however, that the delivery of a letter to be carried from place to place, or the delivery of a promissory note or bill of exchange for the purpose of collection would probably be held to be proper mandates, and the bailee in such cases would be held liable *ex contractu*. Robinson v. Threadgill, 13 Ired. L. 41.

(f) See Salem Bank v. Gloucester Bank, 17 Mass. 1. The leading case on this point in this country is Thorne v. Deas, 4 Johns. 84, already referred to. In that case A and B being joint owners of a vessel, A voluntarily undertook to get the vessel insured, but neglected to do so, and the vessel was afterwards lost. The court held, that no action would lie against A for the non-performance of this promise, though B sustained a damage thereby. See also Balfe v. West, 22 E. L. & E. 506; s. c. 13 C. B. 486.

(g) Smedes v. Bank of Utica, 20 Johns. 372; s. c. 3 Cowen, 662; Bank of

Utica v. McKinster, 11 Wend. 473; Mechanics Bank v. Merchants Bank, 6 Met. 18. Chancellor Kent says: "Receiving a letter to deliver, or money to pay, or a note by a bank to collect, and by negligence omitting to perform the trust, the mandatary, though acting gratuitously, becomes responsible for damages resulting from his negligence. The delivery and receipt of the letter, money, or note, creates a sufficient consideration to support the contract, and is a part execution of it." See 2 Kent, Com. 571, n. (a).

(h) It seems to be held, in the following cases, that where bills or notes are deposited with a bank for collection, the bank is an agent to collect, and not merely to transmit for collection, and is liable for the neglect of any of its agents, however proper the selection may have been. Allen v. Merchants Bank, 22 Wend. 216, overruling s. c. in 15 Wend. 482. Bank of Orleans v. Smith, 3 Hill (N. Y.), 560; Montgomery Co. Bank v. Albany City Bank, 3 Seid. 459; Van Wart v. Wooley, 3 B. & C. 499; Thomson v. Bank of South Carolina, 3 Hill (S. C.), 77; Mechanics Bank v. Earp, 4 Rawle, 384; Taber v. Penett, 2 Gallison, 565. See also, as to the general principle, *ante*, vol. i. p. *84.

for collection, and is itself responsible for due care and skill in all the acts and measures necessary for collection, whether they are performed through the officers of the bank, or through other agents employed by the bank. (i) The authorities on this subject cannot be reconciled. We suppose a different doctrine will be held in different States, according to the decisions of each State. These authorities are gathered in the three preceding notes.

A cashier of a bank is its agent for many important purposes; and the United States Supreme Court have held (two justices dissenting) that he has, by virtue of his office, the power to certify a check and bind the bank by his certificate. (ii)¹

A bank has also a lien on its deposits for the general balance it has against the depositor, (j)² unless the deposit is made by an agent for a principal who is the only owner of the property. But if so made, and the bank knows this agency; or if not knowing it, and supposing the agent to be owner, the bank has made no advance to the agent as depositor on the security of the deposit, the bank has no lien. (k)³

(i) That the bank is responsible only for due care and diligence in selecting its agents, and in transmitting or submitting the papers to them, may be gathered from *Fabens v. Mercantile Bank*, 23 Pick. 330; *Dorchester and Milton Bank v. New England Bank*, 1 Cushing, 177; *Warren Bank v. Suffolk Bank*, 10 Cushing, 583; *East Haddam Bank v. Scovil*, 12 Conn. 303; *Jackson v. Union Bank*, 6 Har. & J. 140; *Baldwin v. Bank of Louisiana*, 1 La. An. 15; *Bellemire v. Bank of U. S.* 4 Whart. 106. That banks which receive bills for transmission only, are responsible only for due care and diligence in transmitting, is the doctrine of *Mechanics Bank v. Earp*, 4 Rawle, 884, and *Bank of*

Washington v. Neale & Triplett, 1 Pet. 25. It may be inferred, perhaps, from C. J. Marshall's language in this last case, that the Supreme Court of the United States would extend the responsibility of a bank for collection, over the conduct of all its agents.

(ii) *Merchants Bank v. State Bank*, 10 Wallace, 604. See also *Pope v. Bank of Albion*, 59 Barb. 226.

(j) *Brandao v. Barnett*, 3 C. B. 531; 12 Cl. & F. 787; 3 M. G. & S. 590; *Jones v. Starkey*, 11 E. L. & E. 235.

(k) *Bank of Metropolis v. N. E. Bank*, 6 How. 212. But see, as perhaps *contra*, *Lawrence v. Stonington Bank*, 6 Conn. 521.

¹ *Cook v. State Bank*, 52 N. Y. 96; but an assistant-cashier cannot so certify in the absence of usage. *Pope v. Albion Bank*, 57 N. Y. 126. So a cashier, by signing a transfer in blank upon the back of a certificate of stock fraudulently altered, will estop the bank from denying its genuineness. *Morse v. Massachusetts Bank*, 1 Holmes, 209; and a cashier's refusal to transfer stock held by it as collateral, binds the bank, *Case v. Bank*, 100 U. S. 446. As to the further ability of a cashier to bind the bank, see *Cocheco Bank v. Haskell*, 51 N. H. 116; *West Bank v. Shawnee Bank*, 95 U. S. 557; *Dorsey v. Abrams*, 85 Penn. St. 299; *Ziegler v. Bank*, 93 Penn. St. 393. So a teller's fraudulent statement, that a certificate of deposit signed by a firm, the members of which were the bank's president and cashier, is the same as the bank's certificate, binds the bank, *Steckel v. Bank*, 93 Penn. St. 376; and where a bank officer induced one to sign a note, fraudulently representing it as a receipt, the bank cannot recover, *Resh v. Bank*, 97 Penn. St. 357.

² *Australia Bank v. White*, 4 App. Cas. 413.

³ Where an insurance agent, as such, deposited premiums collected with a bank, with the latter's knowledge, against which to draw checks for transmission, it was held, in an action brought by the insurance company to recover the balance of such fund, that a lien

A mandatary, as we have already intimated, is generally bound to exercise only slight diligence, and is responsible only for gross neglect. (*l*) The parties may, however, vary the

(*l*) The Roman law seems to have been different in this respect. By that law every mandatary seems to have been bound to bestow on the matter with which he was charged all the diligence and skill which the proper execution of it required. See Story on Bailm. § 173. Sir William Jones professed to follow the Roman law in this respect, but attempted to make a distinction between a mandate to carry and a mandate to perform a work, holding that the rule did not apply to the former, and that mandataries of that class were, like depositaries, liable only for gross negligence. *Essay on Bailm.* 52, 62. Mr. Justice Story is of opinion that there is no foundation for this distinction in the Roman law, and there certainly is none in our law. On the other hand, the rule is perfectly established with us that the same degree of diligence is required in cases of mandate, whether it be to carry or to perform work, as in cases of deposit. This was very authoritatively declared in the case of *Shiells v. Blackburne*, 1 H. Bl. 168, the facts of which are stated *ante*, p. *99, note (d). Lord Loughborough there observed: "I agree with Sir William Jones, that where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a ship-broker, or clerk in the custom-house, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries. But when an application, under the circumstances of this case, is made to a general merchant to make an entry at the custom-house, such a mistake as this is not to be imputed to him as gross negligence." See also, to the same point, *Stanton v. Bell*, 2 Hawks, 145; *Beardlee v. Richardson*, 11 Wend. 25. No definite rule can be laid down as to what will constitute gross negligence in each particular case. For this purpose, the nature

and circumstances of the case, and the terms of the contract, must be carefully attended to. In the case of *Fellowes v. Gordon*, 8 B. Mon. 415, the plaintiff, being indebted to the defendant, and holding a note against the owners of a certain steamer, delivered the note which he so held to the defendant to be collected through a certain house at New Orleans, with which the defendant, who had a house at Louisville, was connected, the proceeds to be applied to the payment of the defendant's demand. When the note was delivered, the plaintiff informed the defendant that the solvency of the boat and owners was doubtful, and that the only probable means of saving the claim was, to attach the boat at New Orleans on her first arrival there after the note became due, unless the note should be paid. The note was sent by the defendant to the house at New Orleans, by which it was presented and payment demanded, on the first arrival of the boat at that city, but on payment of \$100 (one-sixth only of the debt), the boat was permitted to depart, and on her arrival at Nashville a short time afterwards, she was attached for other debts and sold, before the note was returned to the plaintiffs, for an amount not sufficient to pay the attaching creditors. The court held this to be a breach of duty for which the defendant was liable. And Marshall, C. J., said: "Regarding the houses at Louisville and New Orleans as merely gratuitous bailees, still, having undertaken the commission, and proceeded in its execution, each was bound to proceed with reasonable care and diligence, according to the terms of the mandate. And a failure in the performance of this obligation was a breach of duty, for which, on well-established principles, the delinquent party is liable in case of loss produced by his neglect. A bailee, receiving property under particular directions as to its disposition, impliedly undertakes to dispose of it according to those directions, and may be made liable for the loss consequent upon his failure or neglect to do so, and especially if he actually proceed with the business committed to him." On the other hand, in the case of *Whitney v. Lee*, 8 Met. 91, where a prom-

did not exist on such fund in the bank's favor, because of an obligation due from the agent, although the fund included the agent's commissions. *National Bank v. Insurance Co.* 104 U. S. 54.

* terms of the contract at their pleasure by a special agreement. So a mandatary may impose upon himself an additional degree * of liability by his interfering with the property committed to his charge, by which its custody is rendered more insecure. (m) So it may be gathered from the cases, and from obvious reasons, that where the work to be done requires peculiar skill and care, and the mandatary undertakes it in such way as to be bound to go through with it, the want of the required skill and care would be negligence enough. (n)

isory note was delivered to the defendant, on his voluntarily undertaking, without reward, "to secure and take care of it," it was held, that he was not bound to take any active measures to obtain security, but was simply bound to keep the note carefully and securely, and receive the money due thereon when offered. Shaw, C. J., remarked: "The term, to 'secure,' may be deemed ambiguous, meaning either to obtain security, or to keep securely; but associated with the words 'take care of,' and being a gratuitous undertaking, we do not understand that the defendant was to take active measures to obtain security, but simply to keep the note carefully and securely, and receive the money due thereon, when offered. This last authority and duty would seem to result from the custody of the note. . . . The law has endeavored to make a distinction in the degrees of care and diligence to which different bailees are bound; distinguishing between gross negligence, ordinary negligence, and slight negligence; though it is often difficult to mark the line where the one ends and the other begins. And it must be often left to the jury, upon the nature of the subject-matter, and the particular circumstances of each case, with suitable remarks by the judge, to say whether the particular case is within the one or the other." See also Mechanics and Traders Bank v. Gordon, 5 La. An. 604.

(m) Nelson v. Macintosh, 1 Stark. 287; Bradish v. Henderson, 1 Dane, Abr. 310.

(n) See the remarks of Lord Loughborough in the case of Shiells v. Blackburne, quoted ante, p. * 104, note (l). Mr. Justice Heath, in the same case, said: "If a man applies to a surgeon to attend him in a disorder, for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence, if he undertook gratis to attend a sick person, because

his situation implies skill in surgery; but if the patient applies to a man of a different employment or occupation, for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable." But even a mandatary, whose occupation implies peculiar skill, is not required to exercise the greatest amount of skill; if he exercises such skill as is usually exercised by members of his profession, it is sufficient. The law upon this subject is admirably stated by Mr. Justice Porter, in the case of Percy v. Millaudon, 20 Mart. (La.) 68, 76. His language was as follows: "It is said by a writer of great authority [Pothier], who treats of the doctrine of mandate, that the mandatary cannot excuse himself by alleging a want of ability to discharge the trust undertaken. That it will not be sufficient for him to say he acted to the best of his ability, because he should have formed a more just estimate of his own capacity before he engaged himself. That, if he had not agreed to become the agent, the principal could have found some other person willing and capable of transacting the business correctly. This doctrine, if sound, would make the attorney in fact responsible for every error in judgment, no matter what care and attention he exercised in forming his opinion. It would make him liable to the principal in all doubtful cases, where the wisdom or legality of one or more alternatives was presented for his consideration, no matter how difficult the subject was. And if the embarrassment, in the choice of measures, grew out of the legal difficulty, it would require from him knowledge and learning, which the law only presumes to those who have made the jurisprudence of their country the study of their lives, and which knowledge often fails in them from the intrinsic difficulty of the subject, and the fallibility of human judgment. It is no doubt true,

*107 So if he enters upon the *undertaking, it is said that he must obey instructions, or be liable for his departure. (o) Indeed, it would be in that case gross negligence. But it might be otherwise, if the owner had no reason to believe that the mandatary possessed skill sufficient for the precise purpose for which he was employed; and certainly would be, if he had good reason to know that he had not the skill; as if, he gave a valuable watch to be repaired, to one whom he knew was not a watchmaker; or to one who, although a watchmaker, was known by him to be unaccustomed to watches of that kind. All these differences rest upon the ground of the presumed intention of the parties. And on the same principle, although the subject-matter of the mandate do not necessarily imply superior skill in the mandatary, still, if he is known to possess superior skill he is bound to exercise it. (p)

that if the business to be transacted presupposes the exercise of a peculiar kind of knowledge, a person who would accept the office of mandatary, totally ignorant of the subject, could not excuse himself on the ground that he discharged his trust with fidelity and care. A lawyer who would undertake to perform the duties of a physician; a physician who would become an agent to carry on a suit in a court of justice; a bricklayer who would propose to repair a ship, or a landsman who would embark on board a vessel to navigate her, may be presented as examples to illustrate this distinction. But when the person who is appointed attorney in fact has the qualifications necessary for the discharge of the *ordinary duties* of the trust imposed, we are of opinion that on the occurrence of difficulties in the exercise of it, which offer only a choice of measures, the adoption of a course from which loss ensues cannot make the agent responsible, if the error was one into which a prudent man might have fallen. The contrary doctrine seems to us, to suppose the possession, and require the exercise, of perfect wisdom in fallible beings. No man would undertake to render a service to another on such severe conditions. The reason given for the rule, namely, that if the mandatary had not accepted the office, a person capable of discharging the duty correctly would have been found, is quite unsatisfactory. The person who would have accepted, no matter who he might be, must have shared, in common with him who did, the imperfection of our nature; and consequently must be presumed just as liable to have mistaken the

correct course. The test of responsibility, therefore, should be, not the certainty of wisdom in others, but the possession of ordinary knowledge; and by showing that the error of the agent is of so gross a kind, that a man of common sense and ordinary attention would not have fallen into it. The rule which fixes responsibility, because men of unerring sagacity are supposed to exist, and would have been found by the principal, appears to us essentially erroneous."

(o) *Fellows v. Gordon*, 8 B. Mon. 415; *Ferguson v. Porter*, 8 Fla. 27. See note (i), *supra*.

(p) *Wilson v. Brett*, 11 M. & W. 113. This was an action on the case for negligence in riding the plaintiff's horse. The plaintiff had intrusted the horse in question to the defendant, requesting him to ride it to Peckham, for the purpose of showing it for sale to a Mr. Margetson. The defendant rode the horse to Peckham, and, for the purpose of showing it, took it into the East Surrey race-ground, where Mr. Margetson was engaged with others playing the game of cricket; and there, in consequence of the slippery nature of the ground, the horse slipped and fell several times, and in falling broke one of his knees. It was proved that the defendant was a person conversant with and skilled in horses. *Rofe*, B., before whom the cause was tried, told the jury that, under the circumstances, the defendant, being shown to be a person skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it. And the Court of Exchequer held this instruction to be correct. *Parke*, B., said: "I think the

* SECTION III.

* 108

COMMODATUM.

When a thing is borrowed, to be used by the borrower, without any reward or compensation to be received by the owner from him, this transaction resembles the two former, in so far as it is gratuitous. But it is unlike them, in that the benefit belongs exclusively to the bailee; and he is therefore bound to great care, and liable for slight negligence. (*q*)¹

What constitutes this negligence, or, in general, what are the rules which belong to this species of bailment, we cannot ascertain to any great extent from adjudicated cases, as there are few which distinctly decide such questions. But in the case of *Coggs v. Bernard*, so often cited, *Holt* lays down certain principles, which he takes from *Bracton*, who borrows them from the civil law. Resting upon such authority, and also upon manifest reason and justice, they may be deemed the rules of law on this subject; and we give them in a note below, in the words of *Holt*. (*r*)

case was left quite correctly to the jury. The defendant was shown to be a person conversant with horses, and was therefore bound to use such care and skill as a person conversant with horses might reasonably be expected to use; if he did not, he was guilty of negligence. The whole effect of what was said by the learned judge as to the distinction between this case and that of a borrower, was this: that this particular defendant, being in fact a person of competent skill, was in effect in the same situation as that of a borrower, who in point of law represents to the lender that he is a person of competent skill. In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it." *Alderson*, B.: "The learned judge thought, and correctly, that this defendant being shown to be a person of competent skill, there was no difference between his case and that of a borrower; because the only difference is, that there the party bargains for the use of competent skill, which here becomes immaterial, since it appears that the defendant has it." *Rofe*, B. "The dis-

tinction I intended to make was, that a gratuitous bailee is only bound to exercise such skill as he possesses, whereas a hirer or borrower may reasonably be taken to represent to the party who lets, or from whom he borrows, that he is a person of competent skill. If a person more skilled knows that to be dangerous which another not so skilled as he does not, surely that makes a difference in the liability. I said I could see no difference between *negligence* and *gross negligence* — that it was the same thing, with the addition of a vituperative epithet." It does not distinctly appear by the report of this case whether the bailor knew that the bailee possessed superior skill or not. We think, however, it must be presumed that he did not know it, or at least had reason to suppose that such was the case. See *ante*, p. * 98, note (*i*).

(*q*) *Phillips v. Condon*, 14 Ill. 84. See also to same effect, *Howard v. Babcock*, 21 Ill. 250, where the liability is carefully stated; and also *Bennett v. O'Brien*, 37 Ill. 250.

(*r*) "As to the second sort of bailment, namely, *commodatum*, or lending *gratis*, the borrower is bound to the strictest care

¹ *Hagebush v. Ragland*, 78 Ill. 40.

* 109 * It would seem that a gratuitous lender for use, is liable to the party to whom he lends, for mischief directly resulting from the unsafe condition of the article, if that be known to the lender. (s)

SECTION IV.

PIGNUS.

We now enter upon a topic of more interest, inasmuch as the questions which belong to it are of more frequent occurrence.

and diligence, to keep the goods so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable; as if a man should lend another a horse to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under, and it may be if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in *Bracton*, fol. 99 a; his words are: *Is autem cui res aliqua utenda datur, re obligatur, quae commodata est, sed magna differentia est inter mutuam et commodatum; quia is qui rem mutuan accepit ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incurru, consumpta fuerit, vel desperita, subtracta, vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alius eam diligenter potuit custodire; ad vim autem maiorem vel causam fortuitas non tenetur quis, nisi culpa sua intervenierit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus fuerit, et illam incursu hostium vel praedonum vel naufragio amiserit, non est dubium quin ad rei restitutionem teneatur.* I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servants leave the house or stable doors open, and the

thieves take the opportunity of that, and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse. *Bracton* says, the bailee must use the utmost care, but yet he shall not be chargeable where there is such a force as he cannot resist." See also *Scranton v. Baxter*, 4 Sandf. 5; *Booth v. Terrell*, 16 Ga. 20; 2 Ld. Raym. 916. A gratuitous loan is considered as strictly a personal trust, unless from other circumstances a different intention can fairly be presumed. This is well illustrated by the case of *Bringloe v. Morrice*, 1 Mod. 210. That was an action of trespass for immoderately riding the plaintiff's mare. The defendant pleaded that the plaintiff lent him the mare, and gave him license to ride her, and that by virtue of this license the defendant and his servant had ridden the mare alternately. The plaintiff demurred to the plea. And, *per curiam*, "The license is annexed to the person, and cannot be communicated to another; for this riding is a matter of pleasure." And *North*, C. J., took a difference, where a certain time is limited for the loan of the horse, and where not. In the first case, the party to whom the horse is lent hath an interest in the horse during that time, and in that case his servant may ride, but in the other case not. A difference was also taken between *hiring* a horse to go to York, and *borrowing* a horse; in the first place, the party may let his servant ride; in the second not. But where a horse was for sale, and the agent of the vendor let A have the horse for the purpose of trying it, A was held justified in putting a competent person upon the horse to try it, an authority to do so being implied. *Lord Camoys v. Scurr*, 9 C. & P. 883.

(s) *Blakemore v. E. & B. Railway Co.*, 92 Eng. C. L. 1036.

* A pledge is a bailment for the mutual benefit of both parties, for while the pledgee obtains security for his debt, the pledgor obtains credit or delay, or other indulgence. The bailee is therefore bound only to ordinary care, and is liable only for ordinary neglect. If the pledge be lost by an intrinsic defect, which might possibly have been remedied, or by a casualty which might possibly have been prevented, or by superior force which might possibly have been resisted, the bailee is still not responsible, unless he was in positive default. (t)

He has a special property in the pledge; and may maintain any action, which requires such property in the plaintiff, against a third party, for an injury to the pledge; (u) and a judgment in such action brought by the pledgee or by the pledgor would bar an action for the same cause by the other party. (v) And

(t) *Commercial Bank v. Martin*, 1 La. An. 344. In this case the court say that a pledgee is bound to take that care of the property pledged which a prudent person (*diligens paterfamilias*) would take of his own. But he is not bound to use the utmost diligence. And where it becomes necessary for a pledgee, in the exercise of the diligence required of him, to employ an agent on account of his particular profession and skill, he will not be responsible for the misconduct or neglect of the latter, where reasonable care was shown in the choice of the agent, as to his skill and ability. See also *Exeter Bank v. Gordon*, 8 N. H. 66; *Goodall v. Richardson*, 14 id. 567. The general rule of law, where a person receives bonds or notes for collection, as collateral security for a debt, is that he is bound to use due diligence; and if they are lost through his negligence, by the insolvency of the makers, he is chargeable with the amount. *Noland v. Clark*, 10 B. Mon. 239.

(u) It is also decided in the case of *Gibeon v. Boyd*, 1 Kerr, 150, that an action will lie in favor of the pawnee against the general owner, when the rights of the former are invaded by the latter. That was an action of replevin for a mare. It appeared that the mare in question was the property of the defendant, and had been delivered by him to the plaintiff as a pledge. The defendant afterwards took the mare from the plaintiff's possession, whereupon the plaintiff brought this action, and the court held that he was entitled to recover. *Chipman*, C. J., said: "This is an action of replevin for a mare, in

which the defendant pleaded property in himself, and also property in a third person; and the plaintiff replied to each plea that the property was in himself; upon which issue was taken. From the testimony in the case, it appeared that the mare belonged to the defendant, and was delivered to the plaintiff as a security for a debt due from the defendant to the plaintiff; the contract between them therefore was clearly that of a pawn or pledge; and the defendant and plaintiff stood in the situation of pawnor and pawnee. In this state of things the defendant took the mare from the plaintiff. It is now contended on the part of the defendant, that he being the general owner of the mare, the plaintiff cannot maintain this action of replevin against him. It is admitted to be clear law that the pawnee may maintain replevin against a stranger, and the right to retain the thing pawned, until the debt is paid, cannot be *perfect* unless this right of possession is *indefeasible*, and not liable to be invaded or interfered with by the debtor, although he be the general owner of the thing pawned. The fallacy of the argument on the part of the defendant appears to lie in the extent of signification given to the term 'general owner.' He remains the general owner, subject to the right of the pawnee; he has parted with his absolute right of disposing of the chattel until he has redeemed it from its state of pledge. . . . There cannot, I conceive, be a particle of doubt that this action is maintainable."

(v) 48 Ed. 3, 20 b, pl. 8; 20 H. 7, 5, b, pl. 15; *Flewelling v. Rave*, 1 Bulst. 68.

* 111 he * is undoubtedly bound to do all that may be proper or necessary to preserve the value of the pledge. Hence it has been held, that where a party receives negotiable paper from his debtor, with the debtor's indorsement, as collateral security for his demand, and not as agent merely, it is his duty to present the same for payment when due, and take the proper steps to charge the debtor as indorser; and, failing to do this, he makes the paper his own. (w)

He has generally only a right to hold; and if he uses, it is at his own peril; and he is liable for any loss which occurs while using. If he derive a profit from this use, he must allow for it; unless this use was equally profitable to the owner. If the pledge be a horse, the bailee may use it enough to keep the horse in health, without paying for this use; but if he take a journey with it he must pay. He may milk a cow, and indeed ought to, because not to milk her would injure the owner, by hurting the cow; nevertheless he must account for the milk, because he derives a positive profit from it. The question of use sometimes resolves itself into more or less of resulting injury; thus, he may use, carefully, books, although perhaps any use of them implies some slight injury; but not clothes, for these are more rapidly worn out, and necessarily more injured by use. (x) But even if he use the pawn tortiously without putting it out of his possession, it is said that he is only liable to an action; his lien upon it not being thereby terminated. (y) But his lien is terminated by a tender of the debt. (yy) The lien of the pledgee and the rules of law applicable to it, are considered in our chapter on Liens.

In all cases the pledgee must account for income or
* 112 profits * derived from the pledge; (yz) and where he is

(w) *Jennison v. Parker*, 7 Mich. 355. See *Roberts v. Thompson*, 14 Ohio (N. S.), 1.

(x) In *Coggs v. Bernard*, Lord *Holt* makes the following remarks upon the right of the pledgee to use the pledge while in his possession: "If the pawn be such as it will be the worse for using, the pawnee cannot use it, as clothes, &c.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them. But then she must do it at her peril, for whereas if she keeps them locked up in her cabinet, if her cabinet should be broken open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she

will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is *Owen*, 123. But if the pawn be of such a nature as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c., then the pawnee may use the horse in a reasonable manner, or milk the cow, &c., in recompense for the meat." See also *Mores v. Conham, Owen*, 123; *Anonymous*, 2 *Salk.* 522; *Thompson v. Patrick*, 4 *Watts*, 414.

(y) *Thompson v. Patrick*, 4 *Watts*, 414.

(yy) *Haskins v. Kelly*, 1 *Rob.* 160.

(yz) *Hunsaker v. Sturgis*, 29 *Cal.* 142.

put to expense or extraordinary trouble to preserve the value of the pledge, he may charge the owner for it, unless there be a bargain to the contrary, or the nature of the case negatives his right to make such charge.

If the pledge be stolen from him he is not liable, unless the theft arose from or was connected with a want of ordinary care on his part. (z) By the civil law, the theft raised the presumption of neglect, and the bailee was responsible unless he could show an absence of negligence on his part. We doubt whether this be the rule of the common law. If the pledge be stolen, the theft does not of itself discharge the bailee; but the bailor may make him responsible by showing that it happened through a want of ordinary care.

By the civil law, in the case of *pignus*, the possession of the thing pledged passed to the creditor; in the case of *hypotheca*, the possession of the thing hypothecated remained with the owner. This distinction has not been deemed of great importance in England, and the difference between a pledge and a mortgage has not until lately been strongly marked. In recent times, however, and in this country, this distinction is assuming a new importance. In all our commercial cities, the *pledging* of personal property, especially of stocks, has become very common, and recent cases have established, or at least affirmed, rights and liabilities peculiar to such contract, and quite different from those which attend a mortgage. (a)

(z) Sir William Jones's distinction (*Essay on Bailm.* 75) between clandestine theft and violent theft, taken from the civil law, is not sustained by common-law authorities. See Co. Lit. 89 a; Southcote's case, 4 Rep. 83 b.

(a) In *Cortelyou v. Lansing*, 2 Caines Cas. 200, the distinction between a pledge and a mortgage, and the peculiar qualities of a pledge, are very fully and ably considered. In *Barrow v. Paxton*, 5 Johns. 260, the case of *Cortelyou v. Lansing* being cited by counsel, Kent, C. J., said: "That case was never decided by this court. It was argued once, and I had prepared the written opinion which appears in the report of Mr. Caines; but the court directed a second argument, which, for some reason or other, was never brought on, so that no decision took place on the points raised in the case. How my opinion got into print I do not know. It was probably lent to some of the bar, and a copy

taken, which the reporter has erroneously published as the opinion of this court." This circumstance may lessen its authority. But as Chancellor Kent has referred to it in his *Commentaries*, we venture to do so also. Whatever be its authority, of its instructiveness there can be no doubt. The learned judge says: "The note in question came under the strict definition of a pledge. It was delivered to the defendant, with a right to detain as a security for his debt, but the legal property did not pass, as it does in the case of a mortgage, with a condition of a defeasance. The general ownership remained with the intestate, and only a special property passed to the defendant. It is, therefore, to be distinguished from a mortgage of goods; for that is an absolute pledge, to become an absolute interest if not redeemed at a fixed time. Besides, delivery is essential to a pledge; but a mortgage of goods is, in certain

* 113 * It was undoubtedly a rule of the ancient common law of England that delivery was essential to a pledge; and the difference between a pledge and a mortgage consisted in this. The possession of the pledge passed to the pledgee, but the property did not pass; a thing mortgaged might remain in the possession of the mortgagor, but the right of property passed to the mortgagee. The pledgee held the pledge until his debt was paid, the pledge itself remaining the property of the pledgor. The mortgagee acquired the property of the thing mortgaged, the mortgagor parting with the property as in the case of a sale, reserving only the right to defeat the transfer and re-acquire the property by paying the debt. But this distinction has not always been recognized, or, at least, not accurately observed. It seems, however, to be now held, that possession of a pledge must be delivered to the pledgee; (*b*) that this possession may be according to the nature of the thing, and where the pledge does not permit of manual delivery, but consists of stocks, which are transferred upon the books of the company with issue of a new certificate, if the transfer be to secure a debt, and the debtor has a right to the restoration of the property on payment of the debt at any time, the transaction is a *pledge* and not a *mortgage*, although the *legal title* passes to the creditor. This is a very nice, and perhaps a difficult distinction; but, as a consequence of it, it is held, that the creditor takes the stock only to hold, and not to use; that the property is not in him; that he cannot sell

* 114 the stock until the debt is due, and that if it be *payable on demand, or payable presently without demand, he cannot sell until demand, even if it was agreed between the parties that he might sell without notice to the debtor; (*bb*) that if he sells, trover may be maintained against him by the debtor as for a wrongful conversion, although the debt be not paid.

cases, valid without delivery. The mortgage and the pledge or pawn of goods seem, however, generally to have been confounded in the books, and it was not until lately that this just discrimination has been well attended to and explained." See also *Homes v. Crane*, 2 Pick. 607; *Jones v. Smith*, 2 Ves. Jr. 372, 378; *Brownell v. Hawkins*, 4 Barb. 491; *Haskins v. Patterson*, 1 Edm. Sel. Cas. 201. In this last case, *Marvin*, J., said: "A mortgage is a sale of goods, with a condition that if the mortgagor performs

some act it shall be void. If the condition is not performed, the goods become the absolute property of the mortgagee. Before the happening of the contingency upon which the title is to be defeated or become absolute, the possession of the goods may be in the mortgagor or the mortgagee. In the case of a pledge, the property must be delivered to the pawnee. This is of the very essence of a pledge."

(*b*) See the cases cited in the preceding note.

(*bb*) *Campbell v. Parker*, 9 Bosw. 322

As to the damages, it seems that the debtor may recover, if the stocks had risen in value, that enhanced value. Whether, if the stocks had risen and fallen, the debtor is limited to the value at the time of the unauthorized sale, or may have the highest value down to the time of trial, is not certainly decided; but it seems that he may have the highest value. (c)

(c) All these points were elaborately considered in the case of *Wilson v. Little*, 1 Sandf. 851; s. c. 2 Comst. 443. It was an action on the case for not returning stock pledged, and for unlawfully selling the same. The case came on originally in the Superior Court of the city of New York, and was tried before *Sandford*, J. It appeared that on the 20th of December, 1845, the plaintiff borrowed of the defendant the sum of \$2,000, and gave his promissory note therefor, payable presently. The plaintiff at the same time transferred to the defendant fifty shares of the consolidated capital stock of the New York and Erie Railroad Company. The transfer was made on the books of the corporation, where it was standing in the plaintiff's name, and was absolute in its terms. In the note, however, given by plaintiff to the defendant, the stock was mentioned as having been deposited with the defendant "as collateral security," with authority to sell the same, on the non-performance of the promise contained in the note, without notice to the plaintiff. Afterwards, and between the 23d of December and the 3d of January, following the date of the loan, the plaintiff's agent applied to the defendant several times to repay the loan, and have the stock retransferred. The defendant did not comply with his request, and it afterwards appeared that he had sold the plaintiff's stock on the 24th or 25th of December. Between the 23d of December and the 3d of January, the market value of the stock in question rose from about sixty-eight dollars per share to eighty-five dollars per share. On these facts a verdict was taken for the plaintiff, subject to the opinion of the court. The court held, 1. That the defendant had no right to sell the stock until he had first demanded payment of the plaintiff. 2. That the measure of damages was the value of the stock on the 3d of January. Upon the first point, *Vanderpoel*, J., delivering the opinion of the court, said: "The defendant held the stock in question as pledgee. It was pledged to secure the payment of a note of \$2,000, payable on demand. A pledgee cannot dispose of the pledge until the

pledgor has failed to comply with his engagements. If the pledgee sells the pledge without authority, it is a violation of his trust. It is here contended, that as the note was payable on demand, the plaintiff was in default for not paying it the moment the note was given, and that the pledgee, before selling the stock, was not bound to demand the amount loaned. The cases of sale by the pledgee, to be found in the books, are generally those where notes were payable at a future day, and where the pledgee sold the thing pledged before the notes matured. There the pledgee was clearly in the wrong; for the pledgor had not failed to comply with his engagement. Where stock or other property is pledged as collateral security, to secure the payment of a note payable on demand, can the pledgee proceed to sell immediately, without first demanding the amount of the note? This, in the absence of judicial authority, would, to our minds, be repugnant to the fair import and spirit of the contract." After a careful examination of the authorities, the learned judge continues: "It may then be safely assumed, that where an article is pledged to secure a debt, payable on demand, the pledgee cannot sell without first demanding payment of the debt on demand. A contrary rule would, in its practical operation, be wholly destructive to the existence of a general property in the pawnor. Every vestige of the pawnor's interest in the pledge might be destroyed (and that too without his knowledge) within an hour after the pawnee is clothed with his mere special property." In reference to the measure of damages, the learned judge said: "It is contended that in *trotter* the true measure of damages is the value of the property at the time of its conversion, which, as the defendant contends, was on the 27th of December, when the stock ranged in the market from 67½ to 68 per cent. But the present is not in form, nor indeed is it in substance, an action of *trotter*. It is a special action on the case, and I cannot imagine why *assumpsit* could not also have been maintained, for not returning to the plaintiff

* 115 * In this power of disposal, the mortgagee differs greatly from a pledgee. For it is every day's practice for a mort-

his stock, after tender to the defendant of the amount for which it was pledged. . . . This not being an action of trover, the true measure of damages is the value of the stock on the 3d of January, when the stock was sold for \$85 per share. On that day the final interview took place between the defendant and Mr. Cutting, the agent of the plaintiff. The defendant's offer and conversation on that day may be regarded as constituting the final breach. But if it were otherwise, had the breach occurred earlier, the rule of damages would have been the highest value of the stock between the actual refusal of the defendant to return the same, on being offered the amount for which it was pledged, and the commencement of the suit." A question was made also as to whether the plaintiff should have tendered to the defendant the amount due him before bringing his action. The court, however, were of opinion, that the evidence proved that a tender was made, and so this point was not passed upon. The case was afterwards carried up to the Court of Appeals. In that court a question was raised which had not been suggested in the court below, namely, whether the transaction in question did not amount to a mortgage instead of a pledge, on the ground that the legal title to the stock became vested, by the transfer, in the defendant. Upon this part of the case, *Ruggles*, J., delivering the opinion of the court, said: "It is contended, on the part of the defendant, that the transaction was a mortgage and not a pledge; that the money was payable immediately, and the stock became absolutely the property of the appellant, and was only redeemable in equity. If this be true, the Supreme Court, and the court for the correction of errors must have rendered their judgments in the case of *Allen v. Dykers*, 3 Hill (N. Y.), 503; s. c. 7 id. 498, upon a mistaken view of the law. In that case, as in the present, there was a loan of money, a promissory note for the payment of the amount, in which it was stated, that the borrower had deposited with the lenders as collateral security, with authority to sell the same on the non-performance of the promise, 250 shares of stock therein mentioned. The money in that case was payable in sixty days—the sale was to be made at the board of brokers, and notice waived if not paid at maturity. The stock was assigned to the lenders

of the money, and the transfer entered on the books of the company, on the day the note was given. With respect to the question whether the stock was mortgaged or pledged, I can perceive no difference between that case and the present. The question does not appear, by the report of that case, to have been raised. It would have been a decisive point, for if it had been a mortgage, and not a pledge, the plaintiff must have failed. The sale of the stock in that case by the lender, before the maturity of the note, did not make it the less decisive. If there had been good ground for saying, in *Allen v. Dykers*, that the stock was *mortgaged* and not *pledged*, it is not to be believed that it would have escaped the attention of the eminent counsel who argued the cause, and of both the courts; and on examining the question, I am satisfied, that if the point had been taken, it would have been overruled. The argument of the defendant in this case is founded on the assumption, that when personal things are pledged for the payment of a debt, the general property and the legal title always remain in the pledgor; and that in all cases where the legal title is transferred to the creditor, the transaction is a mortgage and not a pledge. This, however, is not invariably true. But it is true that possession must uniformly accompany a pledge. The right of the pledgee cannot otherwise be consummated. And on this ground it has been doubted whether incorporeal things, like debts, money in stocks, &c., which cannot be manually delivered, were the proper subjects of a pledge. It is now held that they are so; and there seems to be no reason why any legal or equitable interest whatever in personal property may not be pledged; provided the interest can be put, by actual delivery or by written transfer, into the hands or within the power of the pledgee, so as to be made available to him for the satisfaction of the debt. Goods at sea may be passed in pledge by a transfer of the munitments of title, as by a written assignment of the bill of lading. This is equivalent to actual possession, because it is a delivery of the means of obtaining possession. And debts and choses in action are capable, by means of a written assignment, of being conveyed in pledge. The capital stock of a corporate company is not capable of manual delivery. The scrip or certificate may

gagee * to sell his mortgage, and by this sale transfer the * 116 right of property from himself to the purchaser, subject to

be delivered, but that of itself does not carry with it the stockholder's interest in the corporate funds. Nor does it necessarily put that interest under the control of the pledgee. The mode in which the capital stock of a corporation is transferred usually depends on its by-laws. It is so in the case of the New York and Erie Railroad Company. The case does not show what the by-laws of that corporation were. It may be that nothing short of the transfer of the title on the books of the company would have been sufficient to give the defendants the absolute possession of the stock, and to secure them against a transfer to some other person. In such case the transfer of the legal title being necessary to the change of possession, is entirely consistent with the pledge of the goods. Indeed it is in no case inconsistent with it, if it appears by the terms of the contract that the debtor has a legal right to the restoration of the pledge on payment of the debt at any time, although after it falls due, and before the creditor has exercised the power of sale. *Reeves v. Capper*, 5 Bing. N. C. 186, was a case in which the debtor 'made over' to the creditor, 'as his property,' a chronometer, until a debt of £50 should be repaid. It was held to be a valid pledge. In the present case, the note for the repayment of the loan and the transfer of the stock were parts of the same transaction, and are to be construed together. The transfer, if regarded by itself, is absolute, but its object and character are qualified and explained by the contemporaneous paper which declares it to be a deposit of the stock as collateral security for the payment of \$2,000, and there is nothing in the instrument to work a forfeiture of the right to redeem or otherwise to defeat it, except by a lawful sale under the power expressed in the paper. The general property which the pledgor is said usually to retain, is nothing more than a legal right to the restoration of the thing pledged, on payment of the debt. Upon a fair construction of the note and the transfer taken together, this right was in the plaintiff, unless it was defeated by the sale which the defendant made of the stock. In every contract of pledge there is a right of redemption on the part of the debtor. But in this case that right was illusory and of no value, if the creditor could instantly, without demand of payment and without notice,

sell the thing pledged. We are not required to give the transaction so unreasonable a construction. The borrower agreed that the lender might sell without notice, but not that he might sell without demand of payment, which is a different thing. The lender might have brought his action immediately, for the bringing an action is one way of demanding payment; but selling without notice is not a demand of payment; and it is well settled that where no time is expressly fixed by contract between the parties, for the payment of debt secured by a pledge, the pawnee cannot sell the pledge without a previous demand of payment, although the debt is technically due immediately." As to a tender by the plaintiff to the defendant of the debt due to the latter before bringing the action, the Court of Appeals held, that the defendant having voluntarily put it out of his power to restore the pledge, a tender of the money borrowed would have been fruitless, and was, therefore, unnecessary. As to the measure of damages the court adhered to the rule adopted by the court below, but based their judgment in this particular upon the special circumstances of the case. *Ruggles*, J., said: "The ground on which the defendant insists that the damages must be estimated according to the price of the stock on the 24th of December, is, that the plaintiff, on learning that the defendant had sold it, might then have gone into the market, and purchased at the current price on that day. But it is evident that he was prevented from doing so by the repeated promises of the defendant to restore the stock. Although the plaintiff was strictly entitled to a re-transfer of the same shares that were pledged, it appears that his broker was willing to receive other stock of the same description and value, which the defendant promised from day to day to give, the plaintiff being all the time ready to pay the money borrowed. Time having thus been given to the defendant, at his request, for the fulfilment of his obligation, and the plaintiff having waited for the delivery of the stock for the accommodation of the defendant, and having relied on the expectation thus held out, and lost the opportunity of purchasing at a reduced price, it is manifestly just that the plaintiff should recover according to the value of the thing pledged, when the defendant finally failed in his promises to restore it." But

* 117 the redemption of * the mortgagor. But the pledgee, having only the possession and not the property, cannot transfer the property; and holding only for security, cannot sell until the debt becomes due and is unpaid.

Where stock is pledged to a stockbroker, and a note given with it, stating that the stock was deposited as collateral security, with authority to sell the same at the board of brokers, if the note was not paid at maturity, evidence was offered of a uniform usage of brokers to dispose of stock so pledged at their pleasure, and at any time, before or after the maturity of the note, and when the debt was paid, return an equal number of shares of the same kind; but this evidence was rejected as contrary to the law regulating these transactions, and inconsistent with the express terms of the contract. (d) Nor could the broker, in any event, sell the stock privately, but only at the board of brokers, and openly, stating how it was held. (e)

although such a transfer operates as a pledge and not as a mortgage, it was nevertheless held, that the legal title passes to the pledgee, so as to entitle the pledgor to bring his bill to redeem and to have an account of the profits of the stock. *Hasbrouck v. Vandervoort*, 4 Sandf. 74. See also *Hardy v. Jandon*, 1 Rob. 261; *Diller v. Brubaker*, 52 Penn. 498.

(d) *Allen v. Dykers*, 3 Hill (N. Y.), 598; s. c. 7 id. 497; *The Hull of a New Ship*, *Daveis*, 199. See also, *Langton v. Horton*, 1 Hare, 549.

(e) Upon this point, *Walworth*, C., remarked: "The authority to sell the stock in question at the board of brokers, for the payment of the debt, if such debt was not paid when it became due, did not authorize the pledgees, even if they had retained the stock in their own hands, to put the same up secretly. But they should have put up the stock openly, and offered it for sale to the highest bidder, at the board of brokers; stating that it was stock which had been pledged for the security of this debt, and with authority to sell it at the board of brokers if the debt was not paid. In this way only the stock would be likely to bring its fair market value at the time it was offered for sale. And in this way alone could it be known that it was honestly and fairly sold, and that it was not purchased in for the benefit of the pledgees by some secret understanding between them and the purchasers. It is a well-known fact that shares of stock are con-

stantly sold at the board of brokers, which shares exist only in the imagination of the nominal buyers and sellers. Such sales, as everybody knows, are not legally binding upon either party. When a real sale, therefore, is to be made at the board of brokers, of shares of stock which have an actual existence, and which have been pledged for the payment of a debt, with authority to sell them at that board, the stock should be specifically described at the time of such sale, as so many shares standing in the name of the pledgee, and sold on account of the pledgor; so that if a full price is obtained for it on such sale, the pledgor of the stock may know that he is entitled to the benefit of the sale. For without such specification, the sale, if an advantageous one, may be put down as a sale of stocks of the pledgee, and which have been sold on his own account. Secret sales, therefore, cannot be sustained under such an agreement or authority." It should be observed, however, that Mr. Justice *Vanderpoel*, in the case of *Wilson v. Little*, already cited, was inclined to doubt the soundness of these views of the learned Chancellor. He says: "In *Dykers v. Allen*, 7 Hill (N. Y.), 498, *Walworth*, Chancellor, intimates or directs how stock, which is pledged, should be sold at the board of brokers. The soundness of his views as to the mode of selling does not, perhaps, come in question here. Were it presented by this case, I should incline very strongly to the opinion, that this part of the learned

It has, however, been held that a pledgee, if not forbidden by the terms of the pledge, may exchange the collateral securities held by him; but he does this on his own responsibility for any injury to the pledgor. (*ee*) And a recent decision in New York holds, that, in the absence of any special agreement, the broker in whose hands stocks pledged to him fall in value, must give notice to the pledgor that he may increase his margin, before the broker sells them. (*ef*)

* The pledgee may have his action of trover for the * 118 pledge against a third party who takes it from him, and recover its full value, because he is responsible over to the pledgor, (*f*) but in an action against one who derives title from the pledgor, he can recover only the amount of his debt. (*g*) And the pledgor retains sufficient property in the pledge to transfer it, subject to the pledgee's right, to any buyer, who, after a tender of the amount of the debt due, may maintain an action of trover against the pledgee. (*h*) Nor does such pledgee acquire an absolute title simply by the failure of the pledgor to pay the debt; there is no forfeiture until the pledgee's rights are determined by what is equivalent to a foreclosure. (*i*)

The holder of negotiable paper, even though it be accommodation paper, is not in contemplation of law a pledgee. He may, therefore, sell, discount, or pledge it, at his pleasure. (*j*) For when one has sent negotiable paper into the world, and given it credit and currency, he cannot protect himself against a *bona fide* holder for a valuable consideration, on the ground that he did not authorize it to be used except for some particular purpose. It has been held, however, that this rule with regard to negotiable paper, does not extend to a bill of lading. (*k*) And it has been said, in a peculiar case, however, that pledgees of negotiable paper must wait until it is mature, and then collect it, and cannot in the mean time sell it. (*l*)¹ And it has also been held,

Chancellor's judgment was uncalled for by the case, and has not, therefore, the weight of authority."

(*ee*) Girard Ins. Co. v. Marr, 46 Penn. St. 604.

(*ef*) Ritter v. Cushman, 7 Rob. 294.

(*f*) Harker v. Dement, 9 Gill, 7.

(*g*) Brownell v. Hawkins, 4 Barb. 491.

(*h*) Franklin v. Neate, 13 M. & W. 481.

(*i*) Brownell v. Hawkins, 4 Barb. 491.

(*j*) Appleton v. Donaldson, 3 Penn. St. 381; Jarvis v. Rogers, 13 Mass. 106.

(*k*) Newsom v. Thornton, 6 East, 17.

(*l*) Brown v. Ward, 8 Duer, 660.

¹ "Authority to sell at public or private sale" certain notes pledged as collateral to secure the pledgor's debt, will not authorize the pledgee to surrender them after due, having made no attempt to collect them, to the maker for a sum less than due, but

* 119 that if a creditor sells negotiable paper held * by him as security, he will be presumed to have taken it in payment of the debt. (m) And he must exercise due diligence in the collection of it, if he holds it as security. (mm) One who has given security for a note is not entitled to a return of his security merely because the note is outlawed. (mn)

An ordinary loan of stocks does not amount to a bailment, but to a sale, to be paid for in similar kind and quantity, as otherwise the purposes of a loan could not be effected. (n)

Although transfer of possession must accompany a pledge, a re-transfer to the owner for a temporary purpose, as agent or special bailee for the pledgee, does not impair the title or possession of the pledgee. (o)

(m) *Cocke v. Chaney*, 14 Ala. 65; *Hawks v. Hinchcliff*, 17 Barb. 492.

(mm) *Wakeman v. Gowdy*, 10 Bosw. 208.

(mn) *Jones v. Merchants Bank*, 6 Rob. 162.

(n) Per *Walworth*, C., in *Dykers v. Allen*, 7 Hill (N. Y.), 497.

(o) *Hayes v. Riddle*, 1 Sandf. 248; *Reeves v. Capper*, 5 Bing. (N. C.) 198. In this last case one Wilson, the captain of a ship, pledged his chronometer, then in the possession of the makers, to the defendants, the owners of the ship, in consideration of their advancing him £50, and allowing him the use of the instrument during a voyage on which he was about to depart. After the voyage was ended he placed it at the makers' again, and then pledged it to the plaintiff, for whom the makers, being ignorant of the pledge to the defendants, agreed to hold it. The money advanced by the defendants not having been repaid, it was held, that the property in the instrument was in the defendants. The counsel for the plaintiff contended, that the possession of the chronometer having been parted with by the defendants, their property in it was entirely lost, upon the ground, that where the party to whom a personal chattel is pledged parts with the possession of it, he loses all right to his pledge. But, per *Tindal*, C. J.: "As to the second point, we agree entirely with the

doctrine laid down in *Ryall v. Rolle*, 1 Atk. 165, that in the case of a simple pawn of a personal chattel, if the creditor parts with the possession, he loses his property in the pledge; but we think the delivery of the chronometer to Wilson under the terms of the agreement itself was not a parting with the possession, but that the possession of Captain Wilson was still the possession of Messrs. Capper. The terms of the agreement were, that 'they would allow him the use of it for the voyage,' words that gave him no interest in the chronometer, but only a license or permission to use it for a limited time, while he continued as their servant, and employed it for the purpose of navigating their ship. During the continuance of the voyage, and when the voyage terminated, the possession of Captain Wilson was the possession of Messrs. Capper; just as the possession of plate by a butler is the possession of the master; and the delivery over to the plaintiff was, as between Captain Wilson and the defendants, a wrongful act, just as the delivery over of the plate by the butler to a stranger would have been; and could give no more right to the bailee than Captain Wilson had himself." See also *Roberts v. Wyatt*, 2 Taunt. 288; *Spalding v. Adams*, 32 Me. 211; *Flory v. Denny*, 11 E. L. & E. 584; s. c. 7 Exch. 581.

enough to pay the debt; such a transaction is not a sale, but a compromise, giving the pledgor a right of action against the pledgee. *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Zimpleman v. Veeder*, 98 Ill. 618. *Joliet Iron Co. v. Scioto Brick Co.* 82 Ill. 548, was to the effect that commercial paper, bonds, and mortgages pledged as collateral security cannot be sold in the absence of a special power, but must be held and collected as they become due.

But while it is essential to a pledge, that delivery should be made, and possession retained, it seems that there may be a hypothecation — whether we translate this pledge or mortgage — of property which cannot yet be delivered. Thus, in admiralty, at least, and in equity, property not yet in existence — as a ship to be built — may be effectually hypothecated. (p)

At common law, pledges could not be taken in an execution * in favor of a third party against the pledgor. (q) * 120 The common law, however, has been changed to some extent in this particular, in some of our States, by statutes. (r) But provision is always made to protect the interest of the pledgee, and to give to the attaching creditor only the interest of the pledgor.

The pledgee cannot retain a pledge for the purpose of securing other debts than those for which it was given, unless he can show that that was the intention of the parties. (s)

The pledgee, after the pledgor fails to pay the debt as due, may sell the pledge. If there be no definite time for the payment of the debt, the pledgee may require an immediate payment, but must, as we have seen, demand payment before selling the pledge. In all cases of sale, the pledgee must, before the sale, give a reasonable notice to the pledgor. (t)¹ And it is safer and better to have a judicial sale by a decree in chancery, whenever the State courts have power to make such decree. Such judicial process was once necessary to make the sale valid; but it is not so now. (u) The pledgee should not buy the pledge himself; (v)

(p) See the Hull of a New Ship, Davis, 190. See also Langton v. Horton, 1 Hare, 549.

(q) Bro. Abr. tit. *Pledges*, 28; Rex v. Hanger, 3 Bulst. 1, 17; Badlam v. Tucker, 1 Pick. 389, 399. In this last case, a quare is made whether the creditor might not remove the incumbrance, and then attach the property. See also Pomeroy v. Smith, 17 Pick. 86; Srodes v. Caven, 3 Watts, 268.

(r) See Averill v. Irish, 1 Gray, 254; Stief v. Hart, 1 Comst. 20.

(s) Jarvis v. Rogers, 15 Mass. 389; Rushforth v. Hadfield, 7 East, 224; Walker v. Birch, 6 T. R. 258; Robinson v. Frost, 14 Barb. 586.

(t) Tucker v. Wilson, 1 P. Wms. 261; a. c. 1 Bro. P. C. 494; Lockwood v. Ewer, 9 Mod. 275; a. c. 2 Atk. 808; Hart v.

Ten Eyck,² Johns. Ch. 100; Stearns v. Marsh, 4 Denio, 227; Castello v. Bank of Albany, 1 N. Y. Leg. Obs. 25; De Lisle v. Priestman, 1 P. A. Browne, 176; Luckett v. Townsend, 3 Tex. 119. In this last case it was decided that a stipulation in a contract of pledging, that if the pledge be not redeemed within a specified time, the right of property shall be absolute in the pawnee, can have no effect, and is absolutely inoperative. And see Milliken v. Dehon, 10 Bosw. 325.

(u) Id. But in a late case in England, the right of a pledgee to sell upon non-payment is denied. Micklawaite v. Winter, 19 Law Times, 61. This case seems opposed by the general tendency of the American cases. See, on this subject, Brass v. Worth, 40 Barb. 648.

(v) 1 Story, Eq. §§ 308-323.

¹ That the pledgee of a note may sell it, see Potter v. Thompson, 10 R. I. 1; Donohoe v. Gamble, 38 Cal. 340.

and he should take all proper and customary precautions, in the time and manner of sale, of notice or advertisement, and the like, to protect effectually the pledgor's interest and property. Nor should he sell at private sale, (*vv*) unless the terms of the pledge authorize this, (*vw*) nor more than enough to pay his debt, if the pledge consist of separable parts; and if the proceeds do not pay his debt, he may sue for the surplus.

Where a pledgor pledges for himself, or as agent or factor, by the act of pledging, it has been held, that he impliedly * 121 warrants * that he or his principal is the owner of the property pledged; and he will be liable to the pledgee for damages incurred by reason of defective title. (*w*)

One who voluntarily made a pledge to secure an illegal demand (illegal because the contract was made on Sunday), was not permitted to reclaim the pledge without paying the demand. (*ww*)

At common law, there cannot be a pledge of that which does not exist, or is not then the property of the pledgor. (*wx*) And if one who has acquired stock by fraud, pledges it for a pre-existent debt, the pledgee acquires no better title than the pledgor had. (*wy*)

This bailment is terminated either by payment and satisfaction of the debt by acts of the party, or operation of law, or by its merger and discharge by the taking of such higher security as operates as a release of the simple debt for which the pledge was given.

SECTION V.

LOCATIO.

Locatio in general, means a hiring; and as are there many ways of hiring, the general topic includes these particular forms, and usually the classification and the terms of the civil law are used.

1. LOCATIO REI; — where a thing is hired and the hirer acquires a temporary use of the thing bailed.

(*vv*) Baltimore, &c. Ins. Co. v. Dally, 25 Md. 269. (*wx*) Smithurst v. Edmunds, 1 McCary, 408.

(*vw*) Bryson v. Rayner, 25 Md. 424. (*wy*) Cleveland v. State Bank, 16 Ohio, 386.

(*w*) Mairs v. Taylor, 40 Penn. St. 446.

(*ww*) King v. Green, 6 Allen, 139.

2. **LOCATIO OPERIS FACIENDI**; — where the bailee is hired to do some work or bestow some care on the things bailed.

3. **LOCATIO OPERIS MERCII VEHENDARUM**; — where the bailee is hired to carry the goods for the bailor from one place to another. This form of *locatio* embraces also the carrying of passengers.

We shall consider these subjects in this order; and begin with

LOCATIO REI. When the owner of a thing lets it to another, who is to have the use of the thing, and to pay a compensation therefor, the contract between these parties is for their mutual benefit. The bailee is bound therefore only to take ordinary care of the thing bailed. (x)¹ But this obligation varies

(x) *Reeves v. The Ship Constitution*, Gilpin, 579; *Bray v. Mayne*, Gow, 1; *Milton v. Salisbury*, 13 Johns. 211; *Harrington v. Snyder*, 3 Barb. 890; *Hawkins v. Pythian*, 8 B. Mon. 515. In the case of *Columbus v. Howard*, 6 Ga. 213, 219, Mr. Justice *Lamptkin* said: "The question has been much mooted, what degree of care or diligence is required of the hirer, while using the property for the purpose, and within the time for which it was hired. Sir *William Jones* considered that the contract being one of mutual benefit, the hirer was bound only for ordinary diligence, and of course was responsible only for such. And this opinion appears to be now settled, upon principle, to be the true exposition of the common law. He ought, therefore, to use the thing, and to take the same care in the preservation of it which a good and prudent father of a family would take of his own. Hence the hirer of a thing, being responsible only for that degree of diligence which all prudent men use, that is, which the generality of mankind use, in keeping their own goods of the same kind, it is very clear he can be liable only for such injuries as are shown to come from an omission of that diligence; or, in other words, for ordinary negligence. If a man hires a horse, he is bound to ride it moderately, and to treat it as carefully as any man of common discretion would his own, and to supply it with suitable food; and if he does so, and the horse, in such reasonable use, is lamed or injured, he is not responsible for any damages." — In *Dean v. Keate*, 3 Camp. 4, it is held, that if, upon a hired horse being taken ill, the hirer calls in a farrier, he is not answerable for any mistakes

which the latter may commit in the treatment of the horse: but if instead of that he prescribes for the horse himself, and from unskillfulness gives him a medicine which causes his death, although acting *bona fide*, he is liable to the owner of the horse as for gross negligence. — A somewhat peculiar question of liability arose in the case of *Davey v. Chamberlain*, 4 Kep. 229. It was an action on the case for negligently driving a chaise, whereby the plaintiff's horse was killed. The two defendants were proved to have been together in the chaise when the accident happened; but Chamberlain, one of the defendants, was sitting in the chaise smoking, and it was driven by the other. *Erskine*, for the defendants, put it to Lord *Ellenborough* whether he was not entitled to have a verdict taken for Chamberlain, the ground of his application being, that no verdict ought to pass against him, the injury having proceeded from the ignorance or unskillfulness of the other defendant, who was the person driving the chaise, and in whose care and under whose management it then was, Chamberlain remaining perfectly passive, and taking no part in the management or direction of the horse. But his lordship said, that "if a person, driving his own carriage, took another person into it as a passenger, such person could not be subjected to an action, in case of any misconduct in the driving by the proprietor of the carriage, as he had no care nor concern with the carriage; but if two persons were jointly concerned in the carriage, as if both had hired it together, he thought the care of the king's subjects required that both should be answerable for any accident arising from

¹ One receiving a horse to pasture for hire, is bound to use reasonable care only; if the owner desires more than that, he must contract for superior diligence. *Mansfield v. Cole*, 61 Ill. 191.

* 122 * with the nature of the thing and the circumstances.

One who hires a valuable watch, easily disordered by any negligence, must be more careful than if the watch were cheaper and stronger. So of a valuable horse. So it should be if any known circumstances gave the thing hired a peculiar value, calling for peculiar care. Still it is only ordinary care, as the law defines that, because the rule must be, that the hirer is bound to render such care, in each case, as the owner has a right to expect that a man of ordinary capacity and caution would take of the same thing, if it were his own and under the same circumstances. (y)¹

the misconduct of either in the driving of the carriage, while it was so in their joint care." The fact turned out to be, that the chaise in question had been hired by both the defendants, and a verdict passed against both accordingly.

(y) What we have stated above in the text has been found to be of great importance in its application to *hired slaves*. Inasmuch as a slave is an intelligent being, and may be supposed capable, under ordinary circumstances, of taking care of himself, his employer is not bound to so strict diligence as the hirer of an ordinary chattel. This is clearly shown by the case of *Swigert v. Graham*, 7 B. Mon. 661. It was an action on the case, brought by the plaintiff against the owners of a certain steamboat, to recover for the loss of one Edmund, the plaintiff's slave, who, while employed as a hired hand upon the defendants' boat, was drowned in the Kentucky River. *Marshall*, C. J., in delivering the opinion of the court, said: "The material question in the case is, whether, under the actual circumstances, the owners of the boat are liable for the loss of the slave by being drowned while in their employ. And this question depends not merely upon the general principles applicable to the case of bailment on hire, as they are stated or adjudged in relation to inanimate or to mere animal property, but upon the proper application or modification of those principles in reference to the particular case of a slave hired for service as a common hand on board of a steamboat engaged in the navigation of the Kentucky and Ohio Rivers. The rule that the bailee on hire is bound to ordi-

nary diligence, and responsible for ordinary neglect, is doubtless true in all cases of their bailment, unless there be fraud, or a special contract by which it may be varied in the particular case. But what is or is not ordinary diligence may vary, not only with the circumstances under which the subject of it may be placed, but with the nature of the subject itself. That which, in respect to one species of property, might be gross neglect, might in respect to another species be extraordinary care. And, under peculiar circumstances of danger, extraordinary exertions may be required of one who is bound only to ordinary diligence, or, in other words, the circumstances may be such, that extraordinary exertions are nothing more than ordinary diligence. Ordinary diligence, then, means that degree of care, or attention, or exertion, which, under the actual circumstances, a man of ordinary prudence and discretion would use in reference to the particular thing were it his own property; or in doing the particular thing, were it his own concern. And where skill is required for the undertaking, ordinary diligence implies the possession and use of competent skill. . . . Applying these principles to the case of a slave hired either for general or special service, we come at once to the conclusion, that being ordinarily capable, not only of voluntary motion, by which he performs various services, but also of observation, experience, knowledge, and skill, and being in a plain case at least, as capable of taking care of his own safety as the hirer or owner himself, and presumably as much disposed to do it, from his possession of these qualities,

¹ Where the hirer of a horse placed it for medical treatment, with the owner's knowledge, with a third person, an implied promise is raised on the owner's part to pay that person for his services, of which he may avail himself in an action. *Leach v. French*, 69 Me. 389.

* The hirer is equally responsible for the negligence of * 123 his servants as for his own ; provided that this negligence

with habits and disposition of obedience implied in his condition, and on which the hirer has a right to rely, he may be expected to understand and perform many, and indeed most, of his duties, by order or direction more or less general, without constant supervision or physical control, and may be relied on, unless under extraordinary circumstances, for taking care of his own safety without particular instructions on that subject, and *a fortiori*, without being watched or followed or led, to keep him from running unnecessarily into danger. What sort of care or diligence, then, is the hirer to use for the safety or preservation of the hired slave ? Omitting to notice what may be necessary to his health and comfort, we should say that he ought not, by his orders, to expose him to extraordinary hazards, without necessity, though they be incident to the nature of the service ; and that when he does expose him to such hazards, necessarily or properly, he should use such precautions, by instructions or otherwise, as the circumstances seem to require, and as a man of ordinary prudence would use in so exposing his own slave. It might be necessary in sending him to the bottom of a deep well, or to the eaves of a steep roof, to tie a rope around his waist. But if he were possessed of ordinary intelligence, it would not be required that, in sending him across a wide bridge, he should even be cautioned not to jump or fall from it. Nor if there were a ford as well as a bridge crossing the river, both ordinarily safe, and with each of which the slave was well acquainted, would it be deemed necessary to direct him to take the one and avoid the other, unless there were some circumstances known or apprehended at the time, changing the usual condition of one or the other. Certainly it would not be necessary, when there was on the road which he was accustomed to travel a ford to be crossed, with which he was well acquainted, to tell him either not to go out of the usual track into the deep water, or not to take another road which he was not accustomed to travel, and which passed the river at a more dangerous place. In the navigation of our rivers by steamboats, it might become necessary, in a particular case, that some one on board should swim to the shore with a line, though the attempt might be attended with great danger. This, though incident to the navigation, would be an extraordinary hazard, and

doubtless it should not be ordered, nor even permitted to be incurred, without the use of such precautions, within the power of the captain or other officer, as experience might indicate for the occasion. But when the boat is aground, on a bar or shoal, where the water on each side, and to the shore on each side, is not more than three feet deep, it could not be deemed necessary, in ordering a particular individual to go to the shore through the water, to do more, even if he were unacquainted with the bar, and could not see it plainly, than to point out its extent, or the direction which he must take to the shore, or to advise caution in his proceedings, or to give such instruction as was necessary. But if he were well acquainted with the bar, or it were plainly visible through the water, and were, moreover, wide and safe, the direction to go to the shore would of itself be sufficient. It might be ordinarily assumed that the individual, whether white or black, slave or freeman, if he had common sense, would not go from the bar into the deep water, and the person giving the order would not be bound to anticipate such a deviation, and either to forbid it, or in any manner to guard against it, but might pursue his own employment. Nor do we suppose that, if he knew the individual to be a swimmer, and saw that he was purposely deviating from the bar, with the view of swimming a few yards to the shore, he would be bound to order him back, or to caution him against it, unless, from the temperature of the water, or some other fact, he had reason to apprehend danger. The direction to go to the shore on such an occasion implies, without more said, that he should go by the known and safe way. It is only when, from the uncertainty or difficulty of the way, or from some other circumstance, there may be danger in executing the order given, that it is necessary, in the exercise of ordinary care or diligence, to accompany it with any other words or acts than such as are essential to make it intelligible and practicable." This point is well illustrated also by the case of *Heathcock v. Pennington*, 11 Ired. L. 840. The defendant had hired of the plaintiff a slave boy, about twelve years of age, to drive a whim near the shaft of a gold-mine. The boy, while working there at night, being without an overcoat, had gone to the fire to warm himself, and on his being called to start his horse, being drowsy, fell into the mine and was killed.

* 124 occurred * when the servant was in the discharge of his duty, or obeying the commands or instructions of his master, express or implied. When not so employed, the person, though generally a servant, does not then stand in the re-

* 125 lation or act in the capacity of a * servant so as to fasten a liability for his conduct on his master; and a master, therefore, would not be responsible for an injury committed by a servant from his own wilful malice, in which the master had no share. (z)

If the loss occur though theft or robbery, or the injury result from violence, the hirer is only answerable when his imprudence or negligence caused or facilitated the injurious act. If a bailee for hire sells the property without authority, the bailor may have trover against even a *bona fide* purchaser. (a)

When the thing bailed is lost or injured, the hirer is bound to account for such loss or injury. But, when this is done, the proof of negligence or want of due care is thrown upon the bailor, and the hirer is not bound to prove affirmatively that he used reasonable care. (b)¹

It was held, in an action by the plaintiff to recover the value of the slave, that the defendant was bound to use such diligence as a man of ordinary prudence would, if the property were his own; that as the slave was a rational being, so much care was not necessary as would be required of the bailee of a brute or an inanimate thing; that as the plaintiff had let the slave for this very purpose, he must be presumed to know all the dangers and risks incident to the employment; and, therefore, as it did not appear that the usual risks were in any way increased, that he could not recover. But where a slave was hired to work in gold-mines, in which wooden buckets were used for raising up water and ore, in which were valves for letting out the water, and an iron drill was dropped into a bucket, and fell through the valve, and split the skull of the slave, it was held to be a want of ordinary care. *Biles v. Holmes*, 11 Ired. L. 1d. See also, as to the duties and responsibilities of the hirers of slaves, *McCall v. Flowers*, 11 Humph. 242; *Mims v. Mitchell*, 1 Tex. 443; *Sims v. Chance*, 7 Tex. 561; *Mitchell v. Mims*, 8 Tex. 6; *McLauchlin v. Lomas*, 3 Strob. L. 86;

Alston v. Ball, 7 Eng. (Ark.) 664; *Jones v. Glass*, 18 Ired. L. 805.

(z) *Finucane v. Small*, 1 Esp. 315; *Foster v. Essex Bank*, 17 Mass. 479; *Brind v. Dale*, 8 C. & P. 207. See also *Butt v. Great Western Railway Co.* 7 E. L. & E. 443; s. c. 11 C. B. 140. But see *Sinclair v. Pearson*, 7 N. H. 210. See also, *ante*, vol. i. p. *102, n. (c).

(a) *Loeschman v. Machin*, 2 Stark. 311; *Cooper v. Willomatt*, 1 C. B. 672.

(b) *Beckham v. Shouse*, 5 Rawle, 179; *Clark v. Spence*, 10 Watts, 385; *Runyan v. Caldwell*, 7 Humph. 134; *Platt v. Hibbard*, 7 Cowen, 400, n. (a); *Schmidt v. Blood*, 9 Wend. 288; *Foote v. Storre*, 2 Barb. 326; *Harrington v. Snyder*, 8 id. 880. This question was very thoroughly discussed in the case of *Logan v. Matthews*, 6 Penn. St. 417. The court below in that case instructed the jury, that "when the bailee returns the property in a damaged condition, and fails, either at the time or subsequently, to give any account of the matter, in order to explain how it occurred, the law will authorize a presumption of negligence on his part. But when he gives an account, although it may be a general one, of the cause, and shows the occasion of the injury, it

¹ The view in the text was affirmed in *Clafin v. Meyer*, 75 N. Y. 260, where, the defendant having shown a loss by theft, it was held that the plaintiff could not recover without proof of negligence.

* The owner must deliver the thing hired in a condition * 126 to be used as contemplated by the parties ; (c)¹ nor may he interfere with the hirer's use of the thing while the hirer's property in it, or right to it, continues. (d) Even if the hirer abuses

then devolves on the plaintiff to prove negligence, unskillfulness, or misconduct." And this instruction was *held* to be correct. *Coulter*, J., said: "The books are extremely meagre of authority on this subject of the *onus probandi* in cases of bailment. But reason and analogy would seem to establish the correctness of the position of the court below. All persons who stand in fiduciary relation to others are bound to the observance of good faith and candor. The bailor commits his property to the bailee, for reward, in the case of hiring, it is true; but upon the implied undertaking that he will observe due care in its use. The property is in the possession and under the oversight of the bailee, whilst the bailor is at a distance. Under these circumstances, good faith requires, that if the property is returned in a damaged condition, some account should be given of the time, place, and manner of the occurrence of the injury, so that the bailor may be enabled to test the accuracy of the bailee's report, by suitable inquiries in the neighborhood and locality of the injury. If the bailee returns the buggy (which was the property hired in this case), and merely says, 'Here is your property, broken to pieces,' what would be the legal and just presumption? If stolen property is found in the possession of an individual, and he will give no manner of account as to the means by which he became possessed of it, the presumption is that he stole it himself. This is a much harsher presumption than the one indicated by the court in this case. The bearing of the law is always against him who remains silent when justice and honesty require him to speak. It has been ruled that negligence is not to be inferred, unless the state of facts cannot otherwise be explained. 9 Eng. Jur. 907. But how can they be explained, if he in whose knowledge they rest will not disclose them? And does not the refusal to disclose them justify the inference of negligence? Judge *Story*, in his Treatise on Bailments, § 410, says, that it would seem that the burden of proof of negligence is on the bailor, and that proof *merely* of the loss is not sufficient to put the bailee on his defence. The position that we are now

discussing, however, includes an ingredient not mentioned by Judge *Story* and on which it turns; that is, the refusal or omission of the bailee to give any account of the manner of the loss, so as to enable the bailor to shape and direct his inquiries and test his accuracy. Judge *Story* says, there are discrepancies in the authorities. In the French law, as stated by him, § 411, the rule is different; and the hirer is bound to prove the loss was without negligence on his part. And he cites the Scottish law to the effect that if any specific injury has occurred, not *manifestly* the result of accident, the *onus probandi* lies on the hirer to justify himself by proving the accident. That would be near the case in hand, because the injury here was not manifestly the result of accident, and the hirer did not even explain or state how the accident occurred. The case of *Ware v. Gay*, 11 Pick. 106, seems to have a strong analogy to the principle asserted. It was there ruled, that where a public carriage or conveyance is overturned, or breaks down, without any *apparent* cause, the law will *imply* negligence, and the burden of proof will be on the owners to rebut the presumption. The *prima facie* evidence arises from the fact that there is no apparent cause for the accident. And in the case in hand, there was no apparent cause; nor would the hirer give any account of the cause. We think, therefore, there was no error in adding to the answer the qualification or explanation which we have been considering." See also *Skinner v. London, B. & S. R. Co.* 2 E. L. & E. 380; *a. c.* 5 Exch. 787. And in *Bush v. Miller*, 13 Barb. 481, where property was delivered to the defendant, who received the same, and engaged to forward it, but it was never afterwards seen nor heard of, and the defendant never accounted for it in any way, it was *held*, that he was *prima facie* liable for the goods without proof of negligence, which proof could not be required unless he gave some account of his disposition of the property.

(c) *Sutton v. Temple*, 12 M. & W. 52, 60.

(d) *Hickok v. Buck*, 22 Vt. 149. In this case the defendant leased to the plaintiff a farm for one year, and, by the con-

¹ So *held* in *Fowler v. Lock*, L. R. 10 C. P. 90, where a cab-driver recovered for injuries received in consequence of the unfitness of a horse furnished him.

the thing hired, as a horse hired for a journey, although the owner may then, as it is said, repossess himself of the thing, if he can do so peaceably, he may not do so forcibly, but must resort to his action. (e) And if such misuse of the thing hired terminates the original contract, the owner may demand the thing, and, on refusal, bring trover; or, in some cases, he may bring this action without demand. (f)

The owner is said to be bound to keep the thing in good order, that is, in proper condition for use; and, if expenses are * 127 * incurred by the hirer for this purpose, the owner must repay them. On this subject, however, there is some uncertainty in the cases. The cases usually referred to on this point relate to real estate; (g) but the hirer of land, or of a real chattel, has neither the same rights nor obligations as the hirer of a personal chattel. Perhaps the conflicting opinions may be reconciled, by regarding it as the true principle, that the owner is not bound (unless by special agreement, express, or implied by the particular circumstances) to make such repairs as are made necessary by the natural wear and tear of the thing, or by such accidents as are to be expected, as the casting of a horse-shoe after it has been worn a usual time; but is bound to provide that the thing be in good condition to last during the time for which it is hired, if that can be done by reasonable care, and afterwards is liable only for such repairs as are made necessary by unexpected causes. (h)

tract, was to provide a horse for the plaintiff to use upon the farm during the term. At the commencement of the term he furnished a horse, but took him away and sold him before the expiration of the term, without providing another. It was held, that the plaintiff acquired a special property in the horse, by the bailment, and was entitled to recover, in an action of trover, for the horse so taken away, damages for the loss of the use of the horse during the residue of the term.

(e) *Lee v. Atkinson*, Yelv. 172.

(f) See the case of *Fouldes v. Willoughby*, 8 M. & W. 540, as to what will amount to a conversion.

(g) *Pomfret v. Ricroft*, 1 Wms. Saund. 321; *Taylor v. Whitehead*, Dougl. 744; *Cheetham v. Hampson*, 4 T. R. 318; *Ferguson v. ——*, 2 Esp. 590; *Horsefall v. Mather*, Holt, 7.

(h) There is very little direct authority in our books upon this question. In *Pomfret v. Ricroft*, 1 Wms. Saund. 321, Lord *Hale* says: "If I lend a piece of plate, and covenant by deed that the par-

ty to whom it is lent shall have the use of it, yet if the plate be worn out by ordinary use and wearing without my fault, no action of covenant lies against me." But this is only a *dictum*. So in *Taylor v. Whitehead*, Dougl. 744, Lord *Mansfield* says, in general terms, that by the common law he who has the use of a thing ought to repair it. But he probably had his mind upon real property. In the case of *Isbell v. Norvell*, 4 Gratt. 176, it is held, that where the hirer of a slave pays a physician for attending on the slave while he is hired, he is entitled to have the amount repaid him by the owner of the slave. But in the case of *Redding v. Hall*, 1 Bibb, 586, the same question was decided the other way, after a careful examination of the authorities. It is impossible to say with certainty what the true rule of law is, until we have further adjudication. But it seems to be certain, that the hirer of an animal is bound to bear the expense of keeping it, unless there is an agreement to the contrary. See *Handford v. Palmer*, 2 Br. & B. 369.

On the part of the hirer there is an implied obligation to use the thing only for the purpose and in the manner for which it was hired. (i) And if he uses it in a different way or for a longer time, it is held that he may be responsible for a loss thence occurring, although by inevitable casualty. (ii) In general, the hirer must in no way abuse the thing hired. (j) But where hired chattels are lost during a * *misuser*, it seems * 128 that trover will not lie, unless the owner can show that the *misuser* caused the loss. (k)

The hirer must surrender the property at the time appointed; and if no time be specified in the contract, then whenever called upon after a reasonable time; and what this is will be determined in each case by its nature and circumstances. (l)

By the contract of hire, the hirer acquires a qualified property in the thing hired, which he may maintain against all persons except the owner, and against him so far as the terms and conditions of the contract, express or implied, may warrant. (m) During the time for which the hirer is entitled to the use of the thing, the owner is not only bound not to disturb him in that use, but if the hirer returns it to the owner for a temporary purpose, he is bound to return it to the hirer. (n) But if a bailee of any chattel, without authority, mortgage it to secure his own debt, and the mortgagee takes possession, the owner may have an action therefor without any demand. (o)

(i) *Duncan v. Railroad Co.* 2 Rich. L. 613; *Columbus v. Howard*, 6 Ga. 218.

(ii) *Lewis v. McAfee*, 32 Ga. 485.

(j) *Homer v. Thwing*, 8 Pick. 492; *Rotch v. Hawes*, 12 id. 136; *Wheeloock v. Wheelwright*, 5 Mass. 104; *De Tollenere v. Fuller*, 1 So. Car. Const. Rep. 116; *Duncan v. Railroad Company*, 2 Rich. L. 613; *Columbus v. Howard*, 6 Ga. 218; *Harrington v. Snyder*, 3 Barb. 380; *Booth v. Terrell*, 16 Ga. 20. In the case of *Mullen v. Enslay*, 8 Humph. 428, the defendant having hired a slave of the plaintiff, for general and common service, set him to blasting rocks, and the slave while so engaged was severely injured. The court held the defendant liable. And *Truly*, J., said: "We are of opinion that the employment of blasting rocks is not an ordinary and usual one; that it is attended with more personal danger than is common to the usual vocations of life; and that a bailee, who has hired a negro for general and common service, has no

right to employ him in such an occupation without the consent of his owner." But in the case of *McLauchlin v. Lomas*, 8 Strob. L. 85, where a negro was let to hire as a house carpenter, and was employed by the hirer in his shop, where he carried on the business of a house carpenter, and where his workmen were accustomed to use a steam circular-saw, when necessary for their work at the business, and the negro, while at work at the saw, received wounds of which he died, and in an action by the owner to recover the value of the slave from the hirer, the jury gave a verdict for the defendant, the court refused to grant a new trial. *Richardson*, J., dissented.

(k) *Harvey v. Epes*, 12 Gratt. 153.

(l) See *Esmay v. Fanning*, 9 Barb. 176.

(m) See *Hickok v. Buck*, 22 Vt. 149, cited *ante*, p. * 127, n. (d).

(n) *Roberts v. Wyatt*, 2 Taunt. 268.

(o) *Stanley v. Gaylord*, 1 Cush. 538.

It is held, that if a hirer fastens hired chattels to real estate, in such a way that they cannot be removed without injury to the real property, a purchaser of the land, without notice, holds the chattels, and the owner of them must look to the hirer for compensation. (*p*)

The letter for hire acquires an absolute right to, and property in, the compensation due for the thing hired; and this compensation or price, where not fixed by the parties, must be a reasonable price, to be determined, like the time for which the thing is hired, by the nature and circumstances of the case.

* 129 * The contract of hire may be terminated by the expiration of the time for which the thing was hired, or by the act of either party within a reasonable time, if no time be fixed by the contract. Or by the agreement of both parties at any time. Or by operation of law, when the hirer becomes the owner of the thing hired. Or by the destruction of the thing hired. If it perish without the fault of either party, before any use of it by the hirer, he has nothing to pay; if after some use, it may be doubted how far the aversion of the law to apportionment would prevent the owner from recovering *pro tanto*; probably, however, where the nature of the case admitted a distinct and just apportionment, it would be applied. (*q*) Either party being in fault would of course be answerable to the other. And the contract might provide for the contingency of the destruction of the property in any manner.

Goods are often hired in connection with real estate; as where one hires a house with the furniture therein, or a room with its furniture. But although the clauses respecting such hire of chattels may form a part of a contract concerning real estate, they are construed and governed by the principles of the law of personality.

It sometimes happens that parties seek to give to other contracts the appearance of a contract to hire; or that they wish to make use of a contract to hire, for purposes usually accomplished by other means. Thus, suppose a person about to open a board-

(*p*) *Fryatt v. The Sullivan Company*, 5 Hill (N. Y.), 116; s. c. 7 id. 529.

(*q*) See *Harrington v. Snyder*, 8 Barb. 380. As to apportionment in cases of hired slaves, where the slave dies during the period of his service, see the following cases. *George v. Elliott*, 2 Hen. &

M. 5; *Williams v. Holcombe*, 1 N. Car. Law Rep. 365; *Bacot v. Parnell*, 2 Bailey, 424; *Redding v. Hall*, 1 Bibb, 536; *Harrison v. Murrell*, 5 Monr. 359; *Dudgeon v. Teas*, 9 Mo. 867; *Collins v. Woodruff*, 4 Eng. (Ark.) 463.

ing-house, and needing furniture, and proposing to buy the same in whole or in part upon credit. The seller is willing to trust, if he can have the security of the property itself; but if he does this by sale and mortgage back, it must be recorded, and an equity of redemption attaches. To avoid this, he makes a lease of the furniture to the other party, say for one year, and the lease contains a provision that the lessee may buy the same by paying a certain price therefor, at certain times. The lessee * takes the property into his house, and a creditor without notice attaches it as his property. The question has sometimes arisen under these circumstances, whether this is not in law a sale with mortgage back; and whether the attempt of the parties to avoid the notice of record, with the permission of the original owner to let the proposed purchaser take open possession without giving any notice of his rights, does not lay him open to lose the property if a *bona fide* creditor of the hirer takes it by attachment. The question is one of mixed law and fact. We do not think that the law attaches to such a transaction an absolute presumption of fraud; and unless the circumstances are such that the jury can infer fraud from them, actual or constructive, the title of the original owner of the furniture would prevail. This question has arisen once or twice at *nisi prius*, but we do not know that it has been authoritatively decided by courts of law, sitting in banc.

LOCATIO OPERIS FACIENDI. The cases in which the bailee is to do some work or bestow some care upon or about the thing bailed, may be conveniently divided into those where,

1. Mechanics are employed in the manufacture or repair of the article bailed to them.
2. Warehouse men or wharfingers are charged with the custody of the thing bailed.
3. Postmasters receive letters to be sent as directed.
4. Innkeepers receive guests and the goods of guests.

Where mechanics are employed to make up materials furnished, or to alter or repair a specific thing, the contract is one of mutual benefit, and only ordinary care is required. But this care may vary much in different cases. Common wood may be given to a carpenter to make a common box. A chronometer may be delivered to a watchmaker to be cleaned or repaired. A

diamond may be given to a lapidary to be cut and polished. The care required in these cases is very different; but it is always *ordinary* care; that is, such care as a person of ordinary caution and capacity would take of that specific thing. So of the skill required. A person who receives a chronometer to repair, and

undertakes the work, warrants that he possesses and
***181 *** will exert the care and the skill requisite to do that work properly, and to preserve the article safely. If, however, one chooses to employ, on a work requiring great and peculiar skill, one whom he has reason to know to be deficient in that skill, he can have no remedy for the want of it. (*r*)

The obligations of the workman are, to do the work in a proper manner, and at the time agreed on, or in a reasonable time if none be specified; to employ the materials furnished in the right way; and not only to guard against all ordinary hazards, but to use the best endeavors to protect the thing delivered to him against all peril or injury. And he should do the work himself, where, from the circumstances, it may be presumed that the personal ability or skill of the workman is contracted for.

The workman has a special property in the thing delivered to him, and may maintain an action against one who wrongfully takes it from his possession. If it perishes in his hands, without his fault, the owner loses the property. And from the authorities it might seem that the owner is also bound to pay *pro tanto* for the work and labor already expended upon it (where the contract does not provide otherwise), as well as the materials used and applied. (*s*) We doubt, however, if the practice in this country be altogether so; it is certain that a distinct usage to the contrary would control any such rule; (*t*) and without asserting that there is any such established usage, we think that, generally, where an owner leaves a chattel with a workman who is to labor upon it, and the chattel is accidentally destroyed when this labor has been partially performed, each loses what each one has in the thing destroyed; the owner his property, and the

(*r*) *Felt v. School Dist.* 24 Vt. 297.

(*s*) *Menetone v. Athawes*, 3 Burr. 1592; *Wilson v. Knott*, 3 Humph. 473. See also *Brumby v. Smith*, 3 Ala. 123.

(*t*) It would seem from *Gillet v. Mawman*, 1 Taunt. 187, that a general usage,

to the effect that the workman was not entitled to be paid until his work was finished, would prevent his recovering for his work and labor on an article accidentally destroyed while the work was going on.

workman his labor. If the thing perishes from intrinsic defect, the reason for requiring *pro tanto* compensation from the owner would be stronger.

Where the workman is employed to make a thing out of his *own materials, it is a case of purchase and sale, * 132 or hiring of labor, and not of bailment. But if the principal materials are delivered to the workman, this is a case of bailment, although he has to add his own materials to them. (u)

(u) *Merritt v. Johnson*, 7 Johns. 473. This subject was thoroughly discussed in the case of *Gregory v. Stryker*, 2 Denio, 628. It was an action of trespass for a wagon, and the defendant, who was a constable, justified the seizure of it under an execution against one Rose; and the question was, whether the wagon when taken by the defendant belonged to the plaintiff or Rose. It appeared that the wagon in question formerly belonged to the plaintiff, and that he made a contract with Rose to repair it for him. Before the wagon was repaired it was worth but little, except the iron; none of the wooden part was used in the reparation, except the tongue and evener. When finished it was worth \$90, and Rose's account for repairs amounted to \$78.50. The defendant took the wagon in the possession of Rose immediately after it was completed, and sold it on the execution. Upon these facts the court held, that the property in the wagon still continued in the plaintiff. And *Beardsey*, J., said: "As the value of the new materials and labor used and employed in repairing or reconstructing the wagon greatly exceeded that of the old materials used in the operation, it was urged that this was really a contract with Rose to make a new wagon, and not for the repair of an old one; and, therefore, as most of the materials were furnished by him, his right of property in the vehicle would continue until its completion and delivery under the contract. No doubt where a manufacturer or mechanic agrees to construct a particular article out of his own materials, or out of materials the principal part of which are his own, the property of the article, until its completion and delivery, is in him, and not in the person for whom it was intended to be made. But it is equally clear, as a general proposition, that where the owner of a damaged or worn-out article delivers it to another person to be repaired and renovated by

the labor and materials of the latter, the property in the article, as thus repaired and improved, is all along in the original owner, for whom the repairs were made, and not in the person making them. The agreement in such case is but an every-day contract of bailment — *locatio operis faciendi*; and the original owner, so far from losing his general property in the thing thus placed in the hands of another person to be repaired, acquires that right to whatever accessory additions are made in bringing it to its new and improved condition. Nor am I aware that in this class of cases it is at all important what the value of the repairs, actual or comparative, may be. No case is referred to which proceeds on that distinction, nor any writer by whom it is adverted to as material. If we adopt this distinction, what shall be its limit? The general property must be in one party, to the exclusion of the other, for surely they are not tenants in common in the thing repaired. Shall we then say that where the value of the repairs falls below that of the dilapidated article on which they were made, the original owner has title to the article in its improved condition, and *vice verad*, where they exceed it in value, title to the article, as repaired and improved, passes over to the person by whom the repairs were made? Such a rule would certainly be plain enough, and probably might be applied, without great difficulty, to any particular case. But it would be found to give rise to a variety of questions never heard of in actions growing out of the reparation of decayed or injured articles; and the rule itself, I am persuaded, has not so much as the shadow of authority for its support. There are a multitude of instances in which the expense of proper repairs greatly exceeds the value of the article on which they are made. It is so in the lowly operation of footing an old pair of boots, and not unfrequently in repairing

* 133 * Where materials are delivered to a workman, and a fabric is to be returned by him, made at his own election, either of those materials or of similar materials of his own, as if a certain weight of silver be given him, to be returned in the form of a silver goblet, or a certain quantity of wheat to be returned in flour, some difficulty has arisen, and some conflict of opinion. We should regard such a contract not as a *locatio operis faciendi*, but as creating an obligation of a different character on the part of the workman; one, indeed, more similar to a debt. If the contract expressly, or by a clear implication, imported that the fabric to be returned should be made specifically of the very material delivered, then, if the material should perish or be lost without the fault of the workman, it would be the loss of the owner. In the former case, where the workman was at liberty to use what materials of like quality he would, those delivered to him would be regarded only as a partial payment in advance for the thing to be made and delivered to him who advanced it, and the workman would be still bound to make and deliver this article. (v)

a broken-down carriage. The principle contended for by the defendant is not necessary for the security of the mechanic by whom the repairs are made. He has a lien for his labor and materials, and may retain possession until his just demands are satisfied. This affords ample protection to the mechanic. And who, let me ask, ever heard that this lien was limited to repairs which, in value, fall below that of the original article on which they are made? Yet this limitation must necessarily exist, if the ground assumed by the counsel for the defendant is well taken."

(v) This subject has been very much discussed within the last few years, especially in the courts of New York. The earliest case that we have seen is that of *Seymour v. Brown*, 19 Johns. 44. There the plaintiff sent to the defendant, a miller, a quantity of wheat, to be exchanged for flour at the rate of a barrel of flour for every five bushels of wheat. The defendant mixed the plaintiff's wheat with the mass of wheat of the same quality belonging to himself and others; but, before the flour was delivered to the plaintiff, the mill of the defendant, with all its contents, wheat and flour, was entirely destroyed by fire from some unknown cause, and without any fault or negligence on the part of the defendant.

It was held, that the defendant was not responsible for the loss of the plaintiff's wheat, there being no contract of sale by which the property was transferred to the defendant. This case was decided in the year 1821. A few months afterwards a case was decided the same way by the Court of Appeals of Virginia, on a somewhat similar state of facts. *Slaughter v. Green*, 1 Rand. (Va.) 3. In 1825, the question came up in Indiana in the case of *Ewing v. French*, 1 Blackf. 358. The facts of the case were almost identical with those in *Seymour v. Brown*, and the court held, that the plaintiff was entitled to recover. *Seymour v. Brown* having been cited, *Blackford*, J., said: "That decision, it is admitted, cannot be reconciled with ours; but as an independent tribunal, we must, after consulting the authorities within our reach, determine for ourselves as to what the law is, however unpleasant it may be to differ from a court so eminently distinguished as that of New York." In 1827 came the case of *Hurd v. West*, 7 Cowen, 752. In that case the defendant had let a number of sheep to one Dayton, and Dayton, while the sheep were in his possession, had sold them to the plaintiff. And the question was, whether the property in the sheep was in Dayton, so that he could transfer them to the plaintiff. *Wood-*

* Closely connected with these questions, and indeed *184 sometimes identical with them, are those which arise

worth, J., in remarking upon the evidence, which was somewhat uncertain, said: "It seems to me the first question was, whether the identical sheep, if they survived, were to be returned, or the same number of sheep, and of as good quality. In the first case, the title would still have continued in the defendant below, with the right to assert it when the period of letting expired. If the terms of the letting were as in the second case, or in the alternative, the right of the defendant below rested in contract; for he was not authorized to claim the identical sheep." Seymour v. Brown was not cited or alluded to, either by the counsel or the court, in Hurd v. West; but the reporter, in a learned note, in which he discusses the question, considers the former as substantially overruled by the latter, and such would seem to be the case from the language which we have quoted. Afterwards, in 1839, the precise question passed upon in Seymour v. Brown came up again in the same court, in Smith v. Clark, 21 Wend. 83, in which the former case was considered by the court, and overruled. Since that time the courts of New York have uniformly held the law as we have stated in the text. See Pierce v. Schenck, 3 Hill (N. Y.), 28; Baker v. Woodruff, 2 Barb. 520; s. c. nom. Norton v. Woodruff, 2 Comst. 153; Mallory v. Willis, 4 Comst. 76. In this last case, the rule as now held was very clearly stated by Bronson, C. J. "The distinction," says he, "which will be found to run through all the authorities on this subject, with the exception of two cases which have been overruled, is this: when the identical thing delivered, though in an altered form, is to be restored, the contract is one of bailment, and the title to the property is not changed. But when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed; it is a sale." The same doctrine is held in the cases of Wadsworth v. Allcott, 2 Seld. 64; Foster v. Pettibone, 8 Seld. 433; Chase v. Washburn, 1 Ohio St. 244; Hyde v. Cookson, 21 Barb. 98; Johnston v. Browne, 37 Ia. 200. A similar rule was laid down in Buffam v. Merry, 3 Mason, 478. In that case A delivered yarn to B, on a contract that the same should be manufactured into plaids. B was to find the *filling*, and was to weave so many yards of the plaids at 15 cents per yard, as

were equal to the value of the yarn at 65 cents per pound. It was held, that, by the delivery of the yarn to B, the property thereof vested in him. On the other hand, in King v. Humphreys, 10 Penn. St. 217, where rags were delivered by the plaintiff to the defendant at a certain price, under a special contract, to be made into paper, which was to be returned at a certain price, — the difference to be paid by a note; and paper was manufactured out of the identical rags; it was held, that the property in the rags and paper continued in the plaintiff. But it appeared that this was the usual mode in which the trade made contracts for working rags into paper; and the court seemed to put their decision upon the ground that the plaintiff was entitled to receive the paper made of the identical rags delivered. If this was the ground of the decision, the case does not conflict with what we have stated to be the established rule; the question in the case was one of construction, and it resembled in this respect the case of Mallory v. Willis, already cited. In that case the plaintiff agreed to deliver good merchantable wheat at a flouring mill carried on by the defendant, "to be manufactured into flour." The defendant agreed to deliver 196 pounds of superfine flour, packed in barrels to be furnished by the plaintiff, for every four bushels and fifteen pounds of wheat. He was to be paid sixteen cents per barrel, and two cents extra, in case the plaintiff made one shilling net profit on each barrel of flour. The defendant was to guarantee the inspection. The plaintiff was to have the "offals or feed," which the defendant was to store until sold. It was held, that the contract imported a bailment of the wheat, and not a sale, and therefore that the plaintiff might maintain replevin for a portion of the flour manufactured from the wheat delivered under the contract. But Bronson, C. J., and Harris, J., dissented from the judgment of the court, and delivered able opinions. There was no difference of opinion, however, among the members of the court, as to the general rule; the only question between them was one of construction. — A question somewhat similar to the one that we have been considering, arises where materials are delivered to be worked up at the shares, as it is termed. But in that case it is held, that the contract is one of bailment, and not of sale. The question arose in

* 135 when property is * claimed by *accession*, or by the right which the owner of property has to whatever other prop-

Pierce v. Schenck, 8 Hill (N. Y.), 28. Logs were delivered by the plaintiff at the defendant's saw-mill under a contract with the defendant that he should saw them into boards within a specified time, and that each party should have one half of the boards. It was held, that the transaction inured as a bailment merely, and that the bailor retained his general property in the logs till all were manufactured pursuant to the contract. And Cowen, J., said: "The plaintiff delivered his logs to the defendant, who was a miller, to be manufactured into boards,—a specific purpose from which he had no right to depart. On completing the manufacture, he was to return the specific boards, deducting one-half as a compensation for his labor. It is like the case of sending grain to a mill for the purpose of being ground, allowing the miller to take such a share of it for toll. This is not a contract of sale, but of bailment,—*locatio operis facienda*. The bailor retains his general property in the whole till the manufacture is completed; and in the whole afterwards, minus the toll. The share to be allowed is but a compensation for the labor of the manufacturer, whether it be one-tenth or one-half. Thus, in Collins v. Forbes, 3 T. R. 816, it appeared that Forbes furnished certain timber to one Kent, which the latter was to work up into a stage for the commissioners of the victualling office, he to receive one-fourth of the clear profit and a guinea per week, on the work being done. This was held to be a bailment by Forbes. So in Barker v. Roberts, 8 Greenl. 101, A agreed to take B's logs, saw them into boards, and return them to B, who was to sell them and allow to A all they brought beyond so much. This was held to be a bailment, and not a sale, though it was expressly agreed that the logs should remain all the while at A's risk. A having sold the logs instead of sawing them, B was allowed to recover their value against A's vendee. What difference is there in principle between an agreement by the owner to pay a share of the avails in money, and in part of the specific thing? Either is but a compensation for his labor. . . . I have been unable to see any difference in the nature of the contract, whether there be an obligation to restore the whole, or only a part of the specific thing. The owner of the goods may reserve the general ownership in the whole or in any part, as he pleases; and he can

with no more propriety be said, *pro tanto*, at least, to have parted with it in the latter case than in the former."—We have already had occasion to refer to Hurd v. West, 7 Cowen, 752. Perhaps that case deserves some further notice. It was ruled in that case, as we have seen, that where one lets chattels for hire, with an agreement on the part of the bailee, in the alternative, either to return the specific chattels, or others of a similar quality; that such a transaction amounts, not to a bailment, but to a sale. The Supreme Court of Vermont have, however, in a series of cases, and after much consideration, decided the same point the other way. The question arose for the first time, we believe, in the latter State, in the case of Grant v. King, 14 Vt. 367. There the owner of cattle leased them, with a farm, for four years, under an agreement that, at the expiration of the four years, the lessee might either return the cattle or pay a stipulated price for them. The lessee sold the cattle before the four years had expired. And it was held, that the lessor might maintain trover for them against both seller and purchaser. The same question arose again in Smith v. Niles, 20 Vt. 815, and in Downer v. Rowell, 22 Vt. 847, and was decided the same way. In the latter case, the plaintiff delivered to the defendant certain sheep, and the defendant executed a receipt therefor, in which he agreed to keep the sheep, or cause them to be kept, "the full term of three years, and return the same, or others in their place, as good as they are." Held, that this was not a sale of sheep to the defendant, nor a bailment with power to sell, but that it was a bailment of the property for a certain period, with a stipulation for its return at the expiration of the bailment; and that the property in the sheep would not vest in the bailee, until he had performed his part of the agreement, by returning to the plaintiff other sheep of equal quality; and that, for a conversion of the sheep, the plaintiff could sustain an action of trover. And Kellogg, J., having cited and commented upon Grant v. King and Smith v. Niles, said: "We are aware that the case of Hurd v. West, 7 Cowen, 752, cited at the argument, is opposed to the view which we take of the case before us. There the court seem to consider that the alternative words in the contract determine its character,—that the right of the party to return other sheep

erty becomes inextricably added * to, or combined with it; * 136 either naturally, as by vegetable or animal growth or increase; or artificially, as where a person makes a new article by adding to his own materials those of another; or by adding to the materials of another, his own labor. And again, similar to these questions are those which arise from the *confusion of goods*, when the property of two or more persons is inseparably and undistinguishably mingled.

In the two preceding notes, we have given the principal American cases which bear in fact, though not always in name, upon these questions. It will be seen, that it must be difficult to draw distinct and certain rules of law from this adjudication. It may be said, however, that neither the English nor the American law permits a man to claim, *by accession*, the property of another, if the claimant originally took the property wrongfully, and as a trespasser. (w)¹ But if one honestly receives goods under a contract and with a design to increase their value by his own labor; and after doing this, subjects himself to an action of trover for a wrongful conversion of them, it seems that he is to be allowed for that increase of value. (x) And if a right by accession takes place, when the materials of many persons are inseparably united together into one article, it seems that there is no better rule, than the somewhat loose one, that the ownership of the whole article rests with the party who was the owner of the principal part of the materials. (y) If there be a *confusion of goods* in

of equal value makes the contract operate as a sale, — that such is the legal effect of the contract, and that upon the delivery of the property it vests in the bailee, or vendee. This decision is admitted to be in direct conflict with the case of *Seymour v. Brown*, 19 Johns. 44, — which last case is said to be overruled. Which of the two cases is the better law I do not deem it necessary to inquire, as I think the case at bar must be controlled by the decisions of our own court. It is analogous to the case of *Smith v. Niles*, and I think in principle cannot be distinguished from it. It may be asked, If the property at the time of the bailment does not pass, when does it vest in the bailee? We answer certainly not until the bailee performs his part of the contract, by returning other sheep of equal goodness. That sufficiently secures to

the bailor a return of the property bailed, and affords to the bailee all that he could claim, upon the most liberal construction of the contract. This construction of the contract is most beneficial to the defendant, and carries into effect, we think, the obvious intention of the parties."

(w) This seems to have been a settled principle as long ago as the time of Henry VII. See Year Books, 5 H. 7, 15; and from that period it can be traced downwards. For recent American cases on this point, see *Fryatt v. Sullivan Co.* 5 Hill (N. Y.), 116; s. c. 7 Hill (N. Y.), 529. See also the case of *Silsbury v. McCoon*, 6 Hill (N. Y.), 425, 4 Denio, 332, 8 Comst. 379.

(x) *Hyde v. Cookson*, 21 Barb. 92.

(y) *Pulcifer v. Page*, 32 Me. 404.

¹ See *Jewett v. Dringer*, 3 Stewart, 291, and the reporter's elaborate note.

* 137 an article which exists by * combining them extricably, we think the common law asks whether either party wrongfully took the goods of the other and mixed them with his own; for, if so, he has lost his goods, and the whole article belongs to the party whose goods were thus wrongfully taken. (z)¹ But the party thus mingling his goods with those of another does not lose them, if he does this through negligence only, and without ill design. (a)

If the party claiming the benefit of the common-law principle as to confusion of goods, has fraudulently countenanced the act of the person by whom the intermixture was made, the object being to conceal the property of the latter from his creditor, the claim of the former will not be sustained against such creditor. (b)

There may be a confusion of goods made honestly, where the goods of a party are mingled with goods of another party, of the same kind, description, and value. As if A receives ten bushels of corn from B, and, with no wrongful purpose, mingles them with corn of his own, of the same kind. Here, there is a confusion of goods, which, in one sense, is perfect; for it would be impossible to identify a single grain as belonging to either party. But, for all practical purposes, the grain of one party may be as certainly and accurately separated from the grain of the other party, by measuring out ten bushels, as the horse of one might be separated from the horse of the other by leading him out of the stable. We do not know that the precise case has arisen; but we should hold the law to be founded upon the practical aspect of the case; and B would own his ten bushels of the mixture, to be discriminated simply by measuring out; there being, practically, no inextricable confusion of goods. (bb)²

(z) See cases.

118; *Warren v. Milliken*, 57 Me. 97, ac-

(a) *Pratt v. Bryant*, 20 Vt. 338.

cord with these views. The business

(b) *McDowell v. Rissell*, 37 Penn. St.

done through grain elevators is now very

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large, and is rapidly increasing; but the

(bb) *Russell v. Carrington*, 42 N. Y.

law on the subject is hardly yet deter-

¹ *Starr v. Winegar*, 3 Hun, 491. If a party so confounds another's property in his charge with his own that it cannot be distinguished, all the inconvenience is thrown upon him, he must distinguish or lose it; and this holds equally good in matters of account. *Diversey v. Johnson*, 93 Ill. 547.

² See vol. i. p. *527, note 2. *Sexton v. Graham*, 53 Ia. 181, held, that when grain is by agreement mingled with other grain of a like grade in an elevator, the depositors become tenants in common of the entire mass; and the nature of the transaction is not altered by the fact that the warehouseman is himself a depositor, or that the identity of the entire mass has been changed by continued additions and subtractions, or that the grain is stored in separate bins.

It is not always easy to determine the rights and obligations of the parties when the workman does his work imperfectly, or in a manner different from that desired, or leaves it unfinished. The difficulty is in the application of the principles of law to the facts, rather than in ascertaining those principles. We think they may be stated thus.

If the workman, by a deviation from his instructions, makes his work of no use, he can claim no compensation. If the article be still of some use, and be received by the employer, the workman may claim *pro tanto*; but his claim is open to a set-off or cross-action for any demand the employer may have for damages sustained by the deviation. If the work be done by special contract, and there be a departure from its terms, the workman can recover nothing under the contract; but may on a *quantum meruit*, if his labor was useful to his employer, and its benefit accepted, but subject to set-off as before. And, undoubtedly, if the deviation be important, and the materials have been so used as to have lost their value as such, the employer may abandon them to the workman, and recover of him their value. So if the thing be left imperfect and unfinished, by the fault of the workman, he can recover nothing; but if not by his fault, then he should have compensation *pro tanto*, subject to set-off.

And if the contract be rescinded by the act or assent * of both parties, then the workman may recover *pro tanto*.

If the deviation be such as makes the thing more valuable and more costly, the workman cannot recover for this additional cost, unless the employer assented thereto. (c)

In this last case, and in some others, it is often important and difficult to determine what is an assent on the part of the employer, and what assent is sufficient. (d) Knowledge and silence might be considered so, if a knowledge of the deviation existed while it was going on, and the employer could put a stop to it. But not if only known afterwards, and when too late to prevent

mined by authority. There is in the American Law Review, April, 1872, p. 454, an able and exhaustive discussion of the whole subject. The conclusions of the writer agree substantially with those expressed in the text. He objects to Chase & others v. Washburne, 1 Ohio (n. s.), 144, opposing them, and refers to McPherson v. Gale, 40 Ill. 388, as agreeing with them.

(c) The principles stated above in our

text are not peculiar to the contract of which we are now treating. They apply equally to several other species of contracts; and we have already had occasion to consider them somewhat in our chapter on the Hiring of Persons. We shall defer their further consideration and the citation of cases until we come to our chapter on Construction.

(d) See Lovelock v. King, 1 Mood. & R. 60. See also *ante*, pp. * 66-68.

or arrest the alteration. It would certainly be safer and more just for the employer to signify his disapprobation as soon as possible ; and his not doing so would be a circumstance, which, connected with others, as directing other alterations in conformity, and the like, might lead to an inference that he assented to and adopted the alteration.

Contracts for work and labor in making some article frequently contain a provision, that if there be alterations made with the assent of both parties, such alterations shall be paid for or allowed for at the same rate of payment as that provided by the contract for the work it specifies ; and we think that such would be the operation of law, without an express stipulation. (e)

A workman employed to make up materials, or to alter or repair a specific article, has a lien upon the materials of the thing for his pay. (f) But this is merely a passive right

* 139 of * retainer, or, as it is sometimes called, a passive lien, and does not authorize a sale. There is some authority for the proposition, that where the retainer of the property involves considerable expenditure, and renders it entirely useless to both parties, the right of sale may exist, by local custom ; (g) but it is well settled that such a lien does not in general authorize a sale. (h) And while equity will decree a sale in fulfilment of a pledge, it refuses in this case to grant relief to a bailee. (i) Tradesmen and mechanics generally have, by the common law of England and this country, a lien on chattels in their hands in the course of their business ; and this lien and the rules of law applied to it, are considered in our chapter on Liens.

(e) See *ante*, p. * 58, note (r).

(f) *M'Intyre v. Carver*, 2 W. & S. 392. In this case it is decided that every bailee, who has by his labor and skill conferred value upon specific chattels bailed to him, has a particular lien on them ; but such lien does not exist in favor of a journeyman or day-laborer. So in *Morgan v. Congdon*, 4 Comst. 551, it is held, that every bailee for hire, who by his labor or skill imparts additional value to the goods, has a lien thereon for his charges, there being no special contract inconsistent with such lien. And such lien extends to all the goods delivered under one contract, and is not confined to the particular portion on which the labor has been bestowed. Accordingly, where a quantity of logs was delivered on different days at the de-

fendant's saw-mill, upon an agreement to saw the whole quantity into boards, and the defendant sawed a part of them, and delivered the boards to the bailor, without being paid for the service ; it was held, that he had a lien for the amount of his account upon the residue of the logs in his possession. And the care, skill, and labor employed by a trainer upon a race-horse give him a right of lien, but he waives this lien by contracting to allow the owner of the horse to take it for racing whenever he chooses. *Forth v. Simpson*, 13 Q. B. 680.

(g) *Hoatler's Case*, Yelv. 66 ; *Moss v. Townsend*, 1 Bulstr. 207.

(h) *Jones v. Thurlow*, 8 Mod. 171 ; *Chase v. Westmore*, 5 M. & S. 180.

(i) *Thames Iron Co. v. Patent Derrick Co.* 1 Johns. & Hem. 93.

WAREHOUSEMEN. This is also a contract for mutual benefit; and the bailee is therefore held only to ordinary diligence. (*j*)¹ The forwarding merchants of this country are only subject to the liabilities of warehousemen, (*k*) unless they act also as

(*j*) *Chenowith v. Dickinson*, 8 B. Mon. 156; *Foote v. Storrs*, 2 Barb. 826; *Hatchett v. Gibson*, 18 Ala. 587; *Calliff v. Danvers*, Peake, Cas. 114; *Platt v. Hibbard*, 7 Cowen, 497; *Knapp v. Curtis*, 9 Wend. 60. But if an uncommon or unexpected danger arise, he must use efforts proportioned to the emergency to ward it off. *Leck v. Maestaer*, 1 Camp. 138. In this case the defendant was the proprietor of a dry-dock, the gates of which were burst open by an uncommonly high tide, and the plaintiff's ship, which was lying there, forced against another ship and injured. It was sworn, that with a sufficient number of hands the gates might have been shored up in time, so as to bear the pressure of the water; and, though the defendant offered to prove that they were in a perfectly sound state, Lord *Ellenborough* held, that it was his duty to have had a sufficient number of men in the dock to take measures of precaution when the danger was approaching, and that he was clearly answerable for the effects of the deficiency. So a wharfinger who takes upon him the mooring and stationing of the vessels at his wharf, is liable for any accident occasioned by his negligent mooring. *Wood v. Curling*, 15 M. & W. 626; s. c. 16 id. 628.—The same rule applies to an agister of cattle. *Broadwater v. Blot*, Holt, 547.

(*k*) *Roberts v. Turner*, 12 Johns. 282. This is a very important case on the liability of *forwarding merchants*. It was an action on the case against the defendant as a common carrier. The defendant resided at Utica, and pursued the business of *forwarding* merchandise and produce from Utica to Schenectady and Albany. It appeared that the course of business was, for the *forwarder* to receive the merchandise or produce at his store, and send it by the boatmen who transported goods on the Mohawk River, or by wagons to

Schenectady or Albany, for which he was paid at a certain rate per barrel, &c., and his compensation consisted in the difference between the sum which he was obliged to pay, and that which he received from the owner of the goods. The defendant received from the plaintiff, who resided in Cazenovia, in Madison county, by one Aldrich, his agent, twelve barrels of potash, to be forwarded to Albany to one Trotter; the ashes were put on board a boat, to be carried down the Mohawk to Schenectady, and, while proceeding down the river, the boat ran against a bridge and sunk, and the ashes were thereby lost. The defendant's price for forwarding to Schenectady was twelve shillings per barrel, and the price which he had agreed to pay for transporting the goods in question to that place was eleven shillings; he had no interest in the freight of the goods, and was not concerned as an owner in the boats employed in the carriage of merchandise. The judge being of opinion that these facts did not make the defendant a common carrier, nonsuited the plaintiff; and a motion having been made to set the nonsuit aside, *Spencer*, J., said: "On the fullest reflection, I perceive no grounds for changing the opinion expressed at the circuit. The defendant is in no sense a common carrier, either from the nature of his business, or any community of interest with the carrier. Aldrich, who, as the agent of the plaintiff, delivered the ashes in question to the defendant, states the defendant to be a forwarder of merchandise and produce from Utica to Schenectady and Albany; and that he delivered the ashes, with instructions from the plaintiff to send them to Col. Trotter. The case of a carrier stands upon peculiar grounds. He is held responsible as an insurer of the goods, to prevent combinations, chicanery, and fraud. To extend this rigorous law to

¹ A warehouseman is not liable for goods deposited "at owner's risk as to fire," and lost without his fault, *Irons v. Kentner*, 51 Ia. 88; nor if the owner by the use of ordinary prudence could have himself saved his property, *Smith v. Frost*, 51 Ga. 336.—It is no part of a warehouseman's business to receive fees from steamboat owners as an inducement to send them goods for shipment; and equity will not compel one partner to share sums so received with his co-partners. *Northrup v. Phillips*, 99 Ill. 449.—A livery-stable keeper who stores a carriage for a certain charge comes under the same liability as a warehouseman. *Searle v. Laverick*, L. R. 9 Q. B. 122.—Where a bull gored a horse through an agister's lack of reasonable care, the latter's lack of knowledge of the bull's disposition was held not essential to his liability in *Smith v. Cook*, 1 Q. B. D. 79.

* 140 * common carriers, in which case they come under the peculiar rules to be hereafter noticed. It may sometimes be difficult to determine in which capacity such a person acted at the time of the loss. But, in general, the rule is, that if the transit had terminated, and the bailee was only under an engagement to forward the goods by another carrier, he is only a warehouseman. (*l*) Nor will it cause him to continue to * 141 be a common * carrier until the next carrier receives the goods, that he has no distinct compensation as warehouseman. (*m*) But if the goods are housed by the carrier between the termini of his transit, they are still under his charge as carrier. (*n*) And if he pays the warehouse rent to another person, he is still liable as carrier, if his duty has not terminated, and he is bound by the contract or the usage to deliver the goods. (*o*) But if he is only bound to keep them safely until the consignee

persons standing in the defendant's situation, it seems to me, would be unjust and unreasonable. The plaintiff knew, or might have known (for his agent knew), that the defendant had no interest in the freight of the goods, owned no part of the boats employed in the carriage of goods, and that his only business in relation to the carriage of goods consisted in forwarding them. That a person thus circumstanced, should be deemed an insurer of goods forwarded by him, an insurer, too, without reward, would, in my judgment, be not only without a precedent, but against all legal principles. Lord Kenyon, in treating of the liability of a carrier (5 T. R. 394), makes this the criterion to determine his character; whether, at the time when the accident happened, the goods were in the custody of the defendants as common carriers. In *Garside v. The Proprietors of the Trent and Mersey Navigation Co.* 4 T. R. 581, the defendants, who were common carriers, undertook to carry goods from Stourport to Manchester, and from thence to be forwarded to Stockport. The goods arrived at Manchester, and were put into the defendants' warehouse, and burnt up before an opportunity arrived to forward them. Lord Kenyon held, the defendants' character of carriers ceased when the goods were put into the warehouse. This case is an authority for saying, that the responsibilities of a common carrier and forwarder of goods rest on very different principles. In the present case the defendant performed his whole undertaking; he gave the ashes in charge to an experienced and faithful

boatman. It has been urged that the defendant derived a benefit from the carriage of the goods, in receiving cash from the owners of produce, and paying the boatmen in goods, and also in charging more than he actually paid. The latter suggestion is doubted in point of fact; but admitting the facts to be so, these are advantages derived from the defendant's situation as a warehouse keeper and forwarder of goods, and by no means implicate him as a carrier; for surely the defendant is entitled to some remuneration for the trouble in storing and forwarding goods. In any and every point of view, there is not the least pretext for charging the defendant with this loss as a common carrier."

(*l*) *Garside v. Trent and Mersey Navigation Co.* 4 T. R. 581. In this case the defendants, being common carriers between Stourport and Manchester, received goods from the plaintiff at Stourport, to be carried to Manchester, and to be forwarded from the latter place to Stockport. The defendants carried the goods to Manchester, and there put them in their warehouse, in which they were destroyed by an accidental fire before they had an opportunity of forwarding them. The court held, that they were not answerable for the loss. See also *Brown v. Denison*, 2 Wend. 598; *Ackley v. Kellogg*, 8 Cowen, 223.

(*m*) See *Garside v. Trent and Mersey Navigation Co.* 4 T. R. 581.

(*n*) *Forward v. Pittard*, 1 T. R. 27.

(*o*) *Hyde v. Trent and Mersey Navigation Co.* 5 T. R. 389.

or owner calls for them, he is then only a warehouseman, although the goods be in his own store. (p)¹ And if he undertakes to forward them beyond his own route, and for that purpose puts them into a suitable vehicle, or otherwise disposes of them in a proper way for that purpose, he is liable only for negligence. (q) And if he receives goods as warehouseman into his store on his own wharf, for the purpose of carrying them forward, he is not liable as a carrier for their loss until their transit begins, actually or constructively, because until then he does not assume the character of a carrier. (r) If, however, he receives them to forward them, and delivers them to one not authorized to receive them, he is liable. (rr)

(p) Webb, in *re* 8 Taunt. 443. In this case, A, B, C, and D, in a partnership as carriers, agreed with S. & Co., of Frome, to carry goods from London to Frome, where they were to be deposited in a warehouse belonging to the partnership at Frome, where A resided, without any charge for the warehouse-room, till it should be convenient for S. & Co. to take the goods home. Goods of S. & Co., carried by the partners from London to Frome, under this agreement, were deposited in the warehouse at the latter place, and destroyed by fire. It was held, that the partners were not liable to S. & Co. for the value of the goods burnt. So in the case of Thomas v. Boston & P. R. R. Co. 10 Met. 472, it was held, that the proprietors of a railroad, who transport goods over their road, and deposit them in their warehouse without charge, until the owner or consignee has a reasonable time to take them away, are not liable, as common carriers, for the loss of the goods from the warehouse, but are liable as depositaries, only for want of ordinary care.

(q) Thus, where common carriers received goods on board their sloop, to transport from New York to Troy, where they transferred them on board of a

canal-boat bound to the north, pursuant to the bailor's instructions; receiving no reward for the transfer or further transportation; and the goods were lost by the upsetting of the canal-boat; it was held, that their character of common carriers ceased at Troy; and having exercised ordinary care in seeing the goods placed on board a safe boat, they were not responsible for the loss. Ackley v. Kellogg, 8 Cowen, 228.

(r) Platt v. Hibbard, 7 Cowen, 497. In White v. Humphrey, 11 Q. B. 43, where the plaintiff deposited hops in the defendant's warehouse, to be conveyed to London in the barges of the defendant (who was also a carrier), whenever the plaintiff should direct, and in the mean time to be kept by the defendant without charge for warehousing, it was held by the judge at nisi prius, that the advantage of carrying the hops for hire might be considered as payment for the warehousing, and that the defendant was not, therefore, a gratuitous bailee, and so liable only for gross negligence; and the Court of Queen's Bench refused to grant a new trial on the ground of misdirection.

(rr) Jeffersonville R. R. Co. v. White, 6 Bush, 261.

¹ A stipulation in a bill of lading that "the goods will be deposited at the expense of the consignee, and at his risk of fire, loss, or injury, in the warehouse provided for that purpose, &c.", does not exempt a carrier from liability as a warehouseman for a negligent delivery of goods stored in a warehouse under his control. Collins v. Burns, 63 N. Y. 1; Merchants, &c. Co. v. Story, 50 Md. 4.—A package of goods was delivered to a common carrier, a railroad, addressed to the plaintiff, "to be left till called for." It arrived on March 25th, and was placed in the station warehouse to await being called for, the address of the plaintiff, who travelled about with drapery goods, not being known. The package had not been called for, when, on the morning of March 27th, a fire accidentally broke out, the warehouse was burned down, and the package consumed. The plaintiff later on the same day called for the goods. Held, that, after the interval of time which the plaintiff had suffered to elapse since the

* 142 * It is not necessary that the goods be housed, to affect the bailee with the liabilities of a warehouseman. It is enough if they are actually within his charge and custody for the purpose of being housed. (s)

As to the obligation of the warehouseman to deliver the goods to the consignee, or to redeliver them to the consignor, in the case where they are claimed by another as the proper owner who forbids such delivery, there seems to be some uncertainty. (t) We take the law to be, however, that he must decide for himself which is the better right, and is exposed to loss if he decide wrongly. But if he in good faith deliver the goods to the original bailor, or his consignee, the true owner should not recover damages from him by merely proving his ownership and a notice to the warehouseman; and not unless he exhibited to the warehouseman in due season such proofs as might reasonably be required of his ownership. And if on such evidence

* 143 * the warehouseman did deliver the goods to the person claiming to be owner, and it appeared afterwards that the claim was unfounded, the original bailor should be limited in his

(s) Thus it has been decided, that as soon as the goods arrive, and the crane of the warehouse is applied to raise them into the warehouse, the liability of the warehouseman commences; and it is no defence that they are afterwards injured by falling into the street from the breaking of the tackle, even if the carman who brought them has refused the offer of slings for further security. *Thomas v. Day*, 4 Esp. 262.

(t) In *Ogle v. Atkinson*, 5 Taunt. 750, it was decided, that a warehouseman, receiving goods from a consignee, who has had actual possession of them, to be kept for his use, may nevertheless refuse to redeliver them, if they are the property of another. But several subsequent cases have established that a warehouseman cannot dispute the title of his bailor, or of any other person whose title he has acknowledged, in an action brought against him by such person. See *Gosling v. Birnie*, 7 Bing. 339; *Holl v. Griffin*, 10 Bing. 246; *Kieran v. Sandars*, 6 A. & E. 515; *Harman v. Anderson*, 2 Camp. 243; *Stonard v. Dunkin*, id. 344; *Burton v. Wilkinson*, 18 Vt. 186. In the case, however, of *Cheeseman v. Exall*, 4 E. L. & E. 438; a. c. 6 Exch. 341, where property had been delivered by the plaintiff to the defendant, for the purpose of defeating an execution against the plaintiff, it was held, that in the present action of trover the defendant might set up the title of a previous transferee of the plaintiff to defeat the plaintiff's right to recover, and the court refer to *Ogle v. Atkinson* as in point. The court are inclined to the opinion that in the case of a pledge the pledgee may set up the *jus tertii* unless he has made an absolute agreement to give up the property to the party pledging it. See also *Bates v. Stanton*, 1 Duer, 79; *Pitt v. Albritton*, 12 Ired. L. 77. So if a warehouseman delivers the goods intrusted to him to a wrong person by mistake, or they are obtained from him by fraud, as by a forged order, he is liable to his bailor for their value. *Lubbock v. Inglis*, 1 Stark. 104; *Willard v. Bridge*, 4 Barb. 361. On the other hand, if the goods are taken from the possession of the warehouseman by the authority of the law, this constitutes a good defence for him in an action brought against him by his bailor. *Burton v. Wilkinson*, 18 Vt. 186.

arrival of the goods, the liability of the railroad as a common carrier in respect of the package had ceased, and it had become a mere warehouseman. *Chapman v. Great Western R. Co.* 5 Q. B. D. 278.

recovery to the strictest compensation, if the warehouseman could show that he acted on evidence which would satisfy a cautious and honest man. In practice, it is usual in such cases to demand and receive an indemnity from the party put in possession of the goods.

It has been recently held, that a bailee who seeks to excuse his non-delivery of goods to one party when they are claimed by another, makes himself a party to the controversy, and his excuse is or is not valid according to its result; but that he may remain neutral, and permit a claimant to take them on his own responsibility; (*tt*) but this rule if it be one, must be subject to much qualification. If sued by the shipper, it seems that he may set up in defence his delivery of the goods to the rightful owner. (*tu*)

In an action against a warehouseman to recover the value of lost baggage, the owner has been admitted to prove the contents, in the same way as in a similar action against a common carrier; but this privilege is strictly confined to the ordinary baggage of a traveller. (*u*)

A warehouseman has a lien on the goods which he stores, for his charges for those goods; and he may redeliver a part of those goods, and retain his lien on the residue, for the whole of his charges on all the goods; provided they were delivered to him as one bailment. But he has no general lien on the goods for all his charges against the bailor for storage of other goods. (*v*)¹

WHARFINGERS. This kind of bailment is quite similar to that first spoken of, and the rules of law applicable to it are much the same. (*w*)²

(*u*) *Rogers v. Weir*, 34 N. Y. 468.

(*tu*) *Bliven v. Hudson R. R. R. Co.* 86 N. Y. 403.

(*tt*) *Clark v. Spence*, 10 Watts, 885.

(*tu*) *Schmidt v. Blood*, 9 Wend. 268.

The subject of the warehouseman's lien is fully and learnedly considered in *Steinman v. Wilkins*, 7 W. & S. 466; *Cole v. Tyng*, 24 Ill. 99. *Held*, that where a party purchases a warehouse receipt for grain, which he is informed

is subject to charges for storage, he will be liable for such charges; and the warehousemen will have a lien for such charges; and if the warehousemen permit the grain to be removed before charges paid, they do not thereby lose their recourse against the holder of the receipt.

(*w*) *Platt v. Hibbard*, 7 Cowen, 497, 502, n. (b); *Sidaways v. Todd*, 2 Stark. 400; *Foote v. Storrs*, 2 Barb. 326. It

¹ A warehouseman who has goods deposited with him as such, is not "an agent intrusted with the possession" of them, within the Factors Act, 5 & 6 Vict. c. 39, such as may make a valid pledge of them against his principals. *Cole v. Northwestern Bank*, L. R. 10 C. P. 354.—Where wood was stored, terminable at the end of any month, at a certain price, and notice was given the owner that an exorbitant sum would be charged if the wood was not removed at the end of the current month, it was held, on the failure so to remove, that only market rates for the subsequent time could be recovered. *Haseltine v. Weld*, 73 N. Y. 156.

² See *Howell v. Morlan*, 78 Ill. 162, that a wharfinger negligently failing to forward goods as directed is liable for the ensuing loss of their value due to the consignee's insolvency.

It has been somewhat questioned whether, in the case of depositaries for hire, and loss or injury to the goods, the law casts the burden of proving negligence on the owner, or that of proving due care and the absence of negligence on the depositary.

We have considered this point in a previous note; (*x*) and *144 the *cases there cited show that the decided weight of authority is in favor of requiring proof of negligence, on the ground that the law will not intend any wrong-doing. But there have been opposite decisions; and courts which adopt this rule sometimes regret its existence.

The wharfinger has a lien on vessel and goods for his wharfage. (*y*) And he is said to have not only a specific lien, but a general lien on the goods for his balance against the owner in respect to freight and wharfage; we do not, however, consider this certain. (*z*)

POSTMASTERS might be regarded as depositaries for a compensation, or as carriers; and as common carriers, because they are obliged to carry for all. But they are also public officers; receiving their appointments and their compensation from the State, which alone regulates and directs their duties. Hence they come under a different obligation and liability from that of ordinary common carriers. The postmaster-general is not liable for loss although it be caused by the negligence of his servants. The law was so established in Lord *Holt's* time, though against his opinion, in the case of *Lane v. Cotton*; (*a*) and that case has been considered as law ever since. (*b*)¹ But it should seem, from general principles, that if such servant were wholly incompetent, and the knowledge of the incompetency were brought home to

has sometimes been inferred from the cases of *Ross v. Johnson*, 5 Burr. 2825, and *Maving v. Todd*, 1 Stark. 72, that the rule as to the liability of wharfingers was different from what we have stated, and that they are held to the same degree of responsibility as common carriers. But it is very doubtful whether those cases justify such an inference; and if they do, they cannot now be considered as law.

(*x*) See *ante*, p. *125, note (*b*).

(*y*) *Johnson v. The Schooner McDonough*, Gilpin, 101; *Lewis, ex parte*, 2 *Garrison*, 488.

(*z*) *Rex v. Humphrey*, 1 McClel. & Y. 173.

(*a*) 1 *Ld. Raym.* 646; s. c. 12 *Mod.* 472.

(*b*) *Whitfield v. Le Despencer, Cowp.* 754; *Schroyer v. Lynch*, 8 *Watts*, 453; *Supervisors of Albany Co. v. Dorr*, 25 *Wend.* 440, per *Nelson, C. J.*; *Wiggins v. Hathaway*, 6 *Barb.* 632; *Martin v. The Mayor*, 1 *Hill (N. Y.)*, 545, per *Cowen, J.* See also *Dunlop v. Munroe*, 7 *Cranch*, 242. And in *Cornwell v. Voorhees*, 13 *Ohio*, 523, the same rule was applied to a mail contractor. Therefore, where money transmitted by mail was lost by the carelessness of the contractors' agents who carried the mail, the court held, that the contractors were not liable. The case of *Hutchins v. Brackett*, 2 *Foster (N. H.)*, 252, is to the same effect.

¹ *Keenan v. Southworth*, 110 *Mass.* 474.

the postmaster-general, this should make him responsible; and if it could be shown that the servant was appointed or retained from unworthy motives after such knowledge, the postmaster-general ought certainly to be held liable. (c) His deputies are not liable except for loss caused by their own fault or negligence; but for this it is clear that they are liable. (d) * This * 145 negligence may be in appointing unfit persons to subordinate offices, or in not using due precautions to secure their good conduct; for each deputy postmaster is bound to exercise due care in such appointments, and due watchfulness over the conduct of his subordinates. (e) And it would seem that the postmaster-general should be held to some measure of the same obligation.

The persons employed as deputies, or in the post-offices, are answerable for any injury sustained by their misconduct or neglect of duty. This has been applied to their refusal to deliver a newspaper. (f)

INNKEEPERS. An inn has been judicially defined as "a house where the traveller is furnished with every thing which he has occasion for whilst upon his way." (g) There need not be a sign to make it an inn. (h) But a mere coffee-house, (i) or eating-room, or boarding-house, (j) is not an inn. (k)

(c) See the authorities cited *infra*, (B). "A sign is not essential to an inn, but is an evidence of it." Per *Holt*, C. J., in *Parker v. Flint*, 12 Mod. 254.

(d) *Whitfield v. Le Despencer*, Cowp. 764; *Rowning v. Goodchild*, 3 Wils. 443; *Maxwell v. McIlvoy*, 2 Bibb, 211; *Christy v. Smith*, 23 Vt. 663. So also *Bolan v. Williamson*, 2 Bay, 551; s. c. 1 Brevard, 181.

(e) *Schroyer v. Lynch*, 8 Watts, 453; *Wiggins v. Hathaway*, 6 Barb. 632; *Christy v. Smith*, 28 Vt. 663. And in *Bishop v. Williamson*, 2 Fairf. 495, this rule was applied to a case where a deputy postmaster had employed an assistant without having an oath administered to him, as was required by the statute of the United States. Accordingly, where such assistant wrongfully refused to deliver a letter to the plaintiff, his employer was held liable in damages. See also *Bolan v. Williamson*, 1 Brevard, 181.

(f) *Teal v. Felton*, 8 Barb. 512; s. c. 1 Comat. 537; a. c. 12 How. 284. See also *Strong v. Campbell*, 11 Barb. 185.

(g) Per *Bayley*, J., in *Thompson v. Lacy*, 3 B. & Ald. 283, 286.

(h) Bac. Abr. tit. *Inns and Innkeepers*

(i) *Doe v. Laming*, 4 Camp. 78.

(j) This was directly held by *Erle*, J., in *Dansey v. Richardson*, 20 Law Times, 218, 25 E. L. & E. 76, 3 E. & B. 144.

(k) So one who entertains strangers occasionally, although he receives compensation for it, is not an innkeeper. *State v. Mathews*, 2 Dev. & B. 424; *Lyon v. Smith*, 1 Morris (Ia.), 184. So it has been held, that a housekeeper at Tunbridge or Epsom, or other watering-place, who lets lodgings, and furnishes meat and drink, and provides stable-room for the company who resort there for health or pleasure, is not an innkeeper. *Parkhouse v. Forster*, 5 Mod. 427; s. c. nom. *Parkhurst v. Foster*, Cartth. 417; s. c. 1 Salk. 387. And Lord *Holt* said, the case was so plain that there was no occasion for giving reasons. See also *Bonner v. Welborn*, 7 Ga. 296. But in *Thompson v. Lacy*, 3 B. & Ald. 283, it was held, that a house of public entertainment in London, where beds, provisions, &c., were furnished for all persons paying for the

* 146 * Public policy imposes upon an innkeeper a severe liability. The later, and, on the whole, prevailing authorities, make him an insurer of the property committed to his care, against every thing but the act of God, or the public enemy, or the neglect or fraud of the owner of the property. (*I*)¹ There seems to be some disposition, however, to regard this rule of law as too severe, and as needing modification. In two recent and well-considered cases a different rule was adopted. (*II*) In a

same, but which was merely called a tavern and coffee-house, and was not frequented by stage-coaches and wagons from the country, and which had no stables belonging to it, was to be considered as an inn, and the owner was subject to the liabilities of innkeepers, and had a lien on the goods of his guests for the payment of his bill, and that too even where the guest did not appear to have been a traveller, but one who had previously resided in furnished lodgings in London. In *Wintermute v. Clarke*, 5 Sandf. 247, the court say, that in order to charge a party as an innkeeper it is not necessary to prove that it was only for the reception of travellers that his house was kept open, it being sufficient to prove that all who came were received as guests without any previous agreement as to the time or terms of their stay. A public house of entertainment for all who choose to visit it is the true definition of an inn. See *Krohn v. Sweeny*, 2 Daly, 200.

(*I*) *Mason v. Thompson*, 9 Pick. 280, per *Wilde*, J.; *Richmond v. Smith*, 8 B. & C. 9, per *Bayley*, J.; *Piper v. Manny*, 21 Wend. 282, per *Nelson*, C. J.; *Grinnell v. Cook*, 8 Hill (N. Y.), 486, per *Bronson*, J.; *Manning v. Wells*, 9 Humph. 746; *Thicketun v. Howard*, 8 Blackf. 535; *Matteer v. Brown*, 1 Cal. 221; *Hulett v. Swift*, 42 Barb. 230; *Burrows v. Trieber*, 21 Md. 320; *Shaw v. Berry*, 31 Me. 478. This last was an action on the case against the defendant, who was an innkeeper, for an injury to the plaintiff's horse, while at the defendant's stable. The horse was placed at the stable in the evening, and the next morning one of his hind legs was found to have been broken above the gambrel joint. The evidence tended to show that he was treated with care and faithfulness; that he was placed in a safe and suitable stall, with sufficient and suitable bedding; and that

the injury happened without the fault of any one. The learned judge, before whom the cause was tried, instructed the jury, that the rule of law applicable to common carriers was not applicable to innholders; that the law, in case of injury to goods or property while in the custody of the innkeeper, presumed it to have happened through his negligence or fault, and would hold him responsible for it, unless he could prove that he was guilty of no fault; and that if the defendant had proved that he was not in fault, the action could not be maintained. The case was carried up to the Supreme Court on exception to these instructions, and that court, after an elaborate examination of the authorities, held the instructions to be incorrect; and declared the rule of law to be that an innkeeper is bound to keep the goods and chattels of his guests so that they shall be actually safe; inevitable accidents, the acts of public enemies, the owners of the goods and their servants, excepted; and that proof that there was no negligence in the innkeeper or his servants, was not sufficient for his immunity.

(*II*) *Dawson v. Chamney*, 5 Q. B. 164, and *Merritt v. Claghorn*, 23 Vt. 177. *Dawson v. Chamney* was an action on the case to recover damages for an injury to the plaintiff's horse. It appeared that the defendant was an innkeeper; that the plaintiff gave the horse in charge to the defendant's hostler, who placed him in a stall where there was another horse; and that the injury was done by the other horse kicking the horse of the plaintiff. The defendant having called witnesses to show that proper care had been taken of the horse, the learned judge directed the jury to find for the plaintiff, if they were of opinion that the defendant, by himself or servants, had been guilty of direct injury, or of negligence, but otherwise

¹ An innkeeper may excuse himself by proof that the loss did not happen through his negligence or that of his servants. *Baker v. Deessauer*, 49 Ind. 28.—*Pullman Palace Car Co. v. Smith*, 73 Ill. 360, decided that the owner of sleeping-car was not liable, as an innkeeper, for money stolen from a passenger in such a car.

recent case in New York where an innkeeper was held responsible for the loss of the goods of his guest by fire of which the cause was unknown, the guest not having been negligent, two of the judges dissented from this opinion. (*lm*)¹ Where a woman

for the defendant. The jury found a verdict for the defendant, and the Court of Queen's Bench held the direction proper. This decision was considered in the case of *Mateer v. Brown*, 1 Cal. 221. The court adopt the *dictum* of Mr. Justice *Bayley* in *Richmond v. Smith*, 8 B. & C. 9, that the innkeeper very closely resembles a common carrier, and is liable for any loss not occasioned by the act of God or the king's enemies, except where the guest chooses to have the goods under his own care; and after a lengthy and able consideration of the subject they say, that although that *dictum* of Mr. Justice *Bayley* has been overturned in England by the decision of *Dawson v. Chamney*, they think the *dictum* right and the decision wrong. The case of *Merritt v. Claghorn* was also an action on the case to recover the value of two horses, a double harness, two horse-blankets and two halters. On the trial, it was conceded that the defendant was the keeper of an inn, and that the agent of the plaintiff was received as a guest at the defendant's inn, with the property in question, belonging to the plaintiff; and that the horses and other property were, as is usual in such cases, put into the barn of the defendant, which was a part of the premises, and, at the usual time for closing the stable, the barn was locked by the defendant; and that about daylight the next morning, and while the property was thus in the custody of the defendant, as an innkeeper, the barn was discovered to be on fire, supposed to be the work of an incendiary, and the horses and other property were burned and destroyed; and that there was no negligence, in point of fact, in the defendant or his servants, in the case of the barn and of the property in question. On these facts, the court held that the plaintiff was not entitled to recover. And *Redfield*, J., in giving the opinion of the court, said: "The case finds that the plaintiff's loss was without any negligence, in point of fact, in the defendant or his servants. From this we are to understand that no degree of diligence on his part could have prevented the loss. If, then, the defendant is liable, it must be for a loss happening by a cause beyond his control. In say-

ing this we have reference only to the highest degree of what would be esteemed reasonable diligence, under the circumstances known to exist, before the fire occurred. We are aware that it would doubtless have been possible, by human means, to have so vigilantly guarded those buildings as probably to have prevented the fire. But such extreme caution in remote country towns is not expected, and if practised, as a general thing, must very considerably increase charges upon guests, which they would not wish to incur, ordinarily, for the remote and possible advantage which might accrue to them. The question, then, is, whether the defendant is liable? Do the authorities justify any such conclusion? For it is a question of authority merely. We know that many eminent judges and writers upon the law have considered that innkeepers are liable to the same extent as common carriers. It may be true, that the cases are much alike in principle. For one, I should not be inclined to question that. But if the case were new, it is certainly not free from question how far any court would feel justified in holding any bailee liable for a loss like the present. But in regard to common carriers, the law is perfectly well settled, and they contract with the full knowledge of the extent of their liability, and demand not only pay for the freight, but a premium for the insurance, and may reinsurance if they choose. And the fact that carriers are thus liable no doubt often induces the owners to omit insurance. But, unless the law has already affixed the same degree of extreme liability to the case of innkeepers, we know of no grounds of policy merely which would justify a court in so holding." After a careful examination of the authorities, the learned judge concludes: "It is certain no well-considered case has held the innkeeper liable in circumstances like the present. And no principle of reason, or policy, or justice, requires, we think, any such result, and the English law is certainly settled otherwise." See also *McDaniels v. Robinson*, 26 Vt 816; *Metcalf v. Hess*, 14 Ill. 129.

(*lm*) *Hulett v. Swift*, 83 N. Y. 571.

¹ In *Cutler v. Bonney*, 30 Mich. 259, it was decided that an innkeeper was not liable

leaving an inn where she had been a guest, left a trunk, saying she would send for it in ten minutes, and some days after sent for it, and the trunk was lost, the innkeeper was held liable, on the ground that he was liable for a reasonable time after the guest had left his house. (*ln*) He would then be liable

* 147 * for a loss occasioned by his own servants, by other guests, by robbery or burglary from without the house, or by rioters or mobs. Nor will it excuse him if he were sick, insane, or absent, at the time; for he is bound to have competent servants and agents. (*m*)

But it is a good defence that the loss was caused by the servant of the owner, (*n*) or by one who came with him as his companion, (*o*) or by the negligence of the owner; (*p*)¹ or that

(*ln*) *Adams v. Clem*, 41 Ga. 65.

(*m*) *Cross v. Andrews*, Cro. E. 622; *Borradaile v. Hunter*, 5 Man. & G. 639.

(*n*) *Calye's case*, 8 Rep. 32.

(*o*) *Id.*

(*p*) *Burgess v. Clements*, 4 M. & Sel. 806; *Armistead v. Wilde*, 6 E. L. & E. 349; s. c. 17 Q. B. 261. This last was an action on the case for the loss of money, which the plaintiff brought with him to the defendant's inn. On the trial, it appeared that the plaintiff was a commercial traveller, who had frequented the defendant's inn for twenty years. On the evening of the night in which the money was stolen from the plaintiff's driving box, he had opened the box and counted over the bank-notes in the presence of many persons in the commercial room, as he had also done on several days before, and after replacing them in the box he left it in that room all night, as he had been accustomed to do; it was the custom of travellers to leave their driving boxes in the commercial room during the night. The box was so insecurely fastened that it might be opened without a key, by pushing back the lock. The learned judge, in summing up to the jury, said, that by the custom of England an innkeeper was bound to keep the goods of his guests safely; but that a guest might, by gross negligence, relieve the innkeeper from his liability; and that if they thought that a prudent man would have taken the box with him to his bedroom, or given it into the express custody of the defendant, they

might find a verdict for the defendant; and left it as a question for them whether the plaintiff was guilty of gross negligence in the traveller's room, or whether they were satisfied on the evidence that the plaintiff had acted with ordinary caution. The jury found a verdict for the defendant. And a rule having been obtained for a new trial, on the ground of misdirection, Lord *Campbell*, C. J., said: "I am of opinion that the rule should be discharged. If the judge had intimated that it was the duty of the plaintiff to withdraw the box from the commercial room, and carry it with him into his bed-chamber, and that, not having done so, he had lost his claim upon the defendant, that would have been a misdirection. But there is no misdirection in what he has reported to us. It must be taken that he left the question to the jury under all the circumstances of the case; and it is not possible to say, as a matter of law, that a traveller might not be guilty of negligence, under some circumstances, in leaving a box containing money in the commercial room; and in this case I think that there was strong evidence from which the jury were justified in finding that the plaintiff was guilty of gross negligence. Indeed, it is questionable whether the direction was not too favorable for the plaintiff, because it is doubtful whether, in order to relieve the innkeeper from his liability, there must be *crassa negligentia* in the guest."

for a guest's horses, wagons, &c., destroyed by a fire not caused by the innkeeper's negligence, which consumed the hotel barn and contents.

¹ A hotel-keeper is not liable for a loss occasioned by the personal negligence of the guest himself. *Elcox v. Hill*, 98 U. S. 218.

* the owner retained personally and exclusively the custody of his goods. (q) It is not enough for this, however, that he exercised some choice as to the room where they should be * placed, (r) or that the key of the room was delivered to him. (s) It was long ago held, that the owner may still recover, even if he does not use the key, but leaves the door unlocked. (t)¹ But an innkeeper may require of his guest to place his goods in a particular place, and under lock and key, or

(q) This was decided in the case of *Farnworth v. Packwood*, 1 Stark. 249. It appeared in this case that Kirton came to the house of the defendant, an innkeeper, and in the course of three or four days afterwards applied to the defendant for a private room, for the purpose of depositing goods there, and exposing them for sale; and the defendant having shown him a small room, which he approved of, Kirton the next day took possession of it, and the key was delivered to him, and was kept by him exclusively for several days; but, upon the defendant's wife requesting to place some parcels in the same room, Kirton permitted her to use the key, and he had not the exclusive use of it, and other parcels were deposited in the same room. Kirton boarded and lodged in the house for almost a fortnight, and from time to time introduced his customers into the room. A short time before he left the house he discovered that a package was missing, which made the subject of the present demand. *Le Blanc*, J., in summing up to the jury, said: "If a guest take upon himself the exclusive charge of the goods which he brings into the house of an innkeeper, he cannot afterwards charge the innkeeper with the loss. The only question in this case is, whether Kirton did not take upon himself the exclusive charge of his goods, to the exclusion of every other person? A landlord is not bound to furnish a shop to every guest who comes into his house; and if a guest takes exclusive possession of a room, which he uses as a warehouse or shop, he discharges the landlord from his common-law liability. The question, therefore, for your consideration is, whether, when the goods were lost, they were exclusively in Kirton's possession? It is admitted that during part of the time Kirton kept the key; if afterwards the defendant took the key from

him, the goods then ceased to be under his exclusive control, and the defendant became liable for their safe custody. The only question is whether, at the time of the loss, the goods were in the exclusive possession of Kirton?" The jury found a verdict for the defendant. See also *Burgess v. Clements*, 4 M. & Sel. 306. The same rule holds, where the guest, instead of reposing himself upon the protection of the innkeeper, intrusts his property to some one else in the house. *Sneider v. Geiss*, 1 Yeates, 34.

(r) Thus, where a traveller went into an inn, and desired to have his luggage taken into the commercial room, to which he resorted, from whence it was stolen, the court held, that the innkeeper was responsible, although he proved that, according to the usual practice of his house, the luggage would have been deposited in the guest's bedroom, and not in the commercial room, if no order had been given respecting it. *Richmond v. Smith*, 8 B. & C. 9. See further *Epps v. Hinds*, 27 Miss. 657.

(s) Anonymous, Moore, 78 pl. 207; Calye's case, 8 Rep. 32. In the case of *Burgess v. Clements*, 4 M. & Sel. 306, Lord *Ellenborough* says: "I agree that if an innkeeper gives the key of the chamber to his guest, this will not dispense with his own care, or discharge him from his general responsibility as innkeeper. But if there be evidence that the guest accepted the key, and took on himself the care of his goods, surely it is for the jury to determine whether this evidence of his receiving the key proves that he did it *animo custodiendi*, and with a purpose of exempting the innkeeper, or whether he took it merely, because the landlord forced it on him, or for the sake of securing greater privacy, in order to prevent persons from intruding themselves into his room."

(t) Calye's case, 8 Rep. 32.

¹ See *Oppenheim v. White Lion Hotel Co.* L. R. 6 C. P. 515, as to the liability of an innkeeper under such circumstances, if a guest negligently omits to lock the door.

he will not be answerable. And if these precautions are reasonable, and the guest neglects them, and exposes the goods to a greater hazard, the innkeeper is exonerated. (*u*)

It is common for large hotels or inns to have safes for holding valuable property, and to give notice to guests that they will not be responsible for such property, as money, jewels or ornaments, unless delivered to them to be put into the safe. Such notice would be reasonable, and it is sustained by a statute in New York, passed in 1855; and would undoubtedly be held generally to limit the responsibility of the innkeeper. (*uu*)¹ So it has been held under a similar statute in Wisconsin, and the rule applied to a watch and chain, although the guest needs the constant use of such an article, and usually keeps it with him. (*wv*) Some doubt may be thrown on this doctrine by a recent case in New York. (*ux*)

A distinction has been taken, and appears to rest on good reason, between those effects of a traveller not immediately requisite to his comfort, and those essential to his personal convenience, and which it is necessary that he should have constantly about him; so that, though personally notified to deposit the latter with the innkeeper for safety, if he fail to comply, the innkeeper will still be responsible. (*v*)

If the goods are once within the custody of the innkeeper, and while there, are lost, the presumption of law is, that they are lost through his negligence. (*w*)

No especial delivery or direction of the goods to the innkeeper is necessary to charge him; for it is enough if they are fairly, according to common practice, within his custody. (*x*)

(*u*) *Sanders v. Spencer, Dyer, 286 b;*
Calye's case, 8 Rep. 82.

(*uu*) For cases under this statute on usage, see *Bendetson v. French, 44 Barb. 31;* and *Pinkerton v. Woodward, 38 Cal. 557.*

(*wv*) *Stewart v. Parsons, 24 Wisc. 241.*

(*ux*) *Krohn v. Sweeney, 2 Daly, 200.*

(*v*) *Proflet v. Hall, 18 Le. An. 524.*

(*w*) See the cases in the former notes, and *Kisten v. Hildebrand, 9 B. Mon. 72;* and *Sibley v. Aldrich, 38 N. H. 558.*

(*x*) *McDonald v. Edgerton, 5 Barb. 580;* *Bennett v. Mellor, 5 T. R. 278.*

Nor is it material whether the property intrusted to the innkeeper consists of goods or of money. *Kent v. Shuckard, 2 B. & Ad. 803.* Nor is it limited to any particular amount. *Berkshire Woollen Co. v. Proctor, 7 Cush. 417.* See the facts of this case stated, *post*, p. *152, note (*j*). *Fletcher, J.*, in reference to the point, says: "The responsibility of innkeepers for the safety of the goods and

¹ But an innkeeper's liability is not affected by such a notice unless it be shown that the guest read it, that his attention was called to its contents, or that he wilfully avoided learning the same. *Bodwell v. Bragg, 29 Ia. 232.* — In *Ramaley v. Leland, 43 N. Y. 539*, it was held that a "watch worn and used in the ordinary manner" is not a "jewel or ornament," within the meaning of a statute under which an innkeeper, by providing a safe and posting a notice of that fact, is exonerated from liability for the loss of "money, jewels, and ornaments."

* Thus, if he engages to take passengers "free" from a station, and a passenger gets into a hack which, by agreement with the owners, may be used by him for that purpose, and loses a trunk in that hack, the innkeeper is liable. (y) If a servant of the innkeeper take the luggage of the passenger to carry it to the cars, the innkeeper continues responsible for it, until delivery to the cars. (yy)

It is said, that if the innkeeper refuses to receive the party as a guest, he is not liable for any loss of his goods. But he cannot so refuse, unless his house is full, and he is actually unable to receive him. (z) And if on false pretences he refuses, he is liable to an action. (a) And it is said that he may even be indicted therefor. (b)

An innkeeper may refuse to receive a disorderly guest, or require him to leave his house. (c) He is not bound to examine into the reasonableness of the guest's requirements, if the guest be possessed of his reason, and is not a minor. (d) And while travellers are entitled to proper accommodations, they have no right to select a particular apartment, or use it for purposes other than those for which it is designed. (e) But an innkeeper has no right to prevent the driver of a lise that is a rival to one which favors the innkeeper, from entering his house for lawful and reasonable purposes. (f)

Nothing need be, nor usually is, paid for the goods separately. (g) The compensation paid by the owner for his entertainment covers the care of the property. The custody of the goods is accessory to the principal contract.

It is sometimes difficult to know who is the guest of an innkeeper. (h)¹ In this country it is very common for per-

chatts and money of their guests, is founded on the great principle of public utility, and is not restricted to any particular or limited amount. . . . The principle for which the defendants contend, that innkeepers are liable for such sums only as are necessary and designed for the ordinary travelling expenses of the guest, is unsupported by authority, and wholly inconsistent with the principle upon which the liability of an innkeeper rests."

(y) *Dickinson v. Winchester*, 4 *Cush.* 114.

(yy) *Sasseen v. Clark*, 87 Ga. 242. In

this case the liability of an innkeeper is much considered.

(z) *Hawthorn v. Hammond*, 1 *Car. & K.* 404; *Kirkman v. Shawcross*, 6 *T. R.* 14.

(a) *White's case*, *Dyer*, 158 b, 1 *Roll. Abr.* 3, (F) pl. 1.

(b) *Rex v. Ivens*, 7 *C. & P.* 212.

(c) *Howell v. Jackson*, 6 *C. & P.* 733; *Rex v. Ivens*, 7 *C. & P.* 218.

(d) *Proctor v. Nicholson*, 7 *C. & P.* 67.

(e) *Fell v. Knight*, 8 *M. & W.* 269.

(f) *Markham v. Brown*, 8 *N. H.* 523.

(g) *Lane v. Cotton*, 12 *Mod.* 472, 487.

(h) Purchasing liquor at an inn has

¹ See *Mowers v. Fethers*, 61 N. Y. 34, as to whether the owner of goods must be a guest, to recover. See also *Healey v. Gray*, 68 Me. 489.

* 151 sons to *become boarders at an inn ; and then they cease to be guests in such a sense as to hold the innkeeper to his peculiar liability, and, on the other hand, give him his lien. (i)

We take the distinction between the guest and the boarder to be this. The guest comes without any bargain for time, remains without one, and may go when he pleases, paying only for the actual entertainment which he receives ; (ii) and it is not

been held sufficient to constitute one a guest. *Bennet v. Mellor*, 5 T. R. 273. In this case the plaintiff's servant had taken some goods to market at Manchester, and not being able to dispose of them, went with them to the defendant's inn, and asked the defendant's wife if he could leave the goods there till the following week, and she said she could not tell, for they were very full of parcels. The plaintiff's servant then sat down in the inn, had some liquor, and put the goods on the floor immediately behind him, and when he got up, after sitting there a little while, the goods were missing. There was a verdict for the plaintiff for the value of the goods ; and, on a motion for a new trial, the Court of King's Bench sustained the verdict, deciding that the plaintiff's servant was to be deemed the guest of the defendant. See also *McDonald v. Edgerton*, 5 Barb. 560; *Washburn v. Jones*, 14 Barb. 198. Nor is it necessary that the owner of the goods be himself a guest, in order to entitle him to an action against an innkeeper. If his servant or friend to whom he has intrusted the possession of the goods is guest, it is sufficient. This is held in the following cases : *Mason v. Thompson*, 9 Pick. 280; *Towson v. Havre de Grace Bank*, 6 Har. & J. 47; *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417.

(i) *Manning v. Wells*, 9 Humph. 746; *Ewart v. Stark*, 8 Rich. L. 423; *Hursh v. Byers*, 29 Mo. 469. The liability of boarding-house keepers for the goods of their guests was much discussed in the case of *Dansey v. Richardson*, 25 E. L. & E. 76; s. c. 8 E. & B. 144. The declaration stated that the plaintiff had become a guest in the boarding-house of the defendant upon the terms, among others, that the defendant would take due and reasonable care of the goods of the plaintiff while they were in the house of the defendant, for hire and reward, and it then became the duty of the defendant, by herself and servants, to take such care of the plaintiff's goods while a guest in the defendant's house. Breach of the alleged duty, and a loss of the plaintiff's goods, by the neglect of the defendant and her servants. On the trial it ap-

peared that the plaintiff had been received as a guest in the defendant's boarding-house, at a weekly payment, upon the terms of being provided with board and lodging and attendance. The plaintiff being about to leave the house, sent one of the defendant's servants to purchase some biscuits, and he left the front door ajar, and while he was absent on the errand a thief entered the house and stole a box of the plaintiff's from the hall. The learned judge directed the jury that the defendant was not bound to take more care of the house and the things in it than a prudent owner would take, and that she was not liable if there were no negligence on her part in hiring and keeping the servant ; and he left it to the jury to say whether, supposing the loss to have been occasioned by the negligence of the servant in leaving the door ajar, there was any negligence on the part of the defendant in hiring or keeping the servant. Held by the court that at least it was the duty of the defendant to take such care of her house and the things of her guests in it as every prudent householder would take ; and, by Lord Campbell, C. J., and Coleridge, J., that she was bound, not merely to be careful in the choice of her servants, but absolutely to supply the plaintiff with certain things, and to take due and reasonable care of her goods ; and that if there had been a want of such care as regarded the plaintiff's box, it was immaterial whether the negligent act was that of the defendant or her servant, though every care had been taken by the defendant in employing such servant ; and, consequently, that the direction of the learned judge was not correct ; but, by Wightman, J., and Erie, J., that the duty of the defendant did not require that she should do more than take all requisite care to employ and keep none but trustworthy servants ; and that if that had been done, the defendant was not liable for the single act of negligence on the part of the servant in leaving the door open ; and, therefore, that the direction at the trial was right. See ante, p. *145, note (k).

(ii) *Shoecraft v. Bailey*, 25 Ia. 553. See also *Pollock v. Landis*, 38 Ia. 661.

enough to make a boarder, and not a guest, that he has stayed a long time in the inn in this way. This we hold to be the general rule; but * there may be some difficulty in the application of it; for, on the one hand, the special contract between the boarder and the master of the house may be express or implied, and a length of residence, upon certain terms, might certainly be one circumstance, which, with others, might lead to the inference of such a contract. On the other hand, if a traveller on a journey stops at an inn for three days, and makes a bargain for that time, it would be difficult to say that he thereby ceased to be a guest, and that the innkeeper was exonerated from liability as such. (j)¹ So if a company gave a ball at an inn, the guests present cannot hold the innkeeper to his liability, as he did not receive them in that character. (jj) Another test is that a boarding-house receives only such guests as the master chooses; but an innkeeper must receive all who come, unless there be a

(j) This question was discussed in the Supreme Judicial Court of Massachusetts, in the case of the Berkshire Woolen Co. v. Proctor, 7 Cush. 417. In that case one Russell, the agent and servant of the plaintiff, a corporation, came to Boston with a large number of witnesses, to take charge of a law-suit in behalf of the corporation, bringing with him one thousand dollars to defray the expenses of the suit, and put up at the defendants' inn as a guest, with several of the witnesses, for whose board he promised to be responsible to the defendants, but at an agreed price for board by the week,—the price to be greater if they did not stay a week,—and under said agreement stayed at the defendants' inn for eighteen days. It was held, that the relation of landlord and guest was established instantly upon his arrival at the inn, and his reception as a guest, and was not affected by his staying for a longer or shorter time, if he retained his character as a traveller, and the fact that there was an agreed price for board would not take away his character as a traveller and guest. And Fletcher, J., said: "It is maintained for the defendants that Russell was not a guest in the sense of the law, but a boarder. But Russell surely came to the defendants' inn as a wayfaring man and a traveller, and the defendants received him, as such wayfaring man and traveller, as a guest at their inn. Russell being thus received by the defendants as their guest at their inn, the relation, with all the rights and liabilities of the relation of landlord and guest, was instantly established between them. The length of time that a man is at an inn makes no difference, whether he stays a week or a month, or longer, so that always, though not strictly *transiens*, he retains his character as a traveller. Story on Bailment, § 477. The simple fact that Russell made an agreement, as to the price to be paid by him by the week, would not, upon any principle of law or reason, take away his character as a traveller and a guest. A guest for a single night might make a special contract as to the price to be paid for his lodging, and whether it were more or less than the usual price would not affect his character as a guest. The character of a guest does not depend upon the payment of any particular price, but upon other facts. If an inhabitant of a place makes a special contract with an innkeeper there, for board at his inn, he is a boarder, and not a traveller or a guest, in the sense of the law. But Russell was a traveller, and put up at the defendants' inn as a guest, was received by the defendants as a guest, and was, in the sense of the law, and in every sense a guest." See also Chamberlain v. Masterson, 26 Ala. 371; and Johnson v. Reynolds, 8 Kans. 257.

(jj) Carter v. Hobbs, 12 Mich. 52.

¹ See Jalie v. Cardinal, 35 Wis. 118.

special reason for refusal. (*jk*) This question must always be one of mixed law and fact.

The responsibility of a boarding-house keeper is considered at much length, in a recent English case. *Wightman*, J., and *Erie*, J., held that a boarding-house keeper was not a bailee of the goods of a lodger, and not answerable for loss caused by the negligence of her servants, unless she was herself negligent or in default for hiring the servants, or in some other way. *Campbell*, C. J., * 153 and *Coleridge*, J., held that she was liable for * the negligence of her servants without having contributed thereto, as she was for her own negligence. We cannot but think this latter view more consistent with reason, and with the authorities, so far as they bear upon the question. (*k*)

One invited into an inn as a visitor by the innkeeper, from whom no pay is expected, is not a guest for whom the innkeeper is liable. (*l*)

Another question has arisen, whether he is a guest who only sends or carries his property to an inn, and places it in the custody of the innkeeper, but does not go there himself to eat or to lodge. Upon this question the authorities are directly antagonistic; (*m*) but we think that such person is not a guest, and that the innkeeper is then only a depositary for compensation, and liable as such. (*mm*) We think the test is this. Is he bound to receive and to keep goods so sent or brought to him? He is certainly bound to receive them—if not unreasonable in quantity, or dangerous in quality—if the guest comes and stays with them; and then insures them as above stated. But he may refuse to take charge of them if the owner does not accompany them; for the custody of the goods, as we have already said, is merely accessory to the principal contract. He may refuse them,

(*jk*) *Pinkerton v. Woodward*, 83 Cal. 557.

(*k*) *Dansey v. Richardson*, 23 Law J. Q. B. 217.

(*l*) *Southcote v. Stanley*, 1 Hurl. & N. 247.

(*m*) This question was decided in the affirmative by a majority of the judges, against the opinion of Lord *Holt*, in *Yorke v. Grensaugh*, 2 Ld. Raym. 866; *s. c. non*. *York v. Grindstone*, 1 Salk. 388. And on the authority of this case it was decided the same way in *Mason v. Thompson*, 9 Pick. 280. See also the case of *Peet v. McGraw*, 25 Wend. 653, which

contains a *dictum* by *Nelson*, C. J., to the same effect; and *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417, in which the point is noticed, but no opinion given.

On the other hand, in *Grinnell v. Cook*, 8 Hill (N. Y.), 485, the Supreme Court of New York, after much consideration, decided the same question the other way, conformably to the opinion of Lord *Holt*. See also *Thickstun v. Howard*, 8 Blackf. 585, to the same effect. See also *Smith v. Dearlove*, *post*, p. * 166, n. (a).

(*mm*) It was also held in a recent case in New York. *Ingallsbee v. Wood*, 83 N. Y. 577.

and therefore if he receives them it is not as an innkeeper, or at least not so as to subject him to the peculiar liability of an innkeeper. It is quite certain that he is not answerable for goods left by the owner, for which he is to receive no compensation. (n) A guest undoubtedly may leave an inn for a time, and still leave his property under the safeguard of the landlord's liability. And it is impossible to say precisely * how long he may so leave it, without ceasing to be a guest. On the other hand, it must be certain that one cannot lodge for a day or two at an inn, and then depart, leaving valuable property for an indefinite period, and the landlord be subjected, as long as the owner pleases, to the peculiar liability of an innkeeper. In such case he would be, like a warehouseman or other depositary, liable only for his negligence. (o)

(n) *Yorke v. Grennaugh*, 2 Ld. Raym. 866; *s. c. non. York v. Grindstone*, 1 Salk. 388.

(o) In the case of *Gelley v. Clerk*, Cro. J. 188, it appeared that the plaintiff, being a guest at the house of the defendant, who was an innkeeper at Uxbridge, went from thence to London, and left his goods with the defendant, saying that he would return within two or three days. He returned, accordingly, within the three days, and in the mean time his goods had been stolen. Upon these facts, *Foster*, Serjeant, for the plaintiff, contended that the innkeeper should be charged. "For when the plaintiff was a guest, and left his goods for so short a time, and promised to return so soon, and returned accordingly, he is all that time accounted as a guest, and shall be said to be a guest, to charge the defendant as an innkeeper, according to the custom of the realm. And it was adjudged in the case of Sir Edwyn Sands, where he came to an inn and lodged, and went out thereof in the morning and left his cloak-bag there, intending to return at night, and at night returned accordingly, and in the interim his cloak-bag was stolen, that he might have his remedy by an action grounded upon the common custom: so here," &c. *Sed non allocatur*; for per *Williams*, J.: "If one comes to an inn and leaves his goods and horses, and goes into the town, and after returns, and in the interim his goods are stolen, no doubt but he is a guest, and shall have remedy, and so was Sir Edwyn Sands's case; for his absence in part of the day is not material, but he is always reputed as a guest. So where one leaves his horse at an inn, to stand

there by agreement at livery, although neither himself nor any of his servants lodge there, he is reputed a guest for that purpose, and the innkeeper hath a valuable consideration; and if that horse be stolen, he is chargeable with an action upon the custom of the realm. But, as in the case at the bar, where he leaves goods to keep, whereof the defendant is not to have any benefit, and goes from thence for two or three days, although he saith he will return, yet he is at his liberty, and therefore he is not a guest during that time." The distinctions taken in this case have been recognized substantially in several subsequent cases. See *Grinnell v. Cook*, 3 Hill (N. Y.), 485; *McDonald v. Edgerton*, 5 Barb. 560; *Towson v. Havre de Grace Bank*, 6 Har. & J. 47. See, however, *ante*, p. * 153, note (m), that what *Williams*, J., says in regard to leaving a horse at an inn, must be confined to those cases where the owner is himself a guest at the time of so leaving the horse. In *Winternute v. Clarke*, 5 Sandf. 262, the plaintiff's son went to the tavern of the defendant with his baggage, which he left there. The next morning he paid his bill for his lodging, leaving, as was contended, his trunk at the inn. Upon the testimony the judge charged the jury, that if they believed the trunk had been taken away by any other person than the plaintiff's son, even after the plaintiff had paid his bill, the defendant was liable. The verdict of the jury for the plaintiff was set aside, and a new trial granted, on the ground that after a guest pays his bill, and leaves the house, it is at his own peril that he leaves his property behind him, and that the inn-

Innkeepers are liable only for goods brought within the inn, or otherwise placed distinctly within their custody, in some customary and reasonable way. (p) Where a horse or carriage * 155 * is put in an open shed, or the horse put for the night into a pasture by the innkeeper, without the consent of the owner, he is still liable; (q) but it is otherwise if it is done with the owner's consent, or by his direction; (r) and where this is usually done, and the owner knows the custom, and gives no particular direction, it might be presumed that he consented, and took the risk upon himself. (s)

keeper has a right to believe that he takes it with him, and is therefore no longer responsible for it, unless it is specially committed to his charge, and then only as an ordinary bailee. See also *McDaniels v. Robinson*, 26 Vt. 816, n.

(p) *Simon v. Miller*, 7 La. An. 360; *Albin v. Presby*, 8 N. H. 408, cited *post*, note (s). But in *Clute v. Wiggins*, 14 Johns. 175, where a sleigh loaded with bags of wheat and barley, was put by the guest into an outhouse appurtenant to the inn, where loads of that description were usually received, and the grain was stolen during the night, the innkeeper was held responsible for the loss, the court holding that the grain was *infra hospitum*.

(q) Calye's case, 8 Rep. 32; *Piper v. Manny*, 21 Wend. 282; *Mason v. Thompson*, 9 Pick. 280. And where an innkeeper on the day of a fair, upon being asked by a traveller, then driving a gig of which he was owner, "whether he had room for the horse?" put the horse into the stable of the inn, received the traveller with some goods into the inn, and placed the gig in the open street without the inn-yard, where he was accustomed to place the carriages of his guests on fair days; and the gig was stolen from thence; the court held, that the innkeeper was answerable. *Jones v. Tyler*, 1 A. & E. 522; s. c. 8 Nev. & M. 576.

(r) Calye's case, 8 Rep. 32. In *Hawley v. Smith*, 25 Wend. 642, it appeared that the defendant was an innkeeper, and that the plaintiff stopped at his house with a drove of 700 sheep, which, with his knowledge, were turned out to pasture. On the following day several of the sheep died, and others sickened, in consequence of having eaten *laurel*, which they found in the pasture. A verdict having been found for the plaintiff, upon these facts, under the direction of the judge, the Supreme Court granted a new trial for a misdirection. And *Nelson, C. J.*, said: "I am of opinion this case falls

within an exception laid down in Calye's case, 8 Rep. 32, to the general rule in respect to the liability of an innkeeper, which has been followed ever since. It was there resolved, that if the guest deliver his horse to the hostler, and request that he be put to pasture, which is accordingly done, and the horse is stolen, the innkeeper is not responsible, not being, in the common-law sense of the term, *infra hospitum*. He is not to be regarded as an insurer of goods without the inn, that is for goods not within the curtilage. The sheep were put to pasture under the direction of the guest, which fact should have been regarded by the learned judge as bringing the case within the above exception. It would then have turned upon the question of negligence, which should have been put to the jury upon the facts disclosed."

(s) Thus in *Albin v. Presby*, 8 N. H. 408, where a traveller, after arriving at an inn, placed his loaded wagon under an open shed, near the highway, and made no request to the innkeeper to take the custody of it, and goods were stolen from it in the night; it was held, that the innkeeper was not liable for the loss, notwithstanding it was usual to place loaded teams in that place. And *Parker, J.*, said: "The present case finds, to be sure, that the wagon was put in the place where loaded wagons of guests were usually placed, when they were put under shelter; but they were doubtless usually so placed, with the knowledge and assent of the guests. It is well known that loaded wagons are often left within the limits of the highway, near the inn, and are usually not placed in any building or inclosed yard, unless there is a special request for it. Few inns in the country have suitable accommodations for securing property of this character in such a manner. In the present case, there is not only knowledge and assent, but the plaintiff himself places the wagon in that situ-

* An innkeeper has a lien on the property of the guest * 156 (not on his person), (*t*)¹ for the price of his entertainment; (*u*) even if he be an infant. (*uu*) And he has this lien on goods brought to him by a guest, although they belong to another person. (*v*) He has this lien on a horse, even if it be stolen and the thief brings it to him; (*w*) but it is said that he cannot sell a horse on which he has a lien, for his keeping, but must proceed in equity. (*x*)² And it is not quite certain, on the authorities, how far this lien of the innkeeper extends. (*y*) Upon the whole, it seems that he has it on all the goods of the guest which he has received, except only those actually worn by him on his person, and that this lien covers the whole amount due for the entertainment of the guest, his servants, and his horses. (*z*)³

ation. He of course could not have expected that it would be removed to another place—he made no request to that effect—and he must have known that the goods could not be secured from thieves in that place, except by a watch. Assuredly he could not have expected they would be guarded by the defendant in that manner; and under such circumstances, ought not to have expected that the defendant was to be responsible for a loss. And as the inns in this country are not generally furnished with accommodations for the protection of the carriages of all guests who may lodge at the inn, and the custom of permitting them to remain in open yards, where they cannot be protected but by a guard, is so universal and well known, we think it a sound position that the assent of the traveller is to be presumed in such case, unless he make a special request that his carriage should be put in a safe place; and that such open yard is not to be deemed a part of the inn, so as to charge the innkeeper for the loss, unless he neglects, upon request, to put the goods in a place of safety, which he is bound to do, on such request, if he have any accommodations which enable him to comply with it." See *Clute v. Wiggins*, 14 Johns. 175, cited ante, p. * 154, note (*p*).

(*t*) *Sunbolf v. Alford*, 3 M. & W. 248.
(*u*) *Robinson v. Walter*, Poph. 127;

s. c. 3 Bulst. 209; *Johnson v. Hill*, 3 Stark. 172; *Grinnell v. Cook*, 3 Hill (N. Y.), 485.

(*uu*) *Watson v. Cross*, 2 Duvall, 147.

(*v*) *Snead v. Watkins*, 1 C. B. (n. s.) 267.

(*w*) *Jones v. Thurloe*, 8 Mod. 172. And where the guest brings to the inn a carriage not his own, for the standing room of which the innkeeper acquires a claim, for this he has a lien, and may defend against an action of trover brought by the owner of the carriage. *Turrill v. Crawley*, 18 Q. B. 197.

(*x*) *Fox v. McGregor*, 11 Barb. 41.

(*y*) In Bac. Abr. tit. *Inns and Innkeepers* (D), it is said: "If a horse be committed to an innkeeper, it may be detained for the meat of the horse, but not for the meat of the guest; for the chattels are only in the custody of the law for the debt that arises from the thing itself, and not for any other debt due from the same party; for the law is open to all such debts, and doth not admit private persons to make reprisals." See also *Rosse v. Bramstead*, 2 Rolle, 488.

(*z*) See *Thompson v. Lacy*, 8 B. & Ald. 283; *Proctor v. Nicholson*, 7 C. & P. 67. But where an innkeeper receives horses and a carriage to stand at livery, the circumstances of the owner at a subsequent period, taking occasional refreshment at the inn, or sending a friend to

¹ As a piano, *Threfall v. Borwick*, L. R. 7 Q. B. 711; affirmed in L. R. 10 Q. B. 210.

² An innkeeper waives his lien by selling a chattel in order to reimburse himself, although its retention would be attended with expense. *Mulliner v. Florence*, 3 Q. B. D. 484.

³ *Shelton v. Tutt*, 10 Lea, 258, held that an innkeeper did not lose his lien for a horse's board by allowing the owner occasionally to ride it, and that such lien was superior to an execution lien placed on the horse while in the owner's possession.

LOCATIO OPERIS MERCIA VEHENDARUM. The owner of goods may cause them to be carried by a private carrier gratuitously, or by a private carrier for hire, or by a common carrier. Any one who carries goods for another is a private carrier, unless he comes within the definition of the common carrier, * 157 which we * shall give presently. If the private carrier carries them gratuitously, he is a mandatary, and is bound only to slight diligence, and liable only for gross negligence; because this bailment is wholly for the benefit of the bailor.

Such a carrier, like any mandatary, has a special property so far as to maintain an action for a tort to the thing while in his possession; but not, it seems, if it went out of his possession by his own wrongful disregard of the directions of the bailor. (a) And if he incur expenses in relation to it, he would have a lien on the article for them.

The private carrier for hire is bound to ordinary diligence, and liable for ordinary negligence, because this bailment is for the benefit of both bailor and bailee. He is of course not liable for a loss caused by robbery or theft, which could not be avoided by ordinary care, or for one from overpowering force. But he is liable for the negligence of his servants or agents. (b) It is not necessary that the owner should promise to pay the carrier a certain price in order to hold him to his liability; for it is enough if the carrier is entitled to a reasonable compensation. By the civil law, robbery by force was a sufficient defence for the bailee, but if the goods were lost by secret purloining, he was bound to show affirmatively the absence of negligence on his part. It can hardly be said that this distinction is adopted by the common law; although it has been said that the occurrence of such loss was *prima facie* evidence of negligence; but it may well be doubted whether the common law raises such a presumption. (c) Certainly in most cases, if not in all, the question of ordinary negligence is one of fact, to be determined by the jury on the whole evidence, and not one of law. (d) And if the loss may as well be attributed to the negligence of the owner as of the carrier, the carrier is not liable. We take the distinction between

be lodged there at his charge, will not entitle the innkeeper to a lien in respect to any part of his demand. For the right of lien of an innkeeper, say the court, depends upon the fact that the goods came into his possession in his character of inn-

keeper, as belonging to a guest. Smith v. Dearlove, 6 C. B. 132.

(a) Miles v. Cattle, 6 Bing. 743.

(b) Brind v. Dale, 8 C. & P. 207.

(c) See Story on Bailm. §§ 393-399.

(d) Doorman v. Jenkins, 2 A. & E. 256.

the common carrier and the private carrier for hire to be this. If goods given to either are neither delivered nor accounted for, the carrier, whether common or private, is liable. But if it be shown that the goods were lost, then the common carrier is still liable, unless he brings the case * within the exceptions of the act of God, or of the public enemy; but the private carrier is not liable, unless the owner shows that the loss arose from the carrier's negligence. (e) It is sometimes said that the liability of the common carrier is independent of contract and imposed by custom and public policy. We should prefer saying that it must arise from a contract and be founded upon it, but is then qualified and regulated by the customary law in a manner different from the liability assumed by a private carrier.

A private carrier for hire may undoubtedly enlarge his liability by special contract, even to the extent of warranty. Or he may lessen his liability by agreement. A special promise to carry "safely and securely," leaves him still liable only for negligence. (f)

The private carrier for hire would seem, on general principles, to have a lien on the goods for his hire; but this does not as yet appear to be distinctly adjudicated.

COMMON CARRIERS. The common carrier may be a carrier of goods, or of passengers, or of both. We shall first consider the common carrier of goods, and afterwards the common carrier of passengers.

The law in relation to the common carrier is very peculiar in many respects. He is held in the first place to very stringent responsibilities. He is not only responsible for any loss of or injury to the goods he carries, which is caused by his negligence, but the law raises an absolute and conclusive presumption of negligence whenever the loss occurs from any other cause than "the act of God, or the public enemy." (g) He is therefore held as an insurer of the goods, except only in these two causes of loss. And this rule of law is at least as ancient as the reign of Elizabeth.(h)

(e) See ante, p. * 125, note (b).

(f) *Boss v. Hill*, 2 C. B. 877.

(g) *Coggs v. Bernard*, 2 Ld. Raym. 909; *Proprietors v. Wood*, 3 Esp. 127; a. *Forward v. Pittard*, 1 c. 4 Doug. 287; *Mershon v. Hobensack*, 2 N. J. 372; *Chevaillier v. Straham*, 2 Tex. 115; *Friend v. Woods*, 6 Gratt. 189. And

by reason of this liability they have an insurable interest in the goods. *Chase v. Washington M. Ins. Co.* 12 Barb. 595;

Steele v. Insurance Co. 17 Penn. St. 290.

(h) *Woodlife v. Curties*, 1 Roll. Abr. T. R. 27; *Action sur Case vers Carrier* (C), pl. 4; Co. Lit. 89 a; s. c. nom. *Woodlife's case*, Moore, 462.

* 159 It is obviously founded on public policy. The goods are entirely within the power of the carrier; * and it would be so easy for him to conceal his fraud or misconduct, and so difficult for the owner to prove it, that the law does not permit the inquiry to be made; but supplies the want of proof by a conclusive presumption.

The "act of God" is considered by some as equivalent to "inevitable accident," (i)¹ but we do not so construe these phrases. There seems to be a real difference between them. The carrier is liable for loss by robbery, although the force was overwhelming, and wholly without notice. If it be said that he is liable for this loss, because it is not "inevitable," as a sufficient guard or other precautions might have prevented it, then we say, that neither can injury from an inundation, a storm, or sudden illness (all of which excuse him), be regarded as "inevitable," because it is seldom that losses from these causes could not have been prevented by previous forethought and precaution. We take the true definition of the "act of God" to be, a cause which operates without any aid or interference from man. (j) For if the cause of loss was wholly human, or became destructive by human agency and co-operation, then the loss is to be ascribed to man, and not to God, and to the carrier's negligence, because it would be dangerous to the community to permit him to make a defence which might so frequently be false and fraudulent. (k)

* 160 Nor need this "act" be positive; * although if

(i) See *Fish v. Chapman*, 2 Ga. 349; *Neal v. Saunderson*, 2 Sm. & M. 572; *Walpole v. Bridges*, 5 Blackf. 222.

(j) "The act of God," says Lord *Mansfield*, "is natural necessity, as wind and storms, which arise from natural causes, and is distinct from inevitable accident." *Proprietors v. Wood*, 4 Doug. 287, 290. See also the remarks of *Cowen*, J., in *McArthur v. Sears*, 21 Wend. 190, 198, and of *Lourie*, C. J., in *Hays v. Kennedy*, 41 Penn. St. 378.

(k) The case of *Forward v. Pittard*, 1 T. R. 27, is a very leading authority as

to what constitutes an act of God. In that case the plaintiff's goods, while in the possession of the defendant as a common carrier, were consumed by fire. It was found that the accident happened without any actual negligence in the defendant, but that the fire was not occasioned by lightning. Under these circumstances, the Court of King's Bench held the defendant liable; and Lord *Mansfield* said: "A carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God or the king's enemies. Now, what

¹ *Nugent v. Smith*, 1 C. P. D. 423, defines the term "act of God," as regards the degree of care to be applied by the carrier in order to entitle himself to its protection, as such an irresistible act of nature as the carrier by the use of no reasonable precaution or foresight under the circumstances could have prevented. "A common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him." *Per James, L. J.*—That small-pox is not an "act of God," see *Dewey v. School District*, 43 Mich. 480.

only negative, it excuses the carrier; thus, a failure of wind is put upon the same footing as a storm. (*l*) The act of God which excuses a carrier, must be not only the *proximate* cause of the loss, (*m*) but there are cases which lead to the con-

is the act of God? I consider it to mean something in opposition to the act of man; for every thing is the act of God that happens by His permission; every thing by His knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests. If an armed force come to rob the carrier of the goods, he is liable; and a reason is given in the books, which is a bad one, *viz.*, that he ought to have a sufficient force to repel it; but that would be impossible in some cases, as, for instance, in the riots in the year 1780. The true reason is, for fear it may give room for collision, that the master may contrive to be robbed on purpose, and share the spoil. In this case, it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier therefore in this case is liable, inasmuch as he is liable for inevitable accident." See also *McArthur v. Sears*, 21 Wend. 190; *Ewart v. Street*, 2 Bailey, 157; *Fish v. Chapman*, 2 Ga. 349; *Backhouse v. Sneed*, 1 Murphey, 173; *Merritt v. Earle*, 31 Barb. 38. Since the loss, to come within the exception of the "act of God," must happen without human agency, it is of course no excuse for the carrier that the loss was occasioned by the act of the third person. Thus the owners of a steamboat, being a common carrier, are liable for a shipment on board of her, lost by means of a collision with another vessel at sea, and without fault imputable to either, there being no express stipulation of any kind, between the owner of the goods and the owners of the boat, that they should be exempted from the perils of the sea. *Plaisted v. B. & K. Steam Navigation Co.* 27 Me. 182. See also *Mershon v. Hobensack*, 2 N. J. 372; *Lipford v. Railroad Co.* 7 Rich. L. 409; *The Brig Casco*, *Daveis*, 184. And see *Whitesides v. Thurlkill*, 12 Sim. & M. 599, for the effect of such stipulation. See also *Wareham Bank v. Burt*, 5 Allen, 113.

(*l*) Thus where a vessel was beating up the Hudson River against a light and

variable wind, and being near shore, and while changing her tack, the wind suddenly failed, in consequence of which she ran aground and sunk; it was held, that the sudden failure of the wind was the act of God, and excused the master; there being no negligence on his part. And *Spencer, J.*, said: "The case of *Amies v. Stevens*, 1 Stra. 128, shows that a sudden gust of wind, by which the hoy of the carrier, shooting a bridge, was driven against a pier, and overset by the violence of the shock has been adjudged to be the act of God, or *vis divina*. The sudden gust in the case of the hoyman, and the sudden and entire failure of the wind sufficient to enable the vessel to beat, are equally to be considered the acts of God. He caused the gust to blow in the one case; and in the other the wind was stayed by Him." *Colt v. McMechen*, 6 Johns. 160. This case, however, has met with the disapprobation of Mr. Wallace. See the note to *Coggs v. Bernard*, 1 Smith, Lead. Cas. 82.

(*m*) *Smith v. Shepherd, Abbott on Shipping*, 388 (5th Am. Ed.), was an action brought against the master of a vessel navigating the rivers Ouse and Humber from Selby to Hull, by a person whose goods had been wet and spoiled. At the trial, it appeared in evidence, that at the entrance of the harbor at Hull there was a bank on which vessels used to lie in safety, but of which a part had been swept away by a great flood some short time before the misfortune in question, so that it had become perfectly steep, instead of shelving towards the river; that a few days after this flood vessel sunk by getting on this bank, and her mast, which was carried away, was suffered to float in the river tied to some part of the vessel; and the defendant, upon sailing into the harbor, struck against the mast, which, not giving way, forced the defendant's vessel towards the bank, where she struck, and would have remained safe had the bank remained in its former situation, but on the tide ebbing, her stern sunk into the water, and the goods were spoiled; upon which the defendant tendered evidence to show that there had been no actual negligence. Mr. Justice *Heath*, before whom the cause was tried, rejected the evidence; and he further ruled that the act of God, which could excuse the defendant, must be immediate;

Conclusion * that it must be the *sole* cause. If, therefore, the carrier wrongfully delays the transportation of goods, and they are injured because of the delay by a flood, the carrier would be held liable, not only because the act of God was, although the *proximate*, not the *sole* cause, but because such a delay operates as a deviation in marine insurance, changing the risk. (n)

But whether the loss be caused by excess or deficiency of wind, or any other act of God, if the negligence of the carrier mingles with it as an active and sufficiently proximate cause, he is responsible. (o) So he is for a loss by fire, whether on land or at sea, unless it is caused by lightning; (p)¹ and this rule is applied to steamboats. (q) But the freezing of our navigable waters, whether natural or artificial, excuses the carrier, unless his negligence co-operates in causing the loss. (r)

but this was too remote; and directed the jury to find a verdict for the plaintiff, and they accordingly did so. The case was afterwards submitted to the consideration of the Court of King's Bench, who approved of the direction of the learned judge at the trial, and the plaintiff succeeded in the cause. There does not appear to have existed in this case any bill of lading, or other instrument of contract; and the question, therefore, depended upon general principles, and not upon the meaning of any particular word or exception. Mr. Justice Story, in commenting upon this case, says: "If the mast, which was the immediate cause of the loss, had not been in the way; but the bank had been suddenly removed by an earthquake, or the removal of the bank had been unknown, and the vessel had gone on the bank in the usual manner, the decision would have been otherwise." Story on Bailm. § 517. And this opinion seems to be supported by the case of Smyrl v. Nilon, 2 Bailey, 421, where it is *said*, that a loss caused by a boat's running on an unknown "snag" in the usual channel of a river is referable to the act of God; and the carrier will be excused. See also Faulkner v. Wright, Rice, 107; and Williams v. Grant, 1 Conn. 487. On the other hand, in Friend v. Woods, 6 Gratt. 189, where a common carrier on the Kanawha River stranded

his boat upon a bar recently formed in the ordinary channel of the river, of the existence of which he was previously ignorant, he was *held* liable for damage done to the freight on board his boat. And this last case has received the support of Mr. Wallace, one of the learned American editors of Smith's Leading Cases. See his note to *Coggs v. Bernard*, 1 Smith, Lead. Cas. 82. See also Steamboat *Lynx v. King*, 12 Mo. 272.

(n) *Read v. Spaulding*, 5 Bosw. 895; same case, 30 N. Y. 680; *Lowe v. Moss*, 12 Ill. 477; *Michaels v. N. Y. R. R. Co.* id. 584.

(o) *Amies v. Stevens*, 1 Stra. 128; *Williams v. Branson*, 1 Murphey, 417; *Williams v. Grant*, 1 Conn. 487; *Campbell v. Morse*, Harp. L. 488; *Clark v. Barnwell*, 12 How. 272; *New Brunswick S. Co. v. Tiers*, 4 Zab. 697.

(p) *Forward v. Pittard*, 1 T. R. 27; *Thorogood v. Marsh*, Gow, 105; *Hale v. N. J. Steam Navigation Co.* 15 Conn. 539, 545; *Parker v. Flagg*, 26 Me. 181; *Parsons v. Monteath*, 13 Barb. 363; *Chevaillier v. Straham*, 2 Tex. 116; *Miller v. Steam Navigation Co.* 10 N. Y. (6 Seld.) 431.

(q) *Gilmore v. Carman*, 1 Sm. & M. 279.

(r) *Parsons v. Hardy*, 14 Wend. 215. But the carrier is nevertheless bound to exercise ordinary forecast in anticipating the obstruction; must use the proper

¹ In *Empire Transportation Co. v. Wamsutter Oil Co.* 63 Penn. St. 14, a railroad was declared liable for the loss of oil by fire, a defective coupling between cars preventing their separation and the saving of the oil. See also *MERCHANTS' DESPATCH CO. v. SMITH*, 76 Ill. 542.

If the goods are taken from the carrier by legal process, with no fault on his part, he is excused for non-delivery, but must give immediate notice to the owner. (rr)¹

* If the goods have been injured by such an act of God, * 162 the carrier is still bound to take all reasonable care of them, to preserve them from further injury; but is not bound to repair them or have them repaired; (s) and if practicable he should unpack the goods and dry them; (t) and for this purpose he may open barrels and boxes; (u) but he is not bound to delay his voyage or journey for that purpose. (v)²

The carrier is not liable for any loss from natural decay of perishable goods, such as fruit or the like; or the fermentation of liquors, or their evaporation or leakage. (w) And it has been held, that a carrier of animals is not liable for injury to them, caused by the peculiar risks arising out of their own nature, to which they are subject. He would not be liable for an accident arising from the animal's own viciousness, or restiveness, or of that of other animals transported with it.³ In such cases the

means to overcome it; and exercise due diligence to accomplish the transportation he has undertaken, as soon as the obstruction ceases to operate, and in the mean time must not be guilty of negligence in the care of the property. *Bowman v. Teall*, 23 Wend. 306. See also *Lowe v. Moss*, 12 Ill. 477. And where damage was done to a cargo by water escaping through the pipe of a steam-boiler, in consequence of the pipe having been cracked by frost; it was held, that this was not an act of God, but negligence in the captain, in filling the boiler before the time for heating it, although it was the practice to fill over night when the vessel started in the morning. And *Bost*, C. J., said: "No one can doubt that this loss was occasioned by negligence. It is well known that frost will rend iron; and if so, the master of a vessel cannot be justified in keeping water within his boiler in the middle of winter, when frost may be expected. The jury found that this was negligence, and I agree in their verdict." *Sjordet v. Hall*, 4 Bing. 607.

(rr) *Bliven v. Hudson River R. R. Co.*
36 N. Y. 408.

(s) *Charleston S. B. Co. v. Bason*,
Harper, 262.

(t) *Chouteau v. Leech*, 18 Penn. St.
224.

(u) *Bird v. Cromwell*, 1 Mo. 81.

(v) *Steamboat Lynx v. King*, 12 Mo.

272.

(w) Thus, if an action be brought against a carrier for negligently driving his cart, so that a pipe of wine was burst and lost, it will be good evidence for the defendant that the wine was upon the ferment, and when the pipe was burst he was driving gently. Per Lord *Holt*, in *Farrar v. Adams*, Bull. N. P. 69. See also *Leach v. Baldwin*, 5 Watts, 446; *Warden v. Greer*, 6 Watts, 424; *Clark v. Barnwell*, 12 How. 272. And where there is a custom to carry goods in open wagons, of which the sender had notice, the carrier is not liable for injuries caused by rains during the transportation. *Chevalier v. Patton*, 10 Tex. 344.

¹ *O. & M. R. Co. v. Yohe*, 51 Ind. 181.

² See *Notara v. Henderson*, L. R. 5 Q. B. 346; 7 Q. B. 225.

³ A common carrier is not liable for loss or damage caused by an inherent defect in the thing or animal carried without any fault of the carrier, or by the manner of packing or loading, the responsibility of which the owner has assumed, or by any want of care which the owner was to exercise. *Rixford v. Smith*, 52 N. H. 355. But where

cause of the loss is a question to be determined by the jury. (x) So far as losses of this kind are caused by the operation of natural laws, they come within the exception of the "act of God." But the carrier is nevertheless not excused if the loss was caused also by his default, as by bad stowage, or other negligence. And if he is informed that the goods are perishable, or should know it from the nature of the goods, he is bound to use all reasonable means and precautions to prevent the loss. (y) So if a particular notice is given him; as by marking the box, "Glass, this side up," or the like, he is bound to take notice and follow these directions. (z)

* 163 * Losses by the public enemy include those only which are sustained from persons with whom the State or nation is at war; and pirates on the high seas, who are "the enemies of all mankind;" (a) but not thieves; or robbers; nor mobs;

(x) *Hall v. Renfro*, 3 Met. (Ky.) 51.

(y) *Farrar v. Adams*, *supra*.

(z) Thus, where a box containing a glass bottle filled with oil of cloves, delivered to a common carrier, was marked, "Glass — with care — this side up;" it was held, that this was a sufficient notice of the value and nature of the contents to charge him for the loss of the oil, occasioned by his disregarding such direction. And *Shaw*, C. J., said: "It is not denied that the box was marked, 'Glass — with care — this side up,' which was quite sufficient notice to the defendant that the article was valuable, and liable to injury from rough handling and other causes, and that there was danger in carrying it in any other position than the one indicated by the inscription. As the carriage is a matter of contract, as the owner has a right to judge for himself what position is best adapted to carrying goods of this description with safety, and to direct how they shall be carried, and as the carrier has a right to fix his own rate for the carriage, or refuse altogether to take the goods with such directions, the court are all of opinion, that if a carrier accepts goods for carriage, thus marked, he is bound to carry the goods

in the manner and position required by the notice. Here it is in evidence, and not denied, that the box was stowed in such a manner that the marked side was not kept up, and consequently the large bottle, which was broken by some cause in the passage, after it was stowed and before its arrival, bore its weight upon its side, and not on its bottom." *Hastings v. Pepper*, 11 Pick. 41. See also *Sager v. Portsmouth Railroad Co.* 31 Me. 228; and *Cougar v. Galena R. R. Co.* 17 Wis. 477.

(a) Story on *Bailm.* §§ 25, 526; *Angel*, Com. Car. § 200. We have ventured to include pirates within the exception of "public enemies," on the authority of these eminent text-writers. The cases, however, which they cite, arose upon bills of lading, which contained the exception of the "perils of the sea;" and the only question made in those cases was whether a loss by pirates came within the latter exception; and the testimony of merchants was taken as to the mercantile usage in that respect. See *Pickering v. Barkley*, 2 Roll. Abr. 248; *s. c. Styles*, 132; *Barton v. Wolliford, Comb.*, 56.

the cause of damage to live-stock, for which recovery is sought, is not connected with the conduct, character, or propensities of the animals undertaken to be carried, the ordinary responsibility of the carrier should attach. *McCoy v. K. & D. M. R. Co.* 44 Ia. 424. Thus *Blower v. Great Western Railway*, L. R. 7 C. P. 655, decided that a common carrier was not liable for the loss of a bullock which escaped solely by its own efforts from a proper car in which it had been placed, and was killed without any negligence on the carrier's part. Carriers of live-stock are liable for any loss occasioned by their failure to provide them with water. *Toledo, &c. R. Co. v. Hamilton*, 76 Ill. 393. See *Michigan, &c. R. Co. v. McDonough*, 21 Mich. 165.

nor rioters, insurgents, or rebels. (b) But this principle may be affected by the rule that robbery at sea is piracy.

SECTION VI.

WHO IS A COMMON CARRIER.

To determine who is a common carrier, we adopt the definition of Mr. Chief Justice *Parker* of Massachusetts. "He is one who undertakes, for hire, to transport the goods of such as choose to employ him, from place to place." (c)¹ And we regard this as a true definition, although in some of the States it has been held, that a wagoner who carried goods on a special request, although such carrying was not his general business, but only * occa- * 164 sional and incidental, was still a common carrier. (d) It

(b) *Morse v. Slue*, 1 Vent. 190, 238.

(c) *Dwight v. Brewster*, 1 Pick. 50, 53. A similar definition is given in *Robertson v. Kennedy*, 2 Dana, 480; *Elkins v. Boston & Maine R. R. Co.* 3 Foster (N. H.), 275; *Mershon v. Hobensack*, 2 N. J. 372. So in *Gisbourn v. Hurst*, 1 Salk. 249 [see preceding note], which was the case of one who was at first not thought to be a common carrier, only because he had, *for some small time before*, brought cheese to London, and taken such goods as he could get to carry back into the country, at a reasonable price; but the goods having been distrained for the rent of a barn, into which he had put his wagon for safe-keeping, it was finally resolved that any man undertaking to carry the goods of all persons indifferently, is, as to exemption from distress, a common carrier. Mr. Justice *Story* has cited this case (*Commentaries on Bailments*, 322), to prove that a common carrier is one who holds himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation, *pro hac vice*. My conclusion from it is different. I take it a wagoner who carries goods for hire is a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment. It is true,

(d) *Gordon v. Hutchinson*, 1 W. & S. 285. In this case the defendant, being a farmer, applied at the store of the plaintiff, for the hauling of goods from Lewis-town to Bellefonte, upon his return from the former place, where he was going with a load of iron. He received an order and loaded the goods. On the way, the head came out of a hogshead of molasses, and it was wholly lost; and this action was brought to recover the price of it. The defendant contended that he was not subject to the responsibilities of a common carrier, but only answerable for negligence, inasmuch as he was only employed occasionally to carry for hire. But the learned judge before whom the case was tried instructed the jury that he was liable as a common carrier. And the Supreme

Court held the instruction to be correct. *Gibson*, C. J., said: "The best definition of a common carrier, in its application to the business of this country, is that which Mr. Jeremy (*Law of Carriers*, 4) has taken from *Gisbourn v. Hurst*, 1 Salk. 249 [see preceding note], which was the case of one who was at first not thought to be a common carrier, only because he had, *for some small time before*, brought cheese to London, and taken such goods as he could get to carry back into the country, at a reasonable price; but the goods having been distrained for the rent of a barn, into which he had put his wagon for safe-keeping, it was finally resolved that any man undertaking to carry the goods of all persons indifferently, is, as to exemption from distress, a common carrier. Mr. Justice *Story* has cited this case (*Commentaries on Bailments*, 322), to prove that a common carrier is one who holds himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation, *pro hac vice*. My conclusion from it is different. I take it a wagoner who carries goods for hire is a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment. It is true,

¹ An express company that receives and agrees to transport goods from a certain place to another for a compensation, in the ordinary means of conveyance, although not the owner, and having no interest in the conveyance by which the goods are transported, is a common carrier, *U. S. Ex. Co. v. Backman*, 28 Ohio St. 144; but not a log-driving company, *Mann v. White River Log, &c. Co.* 46 Mich. 38.

may sometimes be difficult to draw the line; and more difficult * in this country than elsewhere, where men so often

the court went no further than to say the wagoner was a common carrier, as to the privilege of exemption from distress; but his contract was held not to be a private undertaking, as the court was at first inclined to consider it, but a public engagement by reason of his readiness to carry for any one who would employ him, without regard to his other avocations; and he would consequently not only be entitled to the privileges, but be subject to the responsibilities of a common carrier; indeed, they are correlative, and there is no reason why he should enjoy the one without being burdened with the other. Chancellor Kent (2 Com. 597) states the law, on the authority of Robinson v. Dunmore, 2 B. & P. 416, to be, that a carrier for hire in a particular case, not exercising the business of a common carrier, is answerable only for ordinary neglect, unless he assume the risk of a common carrier by express contract; and Mr. Justice Story (Com. on Bailments, 298), as well as the learned annotator on Sir William Jones' Essay (Law of Bailm. 108 d. n. 8), does the same on the authority of the same case. There, however, the defendant was held liable, on a special contract of warranty, that the goods should go safe; and it was therefore not material whether he was a general carrier or not. The judges indeed said that he was not a common carrier, but one who had put himself in the case of a common carrier by his agreement; yet even a common carrier may restrict his responsibility by a special acceptance of the goods, and may also make himself answerable by a special agreement as well as on the custom. The question of carrier or not therefore did not necessarily enter into the inquiry, and we cannot suppose the judges gave it their principal attention. But rules which have received their form from the business of a people whose occupations are definite, regular, and fixed, must be applied with much caution, and no little qualification, to the business of a people whose occupations are vague, desultory, and irregular. In England, one who holds himself out as a general carrier is bound to take employment at the current price; but it will not be thought that he is bound to do so here. Nothing was more common formerly than for wagoners to lie by in Philadelphia for a rise of wages. In England the obligation to carry at request upon the carrier's particular route is the criterion

of the profession, but it is certainly not so with us. In Pennsylvania we had no carriers exclusively between particular places, before the establishment of our public lines of transportation; and according to the English principle, we could have had no common carriers, for it was not pretended that a wagoner could be compelled to load for any part of the continent. But the policy of holding him answerable as an insurer was more obviously dictated by the solitary and mountainous regions through which his course for the most part lay, than it is by the frequented thoroughfares of England. But the Pennsylvania wagoner was not always such even by profession. No inconsiderable part of the transportation was done by the farmers of the interior, who took their produce to Philadelphia and procured return loads for the retail merchants of the neighboring towns; and many of them passed by their homes with loads to Pittsburg or Wheeling, the principal points of embarkation on the Ohio. But no one supposed they were not responsible as common carriers; and they always compensated losses as such. They presented themselves as applicants for employment to those who could give it; and were not distinguishable in their appearance or in the equipment of their teams from carriers by profession. I can readily understand why a carpenter encouraged by an employer to undertake the job of a cabinet-maker, shall not be bound to bring the skill of a workman to the execution of it; or why a farmer taking his horses from the plough, to turn teamster at the solicitation of his neighbor, shall be answerable for nothing less than good faith; but I am unable to understand why a wagoner, soliciting the employment of a common carrier, shall be prevented by the nature of any other employment he may sometimes follow from contracting the responsibility of one. What has a merchant to do with the private business of those who publicly solicit employment from him? They offer themselves to him as competent to perform the service required, and, in the absence of express reservation, they contract to perform it on the usual terms, and under the usual responsibility. Now, what is the case here? The defendant is a farmer, but has occasionally done jobs as a carrier. That, however, is immaterial. He applied for the transportation of these goods, as a matter of

engage in a variety of employments ; but that the rule of law is as we have stated we cannot doubt.

business, and, consequently, on the usual conditions. His agency was not sought in consequence of a special confidence reposed in him — there was nothing special in the case—on the contrary, the employment was sought by himself, and there is nothing to show that it was given on terms of diminished responsibility." It will be seen, that the learned Chief Justice places considerable reliance upon the fact, that the defendant applied to the plaintiff to get the goods to carry ; and it is by no means certain that the decision would have been the same, if the application had come from the plaintiff. But we are not aware of any other case in which such a distinction is taken. The decision receives support, however, independently of this distinction, from the case of *McClure v. Richardson*, Rice, 215. In that case the defendant was the owner of a boat, in which he was accustomed to carry his own cotton to Charleston ; and occasionally, when he had not a load of his own, to take for his neighbors, they paying freight for the same. One Howzer was the master or *patroon* of the boat, and the *general habit* was, for those who wished to send their cotton by the defendant's boat to apply to the defendant himself. On this occasion the *patroon* had been told to take Col. Goodwin's and Mr. Dallas's cotton, which he had done, when the plaintiff applied to Howzer, in the absence of the defendant, to take on board ten bales of his cotton, asking him if it was necessary to apply to the defendant himself, to which Howzer replied that he thought not, and received the cotton ; it was *held*, that, under the circumstances, the defendant was bound by the act of Howzer, as being within the general scope of the authority conferred upon him, by placing him in the situation of master of the boat, and that the defendant was consequently chargeable as a common carrier for any loss of, or damage to, the plaintiff's cotton. — So, too, it has been laid down in general terms, in several cases, that all persons carrying goods for hire come under the denomination of common carriers. See *Moses v. Norris*, 4 N. H. 304 ; *Turney v. Wilson*, 7 Yerg. 840 ; *Craig v. Childress, Peck*, 270 ; *McClures v. Hammond*, 1 Bay, 99. But it would seem to be an insuperable objection to all these cases, that they exclude from the common carrier one of his most important characteristics, namely, his *duty* to carry

for all who may wish to employ him ; for it is conceded in several of them that the individual whom they hold liable as a common carrier, was under no obligation to undertake the carrying in question, unless he had chosen so to do. The case of *Chevaillier v. Straham*, 2 Tex. 115, may be thought to favor views similar to those declared in the cases already cited, but we think it does not. It appeared in that case that the defendant's principal business was farming, but that at a certain period of the year, known as the hauling season, he engaged in the forwarding business, and ran his wagon whenever he met with an opportunity. Under these circumstances, he was *held* liable as a common carrier. And the court said : "From a comparison of the various authorities, to which we have referred for the distinguishing characteristics of both common and private carriers, it may be laid down as a rule, that all persons who transport goods from place to place, for hire, for such persons as see fit to employ them, whether usually or occasionally, whether as a principal or an incidental and subordinate occupation, are common carriers and incur all their responsibilities. There are no grounds in reason why the occasional carrier, who periodically in every recurring year, abandons his other pursuits, and assumes that of transporting goods for the public, should be exempted from any of the risks incurred by those who make the carrying business their constant or principal occupation. For the time being he shares all the advantages arising from the business ; and as the extraordinary responsibilities of a common carrier are imposed by the policy and not the justice of the law, this policy should be uniform in its operation — imparting equal benefits, and inflicting the like burdens, upon all who assume the capacity of public carriers, whether temporarily or permanently, periodically or continuously." It will be seen, therefore, that the only question with the court in this case was, whether it was necessary to constitute one a common carrier that he should hold himself out as such continuously, or whether it was sufficient if he held himself out as such during a certain period of the year. And there would certainly seem to be no reason why one who holds himself out to the public as a common carrier, for a certain season in the year, should not be liable as such. We think it is obvious,

* 166 * We regard truckmen, porters, and the like, who undertake generally to carry goods from one part of a city to

from the facts and circumstances of this case, that the defendant had held himself out to the public in such a manner that he would have incurred a liability if he had refused to carry for any one who wished to employ him during the season in question; and the court held him to be a common carrier on this ground, and carefully distinguished him from one who undertakes to carry for hire in a particular instance and under a special contract. On the whole, it seems to be clear that no one can be considered as a common carrier, unless he has in some way held himself out to the public as a carrier, in such a manner as to render him liable to an action if he should refuse to carry for any one who wished to employ him. That such is the true test, see — v. Jackson, 1 Hayw. (N. C.) 14; Fish v. Chapman, 2 Ga. 349; Samms v. Stewart, 20 Ohio, 60. In Fish v. Chapman, Mr. Justice *Nisbet* declares that Gordon v. Hutchinson, is opposed to the principles of the common law, and its rule wholly inexpedient. The case of Satterlee v. Groat, 1 Wend. 272, is also a very important one upon this point. It appeared that the defendant had been a common carrier between Schenectady and Albany, previous to 1819. He then sold out all his teams but one, which he kept for agricultural purposes on his farm. One witness, however, testified that the defendant employed his team in the carrying and forwarding business, as occasions offered, until 1822 or 1823. But subsequent to that period, there was no evidence of his carrying or forwarding a single load, until April, 1824, when one John Dows applied to him to bring some loads for him from Albany to Schenectady, to which the defendant reluctantly consented, and despatched one *Asia* with his team for the purpose, with special instructions to bring nothing for any other person; and if Dows' goods were not ready, to come back empty. He brought two loads and returned for a third, under the same instructions, repeated again and again. But Dows' third load not being ready, instead of returning empty, as he was directed to do, he applied to the plaintiff for a load, which they furnished him, to be carried to Frankfort, in Herkimer county. He arrived at Schenectady late at night. The next morning it was discovered that one of the boxes had been broken open, and a part of the goods stolen. The defendant disavowed all responsibility for the goods, before it

was discovered that any of them had been taken, and declared that *Asia* had violated his express instructions in bringing them. Upon these facts the court held that the defendant was not liable. *Sutherland*, J., said: "The defendant stood upon the same footing as though he had never been engaged in the forwarding business. He had abandoned it entirely certainly *one year*, and, according to the weight of evidence, four years previous to this transaction. He makes a special contract with Dows to bring goods for him from Albany, and gives his teamster express instructions to bring goods for no one else. He was acting under a special contract, and not in the capacity of a common carrier. Is he then responsible for the act of his servant, done in violation of his instructions, and not in the ordinary course of the business in which he was employed? If a farmer send his servant with a load of wheat to market, and he, without any instructions from his master, applies to a merchant for a return load, and abeconds with it, is the master responsible? Most clearly not. It was an act beyond the scope of the general authority of the servant, *quoad hoc*, therefore he acted for himself, and on his own responsibility, and not for his employer." And in *Kimball v. Rutland & Burlington R. R. Co.*, 26 Vt. 247, which was an action against the defendants, seeking to charge them as common carriers for the non-delivery in good order of certain cattle put on board their cars by the plaintiff, at Brandon, Vt., to be transported to Cambridge, Mass., it was objected, that although the defendants were common carriers of passenger's freight and baggage, they were not common carriers of cattle. But *Isham*, J., who delivered the opinion of the court, said: "It is immaterial whether transportation of cattle is regulated as their (defendants') principal employment, or whether it is incidental and subordinate; the fact that they had undertaken such transportation for hire, and for such persons as chose to employ them, establishes their relation as common carriers, and with it the duties and obligations that grow out of it." And see *Russell v. Livingston*, 19 Barb. 346. But individuals engaged in the express business, namely, in forwarding goods and packages from place to place for hire in vessels and conveyances owned by others, are not common carriers. *Hersfield v. Adams*, 19 Barb. 577. The case of Har-

another as * common carriers ; although this seems to be * 167 doubted. (e) That wagoners and teamsters who carry goods from one city to another are so, is certain.

* Proprietors of stage-coaches are not common carriers * 168 of goods necessarily ; but are so if they usually carry goods other than those of their passengers, and hold themselves out as carrying for all who choose to employ them. (f) So where money

rison *v.* Roy, Miss. 396, approaches in its law the case of Gordon *v.* Hutchinson.

(e) In Brind *v.* Dale, 8 C. & P. 207, Lord Abinger expressed the opinion at nisi prius, that a town carman, whose carts ply for hire near the wharves, and who lets them by the hour, day, or job, is not a common carrier. The correctness of this opinion is, however, severely questioned by Mr. Justice Story. "What substantial distinction is there," says he, "in the case of parties who ply for hire in the carriage of goods for all persons indifferently, whether the goods are carried from one town to another, or from one place to another within the same town ? Is there any substantial difference whether the parties have fixed termini of their business or not, if they hold themselves out as ready and willing to carry goods for any persons whatsoever, to or from any places in the same town, or in different towns ?" See Story on Bailm., § 496, n. 1. So, too, the law was expressly adjudged, agreeable to what we have stated in the text, in Robertson *v.* Kennedy, 2 Dana, 480. That was an action against the defendant for the loss of a hogshead of sugar, which he, as a common carrier, had undertaken, for a reasonable compensation, to carry from the bank of the river in Bradenburg to the plaintiff's store in the same town. At the trial, the plaintiff introduced evidence tending to show that the defendant had been in the habit of hauling for hire, in the town of Bradenburg, for every one who applied to him, with an ox team, driven by his slave ; that he had undertaken to haul for the plaintiff the hogshead in question, and that after the defendant's slave had placed the hogshead on a slide, for the purpose of hauling it to the defendant's store, the slide and hogshead slipped into the river, whereby the sugar was spoiled. Under these circumstances, the court held, that the defendant was liable as a common carrier. And Nichols, J., said : "Every one who pursues the business of transporting goods for hire, for the public generally, is a common carrier. Accordinging to the most approved definition, a

common carrier is one who undertakes for hire or reward to transport the goods of all such as choose to employ him, from place to place. Draymen, cartmen, and porters, who undertake to carry goods for hire, as a common employment, from one part of a town to another, come within the definition. So also does the driver of a slide with an ox-team. The mode of transporting is immaterial." And in Ingate *v.* Christie, 8 Car. & K. 61, where the defendant, who was a lighter-man, carrying goods from wharves to ships for anybody who employed him, was sued for 100 cases of figs, lost by reason of the lighter containing them being run down by a steamer, and Mr. Justice Story's opinion, as stated above, was cited for the plaintiffs. Alderson, B., said : "Mr. Justice Story is a great authority, and, if we would but adhere to principle, the law would be what it ought to be, a science. There may be cases on all sides, but I will adhere to principle, if I can. If a person holds himself out to carry goods for every one as a business, and he thus carries from the wharves to the ships in the harbor, he is a common carrier, and if the defendant is a common carrier, he is liable here. There must be a verdict for the plaintiff." The same rule was applied by Lord Campbell to a person who collected goods in town to go by railway, but he himself carried them only to the railway station. Hellaby *v.* Weaver, 17 Law Times, July 8, 1861, sittings in London after Trinity term.

(f) "If a coachman commonly carry goods, and take money for so doing, he will be in the same case with a common carrier, and is a carrier for that purpose, whether the goods are a passenger's or a stranger's." Per Jones, J., in Lovett *v.* Hobbs, 2 Show. 127. See also to the same point, Dwight *v.* Brewster, 1 Pick. 60 ; Bechman *v.* Shouse, 6 Rawle, 179 ; Clark *v.* Faxon, 21 Wend. 153 ; Jones *v.* Voorhees, 10 Ohio, 145 ; Merwin *v.* Butler, 17 Conn. 138. But in Shelden *v.* Robinson, 7 N. H. 157, it was held, that the driver of a stage-coach, in the general employ of the proprietors of the

had been paid in three instances to the conductor of a horse-railway company for carrying merchandise, this was held to be evidence to a jury that the company had assumed the business of common carriers. (*ff*) Perhaps the tendency * of adjudication now is, to put stage-coaches on the footing of common carriers, as to the goods or parcels they carry. (*g*)

They are undoubtedly common carriers of passengers on their regular route. But the rule that common carriers of passengers are not liable for injuries caused entirely without fault on their part (which is fully considered *post*, sect. 14th of this chapter), has been applied to stage-coaches. (*gg*)

In the reign of James I. the responsibilities of a common carrier of goods by land were held to be applicable to a bargeman; (*h*)¹ and it has been declared that there is no difference between the carrier by land and the carrier by water. (*i*) Perhaps this asser-

coach, and in the habit of transporting packages of money for a small compensation, which was uniform whatever might be the amount of the package, was a bailee for hire, answerable for ordinary negligence, and not subject to the responsibilities of a common carrier; there being no evidence to show him a common carrier, further than the fact that he took such packages of money as were offered. *Parker*, J., thus stated the grounds of the decision. "It has not been suggested that the proprietors are liable in this case; and the evidence does not show the defendant a common carrier; it does not show him to have exercised the business of carrying packages as a public employment, because his public employment was that of a driver of a stage-coach, in the employ of others. It does not show that he ever undertook to carry goods or money for persons generally, although he may in fact have taken all that was offered, as a matter of convenience; or that he ever held himself out as ready to engage in the transportation of whatever was requested, notwithstanding it may have been usual for him and other drivers to carry it. This was not his general employment, and there is nothing to show that he would have been liable had he refused to take this money, especially as he was in the service of another, and as such servant might have had duties to perform inconsistent with the duty of a common carrier. The amount to be paid

for transportation, is also to be considered. A common carrier is an insurer, and entitled to be paid a premium for his insurance. There being no evidence that any compensation was agreed on between these parties, it is to be presumed that the usual compensation was to be paid. The plaintiff might have relied on the usage, upon a claim of payment. And as the sum was small and uniform, whatever might be the amount of money, it would seem very clear that no one committing a package of money to the defendant under such circumstances, and without any special agreement, could have considered him an insurer of safety." See also *Bean v. Sturtevant*, 8 N. H. 146.

(*ff*) *Levi v. Lynn, &c. R. R. Co.*, 11 Allen, 300.

(*g*) *Peixotti v. McLaughlin*, 1 Strob. L. 468. See also *Cohen v. Frost*, 2 Duer 335.

(*gg*) *Aston v. Heavan*, 1 Snead, 220; *Jones v. Boyce*, 1 Starkie, 493; *Ingalls v. Bills*, 9 Metc. 1. See a peculiar case, in which the owners of a stage-coach were held liable for the acts of ferrymen who were taking the coach across the water, *McLean v. Burbank*, 11 Minn. 277.

(*h*) *Rich v. Kneeland*, Cro. J. (11 Jac. 1), 330; s. c. Hob. 17.

(*i*) Per *Buller*, J., in *Proprietors of Trent Navigation Co. v. Wood*, 3 Esp. 127; s. c. 4 Dougl. 287; and per *Story*, J., in *King v. Shepherd*, 8 Story, 390.

¹ A lighterman letting barges to one customer at a time, under a separate agreement with each for the conveyance of goods between such points as such customer wished, was held liable for goods lost without negligence on his part, in *Liver Alkali Co. v. Johnson*, L. R. 9 Ex. 338.

tion is too broad; but the weight of authority in this country seems to have determined that a common carrier of goods by water is responsible for all losses except for those caused by the public enemy, or by those causes provided for by express contract. (j) Canal boatmen are such carriers, (k) and cannot sell property sent by them to market without express authority from the owner. (l) So are boatmen on our rivers. (m) Ferrymen are not common carriers of goods necessarily; but generally become so by usage. (n) And this, although it be a private ferry, not established by the authority of the State. (o) And if it be a public ferry, and the tolls are regulated by law, and the ferryman is appointed by the State executive, and gives bonds with sureties, this does not prevent the liabilities of a common carrier from attaching to him. (p)

Steamboats are the most common kind of inland carriers by water at the present day; and they are undoubtedly common *carriers of goods, if they fall within the general *170 definition. But they may be carriers of passengers only. And they may be carriers of only one particular kind of goods and merchandise. And where a limitation of their business of this kind is declared by them, and made known to a party dealing with them, their liability is limited accordingly. (q) And a steamboat which is usually a common carrier, and is employed in towing a vessel, is not, as to this, a common carrier; but is bound only to ordinary care and skill. (r) So, where such a

(j) Thus, in *Elliott v. Rossell*, 10 Johns. 1, it was held, that masters and owners of vessels, who undertake to carry goods for hire, are liable as common carriers, whether the transportation be from port to port within the State, or beyond sea, at home or abroad; except so far as they are exempted by the exceptions in the contract of charter-party, or bill of lading, or by statute. See also *Kemp v. Coughtry*, 11 Johns. 107; *Crosby v. Fitch*, 12 Conn. 410; *Parker v. Flagg*, 26 Me. 181; *Hastings v. Pepper*, 11 Pick. 41; *Allen v. Sewall*, 2 Wend. 327; s. c. 6 id. 335; *McArthur v. Sears*, 21 id. 190, overruling *Aymar v. Astor*, 6 Cowen, 266; Commander-in-Chief, 1 Wallace, 43.

(k) *Harrington v. Lyles*, 2 Nott & McC. 88; *DeMott v. Laraway*, 14 Wend. 225; *Parsons v. Hardy*, id. 215; *Spencer v. Daggett*, 2 Vt. 92.

(l) *Arnold v. Halenbake*, 5 Wend. 33.

(m) *Gordon v. Buchanan*, 5 Yerg. 71; *Turney v. Wilson*, 7 id. 341.

(n) *Smith v. Seward*, 8 Penn. St. 342; *Pomeroy v. Donaldson*, 5 Mo. 36; *Cohen v. Hume*, 1 McCord, 489; *Fisher v. Chibee*, 12 Ill. 344. See, as to the duties of ferrymen in the preparation and management of their boats, *Willoughby v. Horridge*, 16 E. L. & E. 437; s. c. 12 C. B. 742; *White v. Winnisimmet Co.* 7 Cush. 156. See also *Wilson v. Hamilton*, 4 Ohio St. 722; *Griffith v. Cave*, 22 Cal. 534.

(o) *Littlejohn v. Jones*, 2 McMullan, 366.

(p) This was so decided in the case of *Babcock v. Herbert*, 8 Ala. 392.

(q) *Citizens Bank v. Nantucket Steamboat Co.* 2 Story, 16.

(r) This rule seems to have been declared for the first time by the Supreme Court of New York, in the case of *Caton v. Rumney*, 13 Wend. 387. The same question arose again in the same court, in the case of *Alexander v. Greene*, 3 Hill (N. Y.), 9, and was decided the same way. And *Bronson*, J., thus stated the

* 171 steamboat was hired * to take a vessel through the ice, it was, in this employment, no common carrier. (s) Nor are steam-tugs and tow-boats whose business it is to tow vessels, common carriers as to the vessels they have in tow. (ss)

In the reign of Charles II. it was decided that a ship sailing on the ocean may be a common carrier; (t) and this decision has since been repeatedly confirmed; (u) and it was also held that an action lay equally against the master and owners of the ves-

grounds of the decision: "I think the defendants are not common carriers. They do not receive the property into their custody, nor do they exercise any control over it, other than such as results from the towing of the boats in which it is laden. They neither employ the master and hands of the boats towed, nor do they exercise any authority over them beyond that of occasionally requiring their aid in governing the flotilla. The goods or other property remain in the care and charge of the master and hands of the boat towed. In case of loss by fire or robbery, without any actual default on the part of the defendants, it can hardly be pretended that they would be answerable, and yet carriers must answer for such a loss." This case afterwards, however, came before the Court of Errors, and was overruled. 7 Hill (N.Y.), 533. But upon what principle of law cannot be learned from the opinions delivered. And in the more recent cases of *Wells v. Steam Navigation Co.* 2 Comst. 207, in the Court of Appeals in the same State, this decision of the Court of Errors is declared to be of no authority, and the former decisions of the Supreme Court are re-established. The same rule is declared in the case of *Leonard v. Hendrickson*, 18 Penn. St. 40. And *Chambers*, J., says: "The law of liability of common carriers is one of public policy, and is to be maintained. Does this policy extend to the towing of boats and rafts on navigable or other waters? This exercise of power is peculiar and limited. It is generally for short distances, under the eye and observation of the owner, who may, and often does, accompany, by himself or his agents, the property that is towed for him. If there is peril from the sudden rise of the water, or other unforeseen danger, he may terminate the conveyance at any point of safety in his opinion. The cargo on a canal boat towed is property in the care of the conductors of such boat as common carriers, of which they have the exclusive possession, and

for which they are responsible, knowing its value and quality. The captain or owner of a boat undertaking to tow a loaded canal boat, we presume, neither inspects the cargo, nor overhauls it. His contract has reference to size, tonnage, and obstruction, to which the power of his boat is to be applied; and the connection of his boat by the chain or rope with the vessel and rafts to be conveyed to a fixed point, is the limited control he has over the property thus transported. It was an apt illustration of the learned judge who delivered the opinion of the court below, in saying: 'Wherein does this case differ in principle from that of a railroad company, or the State furnishing locomotive engines for drawing the cars of individuals over the road? The application of steam power to towing boats, &c., is only distinguishable from horse-power where it can be used in the extent of the power. Would it be pretended that a man who furnished horses and a driver, to tow a boat or raft, was an insurer or a common carrier for the boat to be towed and its contents?' It has been held, however, in Louisiana, that the owners of steam tow-boats are liable as common carriers. See *Smith v. Pierce*, 1 La. 349; *Adams v. New Orleans Steam Tow-Boat Co.* 11 La. 46. And Mr. Justice *Kane*, of the United States District Court for the Eastern District of Pennsylvania, in the case of *Vanderslice v. Steam Tow-Boat Superior*, 13 Law Rep. 399, urged very strongly the reasons for holding them so liable, but he did not decide the point. See *The Broeder Trow*, 20 E. L. & E. 634; and *Arctic, &c. Ins. Co. v. Austin*, 54 Barb. 569.

(s) *Steam Navigation Co. v. Danbridge*, 8 Gill & J. 248, 320.

(ss) *Brown v. Clegg*, 68 Penn. St. 51.

(t) *Morse v. Slue*, 1 Vent. 190, 238.

(u) *Boucher v. Lawson*, Cas. Temp. Hardw. 84, 194; *Boson v. Sandford*, 1 Show. 29, 101; *Goff v. Clinkard*, cited in *Dale v. Hall*, 1 Wils. 282. See also the cases cited ante, p. * 169, note (j).

sel. (v) But it is not every ship that carries goods for another than her owner that becomes a common carrier. If the owner, or hirer, loads her with his own cargo, and finding some room to spare, receives the goods of another person to fill this room, the ship is no common carrier; nor is she, in our judgment, unless she is what is sometimes called a general ship; that is, offered to the public, as ready to take any goods of any owner to the port to which she is bound. Common carriers by land have usually, if not always, a certain distinct route, not for each particular journey merely, but for all their journeys. That is, they are established and known to the public as carrying upon such a line of transit, and upon no other. This is true also of ships belonging to an established packet line. Such ships would stand upon the same footing as ordinary carriers by land, and there seems to be no reason why the same rules of law should not apply to them. But there is considerable difference between such a ship and a general ship which is put up for a voyage which she never went before, and is never to go again. If the question were wholly unsettled, it might perhaps be doubted whether such a vessel becomes a common carrier; for if she does, it can hardly be denied that she is bound to take the goods of any one who offers them. But the distinction between a regular packet-ship and a general freighting ship for a particular voyage, does not seem to have been taken by the courts. Still, it is usual in all ships for the master to give a bill of lading for goods received, by which he engages to deliver them to *the order of the * 172 party from whom he receives them, certain risks excepted. This ancient document, in almost universal use among mercantile nations, undoubtedly determines the rights and duties of the parties, so far as it affects them. Thus, it usually excepts "the perils of the seas;" and then the ship is not responsible for a loss by one of these perils, although it could not be referred to the "act of God." (w)¹ And if other exceptions were introduced,

(v) See also to this point, *Boson v. Navigation Co.* 27 Me. 132; *The Brig Sandford*, 1 Show. 29, 101.

(w) As to what losses come within the exception of "perils of the sea," see the following cases. *Williams v. Grant*, 5 Yerg. 71; *Turney v. Wilson*, 7 Yerg. 340; *Buller v. Fisher*, 3 Esp. 67; *The Schooner Reedside*, 2 Sumner, 567; *King 1 Conn.* 487; *McArthur v. Sears*, 21 v. *Shepherd*, 3 Story, 349; *Whitesides v. Wend.* 190; *Plaisted v. B. & K. Steam Thurlkill*, 12 Sm. & M. 599; *The Rebecca*,

¹ As to "thieves," "barratry," or "damage," capable of being covered by insurance, see *Taylor v. Liverpool & Great Western Steam Co.* L. R. 9 Q. B. 546, and *Spinetti v. Atlas Steamship Co.* 80 N. Y. 71.

they would limit the liability accordingly. So also if a ship is hired by a charter-party, to carry goods for the hirers on a certain voyage, or a certain time, and upon certain terms, this charter determines the relation of the parties, and their rights and responsibilities, and not the law of common carriers.

Railroad companies have carried goods but for a short period; but wherever they are established they supersede almost all other modes of conveyance; they exist expressly to carry goods and passengers; their termini and routes are definitely fixed; they advertise for freight, offering to the public the terms on which they will receive it.¹ It seems strange that a doubt whether they were common carriers could ever have existed; that they are, is, however, abundantly settled by authority. (x) And receivers of railroad companies, if liable as carriers in their own State, may be sued as such in another State. (xx) And trustees for mortgage bondholders, when in possession and running the railroad, are liable as common carriers. (xy)

It has been said that there is no difference between railroads and common highways, as to the care necessary in the construction and management of vehicles used upon them. (y)

* 173 Owners * of cars are liable as common carriers, although the State owns and manages the railroads. (z)

There are some peculiarities in the law which regulates the liabilities of railroad companies, which we shall speak of hereafter.

Ware, 188, 210; Van Syckel v. The Ewing, Crabbe, 405; The Newark, 1 Blatchf. C. C. 203; Clark v. Barnwell, 12 How. 272; Rich v. Lambert, 12 How. 347. As to rats, Laveroni v. Drury, 16 E. L. & E. 510; s. c. 8 Exch. 166. As to the exception of loss by "robbers," or "dangers of the roads," see De Rothschild v. R. M. Steam Packet Co. 14 E. L. & E. 327; s. c. 7 Exch. 734. See *post*, chapter on the Law of Shipping.

(x) Thomas v. Boston & P. R. R. Co. 10 Met. 472; Pickford v. Grand Junction R. R. Co. 8 M. & W. 372; Norway Plains Co. v. B. & M. R. R. Co. 1 Gray, 263. They are not common carriers of goods

by their passenger trains, and evidence of one or two instances in which they have so carried will not prove that they intended to hold themselves out as such carriers, but the presumption will be that the goods were carried in this manner for temporary convenience only. Elkins v. Boston & Maine Railroad Co. 2 Foster (N. H.), 275.

(xx) Paige v. Smith, 99 Mass. 395.

(xy) Rogers v. Wheeler, 2 Lans. 486.

(y) Beers v. Housatonic R. R. Co. 19 Conn. 566.

(z) Peters v. Rylands, 20 Penn. St. 497. See also Schopman v. B. & W. R. R. Co. 9 Cush. 24. See *post*, p. * 250.

¹ That railroad companies are carriers for hire, and, being engaged in a public employment affecting the public interest, are, unless protected by their charters, subject to legislative control as to their rates of fare and freight, see Chicago, &c. R. Co. v. Iowa, 94 U. S. 155. Rae v. Grand Trunk R. Co. 14 Fed. Rep. 401, decided that a State may require a railroad to draw cars of other corporations at reasonable times and for reasonable compensation.

Still more recently telegraph companies have been established, and are now very largely employed for the conveyance of messages. Communication by telegraph is so peculiar in its nature, that it must be governed by peculiar laws, nor can they exist as a system until that be created by statutory provisions, or by adjudication. We give the principles and cases which relate to this subject in the chapter on the Law of Telegraphs.

SECTION VII.

OBLIGATIONS OF A COMMON CARRIER.

A private carrier may or may not carry for another, as he prefers. But a common carrier is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment; and is liable to an action in case of refusal. (b) But he is entitled to his pay; he may demand it, and if it be refused, he may refuse to carry the goods. The owner of the goods may tender him the freight-money; or, if the money is not demanded by the carrier, he may aver and prove that he was ready and willing to pay the freight-money, and this will be equivalent to a tender. (c) * Payment * 174

(b) *Lane v. Cotton*, 12 Mod. 472, 484; *Jackson v. Rogers*, 2 Show. 327; *Johnson v. Midland Railway Co.* 4 Exch. 367; *Pickford v. The Grand Junction Railway Co.* 8 M. & W. 372; *East Tennessee R. R. Co. v. Nelson*, 1 Cold. 271. *Contra*, *Costa B. R. Co. v. Moes*, 23 Cal. 323.

(c) *Pickford v. The Grand Junction Railway Co.* 8 M. & W. 372; s. c. 12 id. 766. So if the carrier demands payment before he receives the goods, and demands a larger sum than he is entitled to receive, the owner of the goods may pay him such sum as he demands, under protest, and recover back the excess in an action for money had and received. And to entitle him to recover in this action, it is not necessary that he should make a tender to the carrier of such sum as he is entitled to receive. *Parker v. The Great Western Railway Co.* 7 Man. & G. 253, 8 E. L. & E. 426, 11 C. B. 545; *Edwards v. The Great Western Railway Co.* 8 E. L. & E. 447; s. c. 11 C. B. 588; *Crouch v. The London Railway Co.* 2 Car. & K. 789;

— v. *Pigott*, cited in *Cartwright v. Rowley*, 2 Esp. 723; *Parker v. The Bristol & E. Railway Co.* 7 E. L. & E. 528; s. c. 6 Exch. 184, 702. The same rule holds where the carrier, not having received his pay in advance, nor made any special agreement, refuses to deliver the goods at the end of his transit until he is paid a larger sum for the carriage than he is entitled to receive. Thus in *Ashmole v. Wainwright*, 2 Q. B. 837, the defendants, common carriers, refused to deliver the plaintiff's goods, which they had carried for him, except on payment of £5 5s. charge. He insisted that he was not liable to pay any thing; but ultimately, the defendants having said that they would take nothing less than the whole sum, he paid the whole to regain his goods, protesting that he was not liable to pay any thing, and that if he was liable, the charge was exorbitant. He had not tendered or named any smaller sum. Afterwards, without having demanded the return of any surplus, he

of the fare has been inferred without proof, from the mere usage to pay; (*d*) but we doubt whether this could safely be adopted as a general rule.

Carriers are not bound to adopt every contrivance invented or supposed to promote the safety of the goods they carry, but are bound to apply any apparatus known to be useful and in common use. (*dd*)¹

An act of Congress was passed March 3, 1851, entitled "An act to limit the liability of ship-owners and for other purposes;" and under the provisions of this act it is held that a carrier by water is not liable for the baggage of a passenger destroyed by fire without the carrier's default. (*de*) But this statute does not apply to a common carrier who ships goods over a part of his route on a vessel which he neither owns nor charters; and he is liable for injury to goods caused by an accidental fire on such a vessel. (*df*)

It is a good excuse for the carrier's refusal that his carriage was full, (*e*) or that the goods would endanger him, or incur themselves extraordinary danger, (*f*) or are not such as he car-

brought assumpsit for money had and received, claiming by his particular the whole sum, as having been paid in order to obtain possession of his goods, under protest that he was not liable to pay the same, or any part thereof, or, if he was liable to pay some part, that the sum was exorbitant. The jury having found that the defendant was entitled to charge £1 10s. 6d., the court held, that the plaintiff was entitled to recover the difference in this form of action; and that it was not necessary to his right of recovery that he should have tendered any specific sum. But, *semel*, per *Paterson*, J., that if a party, simply denying that any thing is due, tenders a sum which is accepted, but which exceeds the sum legally demandable, he cannot recover back the excess. This case was doubted by *Pollock*, C. B., in the case of *Parker v. The Bristol & E. Railway Co.* 7 E. L. & E. 528; s. c. 6 Exch. 184, 702, on the ground that the action for money had and received, must be brought for a definite, clear, and certain sum, and not for some unknown sum, which is to depend upon the verdict of the jury, who are to decide whether the defendant has received the money or not. He stated, however, that the doubt belonged exclusively to his own mind, and

not to that of the rest of the court, who were satisfied with the decision, and altogether agreed with it, not merely as a binding authority, but as agreeable to their own opinion and judgment.

(*d*) *McGill v. Rowand*, 3 Penn. St. 451.

(*dd*) *Steinweg v. Erie R. R. Co.* 43 N. Y. 123; *Case v. Northern, &c. R. R. Co.* 59 Barb. 644.

(*de*) *Chamberlain v. Western Transportation Co.* 44 N. Y. 305.

(*df*) *Hill Manufacturing Co. v. Boston, &c. R. R. Co.* 104 Mass. 122.

(*e*) *Lovett v. Hobbe*, 2 Show. 127. But not, it seems, if he has issued a ticket for the journey, and has put no condition to his liability. *Hawcroft v. Great Northern Railway Co.* 8 E. L. & E. 362.

(*f*) *Edwards v. Sherrat*, 1 East, 604; *Pate v. Henry*, 5 Stew. & P. 101. But where, to an action against the defendants as common carriers for refusing to carry a package of the plaintiff, the defendants pleaded that when the package was tendered they requested the plaintiff to inform them of its contents, and that the plaintiff refused to do so, wherefore and because the defendants did not know what the package contained, they refused to receive and carry it; the plea was held bad,

¹ See also *Caldwell v. New Jersey Steamboat Co.* 47 N. Y. 282.

ries in the known and usual course of his business; (*g*)¹ or that he cannot, at the time and in the way proposed, receive them without unreasonable loss and inconvenience. And he is not * obliged to receive them until he is ready to set forth * 175 on his route. (*h*) And if perishable goods are offered him by one owner, and goods non-perishable by another owner, and he cannot take all, he may take the perishable goods, as they will suffer most by the delay. (*hh*)

A common carrier may make what contract he will as to his compensation; but a tender of his *usual*, or of a reasonable compensation, obliges him to carry; (*i*) and when he carries without special agreement, this is all the compensation he can recover. If he carries articles, as for example, bags of grain, for freight, and is to return the empty bags without charge for freight, this is not a gratuitous carriage of the bags, as the freight paid for the full bags is compensation also for the return of empty bags. (*ii*) In the absence of special agreement, he must treat all persons alike; but it is said that he is under no obligations at common law to charge equal rates of carriage to all his customers. (*j*) Where required by statute to make reasonable and equal charges against all, he cannot, by by-laws or rules, discriminate as to amounts or modes of computation between persons according to their occupations, but must carry the same amount, the same distance, for the same price, for all persons. (*k*)²

All carriers are held to act by their agents, and to be responsible for the acts of their servants and agents, under the common rules of agency. (*l*)

for that a carrier has no general right, in any case and under all circumstances, to require to be informed of the contents of packages tendered to them to be carried.

(*g*) *Sewall v. Allen*, 6 Wend. 335; *Tunnell v. Pettijohn*, 2 Harring. (Del.) 48; *Citizens Bank v. Nantucket Steam-boat Co.* 2 Story, 16; *Johnson v. The Midland Railway Co.* 4 Exch. 367.

(*h*) *Lane v. Cotton*, 1 Ld. Raym. 646, 652; s. c. 1 Comyns, 100, 105.

(*M*) *Marshall v. New York, &c. R. R. Co.* 45 Barb. 502.

(*i*) *Harris v. Packwood*, 3 Taunt. 264.
(*ii*) *Pierce v. Milwaukee, &c. R. R. Co.* 23 Wisc. 387.

(*j*) *Baxendale v. Eastern Counties Railway Co.* 93 Eng. C. L. 63.

(*k*) *Pickford v. Grand Junction Railway Co.* 10 M. & W. 399; *Parker v. Great Western Railway Co.* 7 Man. & G. 253, 8 E. L. & E. 426, 11 C. B. 545; *Edwards v. Great Western Railway Co.* 8 E. L. & E. 447; s. c. 11 C. B. 588; *Crouch v. The London Railway Co.* 2 Car. & K. 789.

(*l*) See *Machu v. Railway Co.* 4 Exch.

¹ A carrier, in the absence of improper concealment by the shipper, must inquire as to the nature and value of goods shipped, failing to do which he cannot escape liability. *Merchants' &c. Co. v. Bolles*, 80 Ill. 473.

² See *McDuffee v. Portland, &c. R. Co.* 52 N. H. 430; *Messenger v. Penn. R. Co* 8 Vroom, 531; *Stewart v. Lehigh, &c. R. Co.* 9 Vroom, 505.

If the character of the goods carried is substantially changed by a cause for which the carrier is responsible, the owner need not receive them, and the carrier is responsible for their whole value, and a recovery thereof from him vests the property therein in him; but if only partially injured, the carrier is liable only to the extent of the injury, and the property in the goods remains in the owner. (*m*)

It is now common to send articles by a carrier, who is to receive the price on delivery of the goods. He is the agent of the sender for this purpose. From the cases it would seem that if the carrier undertakes to collect the price, he must do so, and if he delivers the article without receiving the price, he makes himself liable therefor. (*mm*)¹ But it is also held that merely marking the article C. O. D., or Cash on Delivery, is not enough to make him liable without some undertaking on his part; but this may be proved directly, or inferred from a usage. (*mn*)

SECTION VIII.

WHEN THE RESPONSIBILITY BEGINS.

As soon as the goods are delivered and received, they are at the risk of the carrier. This reception of them may * 176 be specific * or general, and according to the usage of his business; and it may be actual or constructive. (*n*)² But the delivery to the carrier is not complete if the goods are still in charge of the owner or his representative; the delivery must place the goods in the custody of the carrier. (*o*)³ The de-

415, and *Butcher v. L. & S. W. R. Co.* 16
C. B. 13.

(*n*) *Merriam v. The Hartford Railroad Co.* 20 Conn. 354.

(*m*) *Hackett v. B. C. & M. R. R. Co.*
35 N. H. 390.

(*o*) *Brind v. Dale*, 8 C. & P. 207. It

(*mm*) *Meyer v. Lemcke*, 31 Ind. 208.
(*mn*) *Chicago, &c. R. R. Co. v. Merrill*,
48 Ill. 425.

frequently becomes a difficult question of fact, whether goods have been so delivered to a carrier as to be in his custody and under his control, or whether they

¹ If a consignor instructs an express company not to permit the consignee to examine the goods sent, before delivery and payment of charges, the company's agent is authorized to refuse such an examination, and incurs no personal liability by returning the goods to the consignor. *Wiltse v. Barnes*, 46 Ia. 210.

² See *Green v. Milwaukee, &c. R. Co.* 38 Ia. 100.

³ *Kent v. Midland R. Co.* L. R. 10 Q. B. 1. *Clark v. Burns*, 118 Mass. 275, held that the owner of a steamship is not liable as a common carrier for a watch worn by a passenger on his person by day, and kept by him within reach by night, whether retained upon his person, or placed under his pillow, or in a pocket of his clothing hanging near him.

livery to a ship is complete * when the master, or mate, or * 177 other agent of the owner, receives them, either at the ship,

still continue under the control of the owner or his servant. There are several cases in the books which have turned upon this question. Thus, in the case of the East India Co. v. Pullen, 2 Stra. 690, an action was brought against the defendant as a common carrier, on an undertaking to carry for hire on the River Thames, from the ship to the company's warehouses. It appeared in evidence that the defendant was a common lighterman, and that it was the usage of the company, on the unshipping of their goods, to put an officer, who was called a guardian, into the lighter, who, as soon as the lading was taken in, put the company's locks on the hatches, and went with the goods to see them safely delivered at the warehouse. It appeared that such was the course in this case, and part of the goods were lost. Upon this evidence, Raymond, C. J., was of the opinion that "this differed from the common case, this not being any trust in the defendant, and the goods were not to be considered as ever having been in his possession, but in the possession of the company's servant, who had hired the lighter to use himself." The plaintiff was accordingly nonsuited. So in the case of Tower v. The Utica & S. Railroad Co. 7 Hill (N. Y.), 47, where an action was brought to charge a railroad company as common carriers, for the loss of an overcoat belonging to a passenger, and it appeared that the coat was not delivered to the defendants, but that the passenger, having placed it on the seat of the car in which he sat, forgot to take it with him when he left, and it was afterwards stolen; it was held that the defendants were not liable. And Nelson, C. J., said: "The overcoat was not delivered into the possession or custody of the defendants, which is essential to their liability as carriers. Being an article of wearing apparel of present use, and in the care and keeping of the traveller himself for that purpose, the defendants have a right to say that it shall be regarded in the same light as if it had been upon his person. No carrier, however discreet and vigilant, would think of turning his attention to property of the passenger in the situation of the article in question, or imagine that any responsibility attached to him in respect to it." On the other hand, in Robinson v. Dunmore, 2 B. & P. 416, it appeared in evidence that the plaintiff, who was an upholsterer, having occasion to send some furniture into the country, agreed with the defendant to take the same; that the

defendant brought his cart to the plaintiff's house, where the goods were loaded in the presence of the plaintiff himself, and with the assistance of two of the plaintiff's servants; that the plaintiff having observed that the tarpaulin which the defendant had brought for the purpose of covering the cart was too small, the defendant said, "I have plenty of sacks, and I will warrant the goods shall go safe;" that, on account of the defendant's being a stranger to the plaintiff, the latter sent one of his own porters with the cart, who would otherwise have gone by the stage; that this porter, in the course of the journey, paid a person for watching the goods one night; and that the goods in the course of the journey were damaged by rain. Upon these facts, the jury, under the direction of Lord Eldon, before whom the case was tried, found a verdict for the plaintiff. And a rule nisi having been obtained for setting this verdict aside and entering a nonsuit, Chambre, J., said: "This is a very clear case. The defendant is not a common carrier by trade, but has put himself into the situation of a common carrier by his particular warranty. As to possession, that seems clearly proved by the circumstances of the case; the defendant attends with his horse and cart at the plaintiff's house, where the goods are delivered to him and put into the cart by the plaintiff's servants. This is a complete possession. How is this affected by the presence of the plaintiff's servant? It has been determined, that if a man travel in a stage-coach, and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost. In this case the plaintiff, for greater caution, sends his servant with the goods, who pays for watching them, because he apprehends danger of their being stolen. So the man who travels in a stage has some care of his own property, since it is more for his interest that the property should not be lost than that he should have an action against the carrier. This case bears no resemblance to that cited from Strange, for there the decision proceeded on the usage of the East India Company, who never intrust the lighterman with their goods, but give the whole charge of the property to one of their own officers, who is called a guardian." The rule was accordingly discharged. See also Richards v. The London Railway Co. 7 C. B. 839;

or on the wharf, or in a warehouse, if such delivery and receipt be according to the usage. And the owners of the ship forthwith become insurers as to all but the cases excepted by law, or by the bill of lading. (p) Delivery may be made in a different way, or at a different time or place, from that which is usual, or notified to the public; such difference being requested, or suggested by the carrier, or his agent, or sanctioned by him by receiving the goods without objection, and entering them on the way-bill. (q) The responsibility of the carrier is fixed by his acceptance of the goods without objection, whatever be the manner of the delivery. Nor is it necessary to complete the delivery that the goods should be *entered on the way-bill or

*178 freight-list, or any written memorandum made. (r) But delivery to a clerk of the carrier, outside of the carrier's office, is not a delivery to the carrier until the parcel comes into actual possession of the carrier's agent for that purpose. (rr) Nor is delivery at the proper place without notice to the proper person, (rs) unless the place is one which the carrier indicates as that where goods for him should be put, and will then be under his care.

The same person may be a common carrier and also a ware-

White v. Winnisimmet Co. 7 Cush. 155; *Maybin v. Railroad Co.* 8 Rich. L. 241; *Midland Railway v. Bromley*, 17 C. B. 372.

(p) *Cobban v. Downe*, 5 Esp. 41. But a delivery to any of the crew is not sufficient, they not being authorized agents for that purpose. *Leigh v. Smith*, 1 C. & P. 638. And, generally, a delivery to a servant of the carrier must be to one authorized to receive the goods. Therefore, where the plaintiff delivered a package to the driver of a coach, who had no authority to receive and enter it on the way-bill, but consented to carry it on to the next agent and have it entered; it was held to be no delivery to the carrier. *Blanchard v. Isaacs*, 3 Barb. 388. The master of a vessel cannot bind the owner by a bill of lading for goods not actually put on board. *Grant v. Norway*, 2 E. L. & E. 337; s. c. 10 C. B. 665; *Hubbersty v. Ward*, 18 E. L. & E. 551; s. c. 8 Exch. 330; *Coleman v. Riches*, 29 E. L. & E. 323; s. c. 16 C. B. 104.

(q) Therefore, where a package was delivered to the agent of a stage-coach company, at the post-office, where the stage was standing, and not at the office of the company, to be carried from Bos-

ton to Hartford, and was entered on the way-bill by the agent when he received it, he having previously directed the person who had the care of the package to bring it to the post-office; and the package was lost before reaching Hartford; it was held, that the owners of the coach were liable to the owner of the package for its value, the delivery at the post-office being with the assent of their agent. *Phillips v. Earle*, 8 Pick. 182. See also *Pickford v. The Grand Junction Railway Co.* 12 M. & W. 766; s. c. 8 id. 372. So in *Powhatan Steamboat Co. v. Appomattox R. R. Co.* 24 How. 247, it was decided, that after a railroad company had received goods into their depot on Sunday, their duty of safe-keeping was not within the prohibition of the Virginia Sunday law, and if the goods are burned the company is responsible for the loss.

(r) *Citizens Bank v. Nantucket Steamboat Co.* 2 Story, 16, 35.

(rr) *Croukite v. Wells*, 32 N. Y. 247; and see *Missouri, &c. Co. v. Hannibal, &c. R. R. Co.* 35 Mo. 84; and *Hotchkiss v. Artisan's Bank*, 42 Barb. 517.

(rs) *Grosvenor v. N. Y., &c. R. R. Co.* 39 N. Y. 34.

houseman, or an innkeeper, or a wharfinger, or a forwarding-merchant. And goods may be delivered to him and lost, under circumstances which would render him liable if he received them *as a carrier*, but not if he received them in another capacity, the loss not having occurred through his negligence. And it is sometimes quite difficult to determine in what capacity the goods were received. (s)

(s) See the case of *Roberts v. Turner*, 12 Johns. 232, cited and stated fully *ante*, p. * 139, note (k). The point considered in that case came under discussion again in the case of *Teal v. Sears*, 9 Barb. 317. It was an action on the case against the defendants as common carriers, to recover for the loss of a case of goods. The facts were as follows: On the 6th of October, 1846, the plaintiffs shipped, at Albany, three cases of goods for Buffalo, on a canal boat. A bill of lading was made out by the plaintiffs, and forwarded by the captain of the canal boat, with directions to deliver the goods in the bill as addressed, and collect the charges for transporting on the canal. The three cases were marked on the bill, "A. B. Case, Chicago, by vessel, care of Sears & Griffith, Buffalo." The cases were received by Sears & Griffith (the defendants), at Buffalo, on the 14th of October, and they paid the canal charges, indorsing a receipt therefor, and a memorandum of the receipt of the goods, on the bill of lading. The defendants were at the time engaged in the forwarding and commission business at B. That was their principal business, but they were interested to some extent in a transporting line on the canal, and also in at least one vessel carrying freight upon the lakes. On the 17th of October, the defendants shipped the goods on board the schooner C., a transient vessel which ran between Buffalo and Chicago, in which they had no interest. They took the captain's receipt, and made a bill of lading for the goods, agreeing with the captain as to the amount of freight he should receive. The vessel was a good one, and her captain in good credit. One of the cases of goods was lost before arriving at Chicago. Upon these facts the court held, 1. That the legal import of the memorandum was not that the goods should be stored at Buffalo, and that the defendants should act as agents of the plaintiffs in procuring a carrier of them from Buffalo to Chicago; but that they were consigned to the defendants at B., with a request or direction that they should be carried, by vessel, from B. to Chicago. 2. That the defendants, receiving the goods with the accompanying memorandum, and transporting or causing the same to be transported by vessel to Chicago, were to be regarded as impliedly contracting to carry; and upon such a receipt the risk of a *carrier*, and not that of a *warehouseman* or *forwarder*, attached. *Roberts v. Turner* having been cited for the defendants, *Wright, J.*, who delivered the opinion of the court, thus endeavored to distinguish the two cases: "We are referred to *Roberts v. Turner*, 12 Johns. 232, as controlling this case. That case was decided in 1815. But without referring to the actual condition of the business of the country since that decision, the case is distinguishable from the present, in that the whole facts showed that Turner acted but as a forwarder of the goods. He kept a store at Utica, where produce was left by the public to be forwarded by boats or wagons to Albany. He had no interest in the boats or wagons. The plaintiff knew, when his ashes were left to be sent to Albany, that Turner's only business, in relation to the carriage of goods, consisted in forwarding them. This was also understood by the public; and that without any concern in the vessels by which the goods were forwarded, or any interest in the freight, they were stored with him merely for the purpose of forwarding by others; he taking upon himself the expenses of transportation, for which he received a compensation from the owners of the goods. But this was not the position of the defendants in the present suit. They were in a measure engaged in the carrying business, and were interested to some extent in vessels on the canal and lakes. They kept a public office for the transaction of their business, at a place of transhipment; receiving and carrying all goods that might be directed to their care, in their own vessels when convenient, and in such other vessels as they could employ on terms most advantageous to themselves. They received the goods in question directed to them, which were destined west on the lakes. They employed a vessel to carry them forward, making out a new freight-bill, and return-

* 179 * The principle which governs these cases may be stated thus. If the transportation be the chief thing, and the deposit of the goods on a wharf or in a building be for a short time only, and merely incidental to the transportation, and the owner of the goods relinquishes them entirely when they are so deposited, then they are so delivered to the common carrier in that capacity, and he is liable for them accordingly. (t) Thus, most carriers have a receiving-office, or depot, or station. However such a place be called, goods once delivered and received there are as much at the risk of the carriers as if they were packed in the wagon or car, and in actual motion. (u) But if they are deposited even in such receiving-office, with orders not to transport them, but to let them lie until further instructions shall be given by the owner, the carrier has not received them *for carriage*; or, in other words, he has not received them as a carrier, but only as a depositary. (v) As soon as final instructions to transport the goods were received by the carrier, his liability in that character would begin under some circumstances. But not if the goods had been previously deposited there, for a distinct time, and an independent purpose.

* 180 In such case the order to carry would * have no further operation than an order by an owner to carry goods in the owner's possession. It attaches no liability until the order is executed, or begins to be executed. So, if goods are deposited with one who is a carrier, but distinctly for the purpose of warehousing them, the depositary is answerable only for negligence; and if afterwards he is ordered to carry, and undertakes to carry the same goods, his peculiar liability as carrier does not begin until he begins to carry, or moves the goods, or prepares them for car-

ing the old one, and for themselves taking the captain's receipt for the goods. Persons ostensibly engaged as forwarders have, in this State, become numerous, and their business complicated and extensive. The rigid rules of the common law make the carrier assume the liability of an insurer of property, whilst the warehouseman and forwarder are but answerable as bailees, for ordinary neglect. *The law distinctly defines the business of each, and their liabilities. Whilst the warehouseman confines himself to the receipt and storage of goods for a compensation, and a forwarder to the receipt of goods, and the forwarding of them by a carrier other than himself, in good credit and in safe vessels, they only assume the

liability of depositaries for hire. But if, calling themselves forwarders, they so act and conduct their business as to lead the public to regard them as carriers, and employ them as such, without intimation of their true character, the liabilities of a carrier attach to them."

(t) *Maving v. Todd*, 1 Stark. 72. And see *Clarke v. Needles*, 25 Penn. St. 338; *Moses v. The Boston & Maine Railroad Co.* 4 Foster (N. H.), 71.

(u) *Camden & Amboy Railroad Co. v. Belknap*, 21 Wend. 354; *Woods v. Devin*, 13 Ill. 746; *Moses v. Boston & Maine Railroad Co.* 4 Foster (N. H.), 71.

(v) *Platt v. Hibbard*, 7 Cowen, 497; *Moses v. Boston & Maine Railroad Co.* 4 Foster (N. H.), 71.

riage, taking them as it were anew into his possession for this specific purpose.

The delivery to a carrier must be known to the carrier, in order to create a responsibility on his part. (w) If goods are left in his depot or receiving-office, with no notice to him, and no knowledge by him, he is not then, in general, bound to any care or charge of them. But usage, or terms made public by advertisement, might raise such an obligation. (x) As if he * had adver- * 181

(w) *Selway v. Holloway*, 1 Ld. Raym. 46; *Buckman v. Levi*, 3 Camp. 414; *Packard v. Getman*, 6 Cowen, 757.

(x) *Mechanics & Traders Bank v. Gordon*, 5 La. An. 604. The case of *Merriman v. The Hartford Railroad Co.* 20 Conn. 354, is very strong to this point. In that case, certain goods, designed to be transported by the defendants, as common carriers, from New York to Meriden, in Connecticut, were delivered in New York, in the usual manner, on the defendants' private dock, which was in their exclusive use for the purpose of receiving property to be transported by them. It was held, that such delivery was a good delivery to the defendants to render them liable for the loss of the goods, although neither they nor their agent were otherwise notified of such delivery. And *Storrs*, J., said: "A contract with a common carrier for the transportation of property being one of bailment, it is necessary, in order to charge him for its loss, that it be delivered to and accepted by him for that purpose. But such acceptance may be either actual or constructive. The general rule is, that it must be delivered into the hands of the carrier himself, or of his servant, or some person authorized by him to receive it; and if it is merely deposited in the yard of an inn, or upon a wharf to which the carrier resorts, or is placed in the carrier's cart, vessel, or carriage, without the knowledge and acceptance of the carrier, his servants or agents, there would be no bailment or delivery of the property, and he, consequently, could not be made responsible for its loss. *Addison on Cont.* 809. But this rule is subject to any conventional arrangement between the parties in regard to the mode of delivery, and prevails only where there is no such arrangement. It is competent for them to make such stipulations on the subject as they see fit; and when made, they, and not the general law, are to govern. If, therefore, they agree that the property may be deposited for transportation at any particular place, and without any express notice to the carrier, such deposit

merely would be a sufficient delivery. So if, in this case, the defendants had not agreed to dispense with express notice of the delivery of the property on their dock, actual notice thereof to them would have been necessary; but if there was such an agreement, the deposit of it there, merely, would amount to constructive notice to the defendants, and constitute an acceptance of it by them. And we have no doubt, that the proof by the plaintiff of a constant and habitual practice and usage of the defendants to receive property at their dock for transportation, in the manner in which it was deposited by the plaintiff, and without any special notice of such deposit, was competent, and in this case sufficient to show a public offer, by the defendants, to receive property for that purpose, in that mode; and that the delivery of it there accordingly, by the plaintiff, in pursuance of such offer, should be deemed a compliance with it on his part; and so to constitute an agreement between the parties, by the terms of which the property, so deposited, should be considered as delivered to the defendants without any further notice. Such practice and usage was tantamount to an open declaration, a public advertisement, by the defendants, that such a delivery should, of itself, be deemed an acceptance of it by them, for the purpose of transportation: and to permit them to set up against those who had been thereby induced to omit it, the formality of an express notice, which had thus been waived, would be sanctioning the greatest injustice and the most palpable fraud. The present case is precisely analogous to that of the deposit of a letter for transportation in the letter-box of a post-office, or foreign packet vessel, and to that of a deposit of articles for carriage in the public box provided for that purpose, in one of our express offices; where it would surely not be claimed that such a delivery would not be complete, without actual notice thereof to the head of these establishments or their agents."

tised that parcels properly directed might be put into his box, that adequate provisions had been made for their safety, and that he should hold himself responsible for them, he would in such case undoubtedly be held to this responsibility. And the knowledge of his authorized agent is his knowledge. (y) But not every one employed by him is his agent in such wise as to charge him with this responsibility. (z) Drivers of stage-coaches, or conductors of cars, may be in the habit of carrying goods generally, in parcels of some particular kind, on their own account, receiving themselves the pay, and not accounting for it to their employers. One who delivers goods to such a person for carriage, knowing that he carries them only in this way, and that no part of the compensation he receives goes to his employer, cannot hold that employer liable for loss of the goods. (a) But the employing carrier cannot defend himself by showing that his servant carried his goods

on his separate account, and for his separate gain, provided the owner did not * know the state of the case, but believed that the employer was the carrier, and the servant his receiver of goods for carriage, and was justified by the apparent facts of the case in so believing. (b)

(y) *Burrell v. North*, 2 Car. & K. 680; *Davy v. Mason*, 1 Car. & M. 45; *D'Anjou v. Deagle*, 3 Har. & J. 206.

(z) But the agent must have an authority for this purpose, or be held out as having it. Therefore, where a common carrier sent his wagon to Nashville with a load of cotton, and the driver was a young negro who had never been allowed to make contracts for hauling, and who had never before been intrusted with the wagon and team alone, and who was particularly instructed to bring home a load of salt, and not to receive goods of any kind for carriage, notwithstanding which he did receive goods for carriage, and the goods were damaged; it was held, that the owner of the team was not liable. *Jenkins v. Pickett*, 9 Yerg. 480. See *Ford v. Mitchell*, 21 Ind. 54.

(a) Thus where a ship is not put up for freight, but employed by the owner on his own account; and the master receives goods of another person on board as part of his privilege, taking to himself the freight and commissions, the owner of the ship is not liable in case of embezzlement, or for the conduct of the master in relation to such goods. *King v. Lenox*, 19 Johns. 235. See also *Butler v. Basing*, 2 C. & P. 613; *Reynolds v. Toppin*, 15

Mass. 370; *Citizens Bank v. Nantucket Steamboat Co.* 2 Story, 16; *Allen v. Sewall*, 2 Wend. 327, 6 id. 335; *Walter v. Brewer*, 11 Mass. 99.

(b) Thus, where the owners of a stagecoach employed a driver, under a contract that he should receive a certain sum of money per month, and the compensation which should be paid for the carriage of small parcels, it was held, that the owners would be answerable for the negligence of the driver in not delivering a parcel of that description, intrusted to him to carry, unless this arrangement was known to the proprietor of the goods, so that he contracted with the driver as principal. *Bean v. Sturtevant*, 7 N. H. 146. See also *Allen v. Sewall*, 2 Wend. 327; s. c. 6 id. 335; *Hosea v. McCrory*, 12 Ala. 349; *Chouteau v. Steamboat*, 16 Mo. 216; *Whitmore v. Steamboat Caroline*, 20 id. 513. See also the case of *Farmers and Mechanics Bank v. Champlain Transportation Co.* 23 Vt. 186, in which these points are thoroughly considered. See the facts of the case stated post, p. *187, note (s). One of the points made was whether the defendants were to be held as common carriers of the bank-bills in question. Upon this point *Redfield*, J., said: "It seems to us that when a natural person, or a corporation,

A ship may be a common carrier, whether in the hands of her owner, or chartered by him to another.¹ But she may be chartered in two ways. If the hirer provides and pays the officers and crew, in this case the owner is not more liable for their acts than if he had sold the ship. (*c*)² If the owner agrees to man the ship, and then the hirer hires ship, officers, and crew,

* of the owner, the owner alone is in general responsible * 183 for the acts of the officers and men in reference to the goods, because his possession and control of the ship for that voyage are sufficient to render him thus liable. (*d*) The owner of the ship is certainly liable for the acts of those whom he provides and pays, where the goods were laden on board on his credit, trusting to him as the owner of the ship, he knowing this trust, and by his words or conduct authorizing it, and so accepting the responsibility. So an owner of a ferry who has leased it and placed the lessee in possession, is not liable for loss of goods in crossing the ferry. (*e*)

whose powers are altogether unrestricted, erect a steamboat, appoint a captain, and other agents, to take the entire control of their boat, and thus enter upon the carrying business, from port to port, they do constitute the captain their general agent to carry all such commodities as he may choose to contract to carry within the scope of the powers of the owners of the boat. If this were not so, it would form a wonderful exception to the general law of agency, and one in which the public would not very readily acquiesce. There is hardly any business in the country, where it is so important to maintain the authority of agents, as in this matter of carrying, by these invisible corporations, who have no local habitation, and no existence, or power of action, except through these same agents, by whom almost the entire carrying business of the country is now conducted. If, then, the captains of these boats are to be regarded as the general agents of the owners,—and we hardly conceive how it can be regarded otherwise,—whatever commodities, within the limits of the powers of the owners, the captains, as their general agents, assume to carry for hire, the liability of the owners as carriers is thereby fixed, and they will be held responsible for all losses, unless, from the course of business of these boats, the

plaintiffs did know, or upon reasonable inquiry might have learned, that the captains were intrusted with no such authority. *Prima facie* the owners are liable for all contracts for carrying, made by the captains or other general agents for that purpose, within the powers of the owners themselves, and the *onus* rests upon them to show that the plaintiffs had made a private contract with the captain, which it was understood, should be kept from the knowledge of the defendants, or else had given credit exclusively to the captain. But it does not appear to us, that the mere fact that the captain was, by the company, permitted to take the perquisites of carrying these parcels, will be sufficient to exonerate the company from liability. Their suffering him to continue to carry bank-bills ought, we think, to be regarded as fixing their responsibility, and allowing the captain to take the perquisites, as an arrangement among themselves."

(*c*) *James v. Jones*, 3 Esp. 27; *Vallejo v. Wheeler*, Cwop. 143; *Frazer v. Marsh*, 13 East, 238; *Reynolds v. Toppin*, 15 Mass. 370.

(*d*) *Parish v. Crawford*, Stra. 1251; *Emery v. Hersey*, 4 Greenl. 407; *McIntire v. Browne*, 1 Johns. 229.

(*e*) *Ladd v. Chotard, Minor (Ala.)*, 366.

¹ In *Nugent v. Smith*, 1 C. P. D. 19, *Brett*, J., declared that all ship-owners who carry goods for hire, whether common carriers or not, were, in the absence of stipulation to the contrary, liable as insurers; but *Cockburn*, C. J., on appeal, reversing the decision below, said that a ship-owner who is not a common carrier does not insure the goods bailed to him for carriage, Ib. 423.

² *Marquette Bank c. Stewart*, 26 Mich. 83.

SECTION IX.

WHEN THE RESPONSIBILITY ENDS.

As the liability of the carrier begins with the delivery of the goods to him, so it continues until the delivery of the goods by him. For he is bound not only to carry them to their destined place, but to deliver them there to the bailor, or as the bailor may direct. (*f*) And this he must do within what shall be a reasonable time, judging from all the circumstances of the case; (*g*)¹ and within the proper hours of business, when the goods can be received and properly stored. (*h*) And mis-

(*f*) *Golden v. Manning*, 3 Wils. 429; *s. c. 2 W. Bl.* 916; *Hyde v. Trent & Mersey Navigation Co.* 5 T. R. 389; *Wardell v. Mourillyan*, 2 Esp. 693; *Storr v. Crowley, McClel. & Y.* 129; *Gibson v. Culver*, 17 Wend. 305; *Fish v. Newton, 1 Denio*, 45; *Ostrander v. Brown*, 15 Johns. 39; *Eagle v. White*, 6 Whart. 505; *McHenry v. Railway Co.* 4 Harring. (Del.) 448; *Adams v. Blankenstein*, 2 Cal. 413. The bailor undertakes also that a proper person shall be at the destination of the goods, and in default thereof, the liability of the carrier, upon due notice, is discharged. *Marshall, &c. v. Am. Express Co.* 7 Wis. 1.

(*g*) *Hand v. Baynes*, 4 Whart. 204; *Favor v. Philbrick*, 5 N. H. 358; *Wallace v. Vigns*, 4 Blackf. 260; *Nettles v. Railroad Co.* 7 Rich. L. 190; *Raphael v. Pickford*, 6 Scott, N. R. 478.

(*h*) *Eagle v. White*, 6 Whart. 505. In this case the defendants, who were common carriers on the railroad from Philadelphia to Columbia, undertook to carry certain boxes of goods belonging to the plaintiffs from Philadelphia to Columbia. The cars arrived at the latter place about sunset on a Saturday evening, and by the direction of the plaintiffs were placed on a siding. The plaintiffs declined receiving the goods that evening, on the ground

that it was too late; whereupon the agent of the defendants left the cars on the siding, taking with him the keys of the padlocks with which the cars were fastened, and promised to return on Monday morning. The cars remained in this situation until Monday morning, when they were opened by the plaintiffs by means of a key which fitted the lock; and on examination it was discovered that one of the boxes had been opened, and the contents carried away; *held*, that the defendants were liable to the plaintiffs for the value of the goods lost. *Huston, J.*, dissented.—So in *Merwin v. Butler*, 17 Conn. 138, where the defendant, who was a common carrier, received from the plaintiff a package of money, to convey it from S. to P., and to deliver it at the bank in P.; it appeared that when the defendant arrived at P. the bank was shut; that he went twice to the house of the cashier, and not finding him at home, brought the money back, and offered it to the plaintiff, who declined to accept it; and that the defendant then refused to be further responsible for any loss or accident; it was *held* that, in the absence of any special contract (none being proved in this case), these facts did not constitute a legal excuse to the defendant for the

¹ In the absence of a special contract, the law implies an agreement on the part of a common carrier to transport merchandise within a reasonable time, and if he negligently omits to do so, and its market value falls, the measure of damages is the difference in its value at the time and place it ought to have been delivered, and at the time of its actual delivery. *Ward v. New York Central R. Co.* 47 N. Y. 29; *Newell v. Smith*, 49 Vt. 255. A common carrier should deliver goods within a reasonable time, and make reasonable effort to find and notify the consignee, if unknown, before he has a right to ware-house the goods. *Sherman v. Hudson River R. Co.* 64 N. Y. 254.

delivery of an article has been held to be a conversion by him. (A)¹ As to what * constitutes delivery, regard must be had to all the facts bearing upon the question, and especially to the character of the transaction, and the interest of the parties, in order to ascertain if the delivery be such as the nature of the case admits. (s)

* But if there is delay through an accident or misfortune, and the carrier afterwards delivers the goods as soon as

non-performance of his undertaking. And *Hissman*, J., said: "That there may be circumstances which would excuse a carrier from the delivery of a package is doubtless true, but there is nothing stated in this motion that ought to have that effect. That the bank was shut when the carrier went there, can amount to nothing, unless it appeared further that he went there at a proper time, during the ordinary business hours; and even then we could not say, as matter of law, that this would be a legal excuse. It would depend upon the degree of diligence which the carrier used, to let the officers of the bank know that he had a package to deliver there. No question of this sort was raised on the trial below, nor does it appear that there was any foundation on which it could have been." See also *Hill v. Humphreys*, 5 W. & S. 123; *Young v. Smith*, 3 Dana, 91; *Storr v. Crowley*, McClel. & Y. 129. The question, what constitutes a sufficient delivery, is well illustrated by the case of *De Mott v. Laraway*, 14 Wend. 325. The defendant in that case was the owner and master of a canal boat, and received on board his boat at Troy a hogshead of molasses and other goods belonging to the plaintiffs, to be transported to Kidder's ferry, being a landing-place nearest to Farmersville, where the plaintiffs transacted business. All the goods were safely transported and delivered to the plaintiffs except the hogshead of molasses. The boat arrived at Kidder's ferry, and, in the attempt to hoist the hogshead of molasses into a warehouse, the usual place for the delivery of goods for Farmersville, the fault (part of the machinery for hoisting attached to the warehouse) broke, and the hogshead fell back into the boat, was stove, and most of the molasses lost. At the time of the accident the hogshead was clear of the boat, and almost up to the sill of the door of the warehouse. One of the plaintiffs was present, and had wagons

there in which some of the goods were loaded. It was held, that the defendant was liable for the loss. *Sutherland*, J., said: "Laraway was a common carrier upon the canal, and as such undertook to transport the defendant's goods from Troy to Kidder's ferry. This necessarily included the duty of delivering the goods there in safety. They were all thus delivered except a hogshead of molasses, which was stove in the act of being unloaded; as they were hoisting it from the boat with a tackle attached to a storehouse upon the bank of the canal, the rope broke, and the hogshead fell back into the boat, and most of the molasses was lost. Although one of the plaintiffs was present, there is no pretence that he had accepted the molasses as delivered previously to the accident, or that he had anything to do with the delivery. The delivery was not complete when the accident occurred, and the goods were still at the risk of the carrier. It is a matter of no importance that the machinery employed in unloading the boat was attached to and belonged to a store on the bank of the canal, and not to the carrier's boat. It was *pro hac vice* his tackle, and he was responsible for its sufficiency. When the responsibility of a common carrier has begun, it continued until there has been a due delivery by him." See also *Graff v. Bloomer*, 9 Penn. St. 114.

(A) *Clafin v. Boston, &c. R. R. Co.* 7 Allen, 341. See *Winslow v. Vermont, &c. R. R. Co.* 42 Vt. 700. In *McKeon v. McIvor*, L. R. 6 Ex. 36, it was held that the carrier was not liable for mis-delivery without negligence.

(i) *Miller v. Steam Navigation Co.*, 10 N. Y. (6 Seld.) 431; *Hall v. Richardson*, 16 Md. 396; *Merritt v. Old Colony R. R. Co.* 11 Allen, 80; *Blumenthal v. Brainerd*, 38 Vt. 402; *Fenner v. Buffalo, &c. R. R. Co.* 46 Barb. 103; *Cincinnati, &c. R. R. Co. v. McCool*, 26 Ind. 140.

¹ *Joslyn v. Grand Trunk R. Co.* 51 Vt. 92. Such a delivery to the wrong person may be ratified by bringing suit against such person for the price, accepting from him an order on a third person, and giving a receipted bill. *Converse v. Boston & Maine R. Co.* 58 N. H. 521.

*i. Simple
is not a
sufficient*

* 186

: Care

THE LAW OF CONTRACTS.

[BOOK III.

may be, he is not responsible for the effect of the delay, although it was not occasioned by "the act of God or the public enemy," and might possibly have been prevented; for as to the time of the delivery he is not bound to more than diligence, nor responsible unless for the want of due diligence; his liability as to the time of delivery being quite distinct from his liability for the delivery itself. (j)¹ And it has been held, that it is not a sufficient excuse on the part of the consignee (a bank) for refusing to receive packages, that they are tendered after banking hours, and that the vaults are locked and the cashier gone to his residence with the keys. (k) It seems, however, that if he has made an express agreement to deliver by a specified time, delay caused by unavoidable accident will be no excuse; (l) and it has been held in New York, that a delay to transport freight in the usual time, will subject a railroad corporation to damages, where the delay is caused by sudden and wrongful refusal to work, by the servants of the company. (m)

If the consignee refuse to receive the goods, or cannot receive them, or is dead, or absent, this will excuse delay in delivery, but not absolve the carrier from all duty or responsibility; for he is still bound to make all reasonable efforts to place them in the hands of the consignee, and, when these are ineffectual, * 186 to * take care of the goods for the owner, by holding them himself, or lodging them with suitable persons for him; and such persons then become bailees of the owners of the goods. (n)

(j) *Parsons v. Hardy*, 14 Wend. 215; *Dows v. Cobb*, 12 Barb. 310, 320; *Wibert v. The New York & Erie R. R. Co.* 2 Kern. 245; *Scoville v. Griffith*, id. 509; *Boyle v. McLaughlin*, 4 Har. & J. 291; *Hadley v. Clarke*, 8 T. R. 259; *Lowe v. Moss*, 12 Ill. 477. See *Harrell v. Owens*, 1 Dev. & B. 273, *contra*. — But if the carrier is prevented by any cause from delivering goods in due time, his liability to deliver them within a reasonable time, after the cause of detention is removed, still continues. Id. Therefore, where the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn, and on the vessel's arrival at Falmouth, in the course of her voyage, an embargo was laid on her, "until the further order of Council;" it was held, that such embargo

only suspended, but did not dissolve, the contract between the parties; and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff for damages for the non-performance of their contract. *Hadley v. Clarke*, 8 T. R. 259. See also *Hadley v. Baxendale*, 9 Exch. 341.

(k) *Marshall v. Am. Express Co.* 7 Wis. 1.

(l) *Harmony v. Bingham*, 1 Duer, 209.

(m) *Blackstock v. New York & Erie R. R. Co.* 10 N. Y. (6 Seld.) 48.

(n) *Ostrander v. Brown*, 15 Johns. 39; *Fisk v. Newton*, 1 Denio, 45. In this last case the consignee of certain kegs of butter, sent from Albany to New York by a freight barge, was a clerk, having no place of business of his own, and whose

¹ A carrier of goods is not liable for mere delay in delivery caused by a strike and rioting of its employees, Pittsburgh, &c. R. Co. v. Hollowell, 65 Ind. 188; but is liable for a delay caused by the employees' refusal to do their duty, Pittsburgh, &c. R. Co. v. Hazen, 84 Ill. 36.

But the question of reasonableness of time disappears when the parties have made their time certain by the special agreement. Then it must be precisely adhered to. Any delay is a failure and a breach of the contract. (o) And where there is a custom which would wholly excuse the carrier from delivering the goods, still, if he make an express promise to deliver, he is bound by this promise, and the custom becomes inoperative.

In general, the delivery of the goods must be to the owner or consignee himself, or to his agent, (p)¹ or they must be carried to his residence, or they may be taken to his place of business, where, from the nature of the parcels, this is the more appropriate place for their delivery. Nor is it sufficient that they are left at the public office of the carrier, unless there be express permission for this, or a usage so established and well known as * to be equivalent to such permission. (q) But a delivery * 187 of the goods in accordance with the labels is sufficient. (r)

name was not in the city directory, and who was not known to the carrier, and after reasonable inquiries by the carrier's agent could not be found. It was held, that the carrier discharged himself from further responsibility, by depositing the property with a storehouse keeper, then in good credit, for the owner, and taking his receipt for the same according to the usual course of business in that trade, although the butter was subsequently sold by the storehouse keeper, and the proceeds lost to the owner by his failure. And Jewett, J., said: "When goods are safely conveyed to the place of destination, and the consignee is dead, absent, or refuses to receive, or is not known, and cannot, after due efforts are made, be found, the carrier may discharge himself from further responsibility by placing the goods in store with some responsible third person, in that business, at the place of delivery, for and on account of the owner. When so delivered, the storehouse keeper becomes the bailee and agent of the owner in respect to such goods." See also Stone v. Waitt, 31 Me. 409; Hemphill v. Chenie, 6 W. & S. 62.

(o) Hand v. Baynes, 4 Whart. 204, 214; Paradine v. Jane, Aleyn, 27; Brecknock Co. v. Pritchard, 6 T. R. 750. But see Dows v. Cobb, 12 Barb. 310, 321.

(p) See cases cited ante, p. * 183, note (f). In Lewis v. The Western Railroad Co. 11 Met. 509, it was held, that if A, for whom goods are transported by a rail-

road company, authorizes B to receive the delivery thereof, and to do all acts incident to the delivery and transportation thereof to A; and B, instead of receiving the goods at the usual place of delivery, requests the agent of the company to permit the car which contains the goods to be hauled to a near depot of another railroad company, and such agent assents thereto, and assists B in hauling the car to such depot, and B there requests and obtains leave of that company to use its machinery to remove the goods from the car, then the company that transported the goods is not answerable for the want of care or skill in the persons employed in so removing the goods from the car, nor for the want of strength in the machinery used for the removal of them, and cannot be charged with any loss that may happen in the course of such delivery to A.

(q) Gibson v. Culver, 17 Wend. 305. In this case it was held, that it is competent for a carrier to prove that the uniform usage and course of the business in which he is engaged, is to leave the goods at his usual stopping-places in the towns to which the goods are directed, without notice to the consignees; and if such usage be shown of so long continuance, uniformity, and notoriety, as to justify a jury to find that it was known to the plaintiff, the carrier will be discharged.

(r) Bristol v. R. & S. R. R. Co., 9 Barb. 158.

¹ Jewell v. Grand Trunk R. Co. 55 N. H. 84.

If a part of the goods are lost by the act of God, or in such wise that the carrier is not liable for the loss, and he delivers the remainder of the goods, he is entitled to freight for what he delivers. (rr)

Usage, so long established, so uniform, and so well known that it must be supposed that the parties to a contract knew it, and referred to it, becomes, as it were, a part of the contract, and may modify the rights and duties of the parties in an important manner. And in determining what is a sufficient delivery of goods by a carrier, usage has frequently great influence. (s) In general, as we have said, the delivery must be to the owner or consignee, or his authorized agent. But if the goods are left at his residence or (such delivery being more appropriate) at his place of business, that is equivalent to a delivery into his personal

possession, and it does not seem that any personal notice

* 188 * is necessary. Perhaps it may always be presumed that the owner of goods will receive information if they are left at his house; and if not, that it is his own fault, or, if the fault of others, not that of the carrier. But where a delivery by a carrier is made at an owner's house, but not in a usual way, as if

(rr) *Price v. Hartshorn*, 44 Barb. 655.

(s) See *Farmers & Mechanics Bank v. Champlain Transportation Co.* 16 Vt. 52, 18 id. 131, 23 id. 186. This is one of the strongest cases in the books upon this point. The defendants were common carriers on Lake Champlain, from Burlington to St. Albans, touching Port Kent and Plattsburgh long enough to discharge and receive freight and passengers. This action was brought against them to recover for the loss of a package of bank-bills. It appeared in evidence that the package in question, which was directed to "Richard Yates, Esq., Cashier, Plattsburg, N. Y.", was delivered by the teller of the plaintiffs' bank to the captain of the defendants' boat, which ran daily from Burlington to Plattsburg, and thence to St. Albans; and that, when the boat arrived at Plattsburg, the captain delivered the package to one Ladd, a wharfinger, and that it was lost or stolen while in Ladd's possession. No notice was given by the captain of the boat to the consignee of the arrival of the package, nor had he any knowledge of it until after it was lost. The principal question in the case was, whether the package was sufficiently delivered to discharge the defendants from their liability as carriers. The defendants offered evidence to show, that a

delivery to the wharfinger, without notice, under the circumstances of the case, was a good delivery according to their own uniform usage, and the usage of other carriers similarly situated. The case has been before the Supreme Court of Vermont three times, and that court has uniformly held, that in the absence of any special contract, a delivery to the wharfinger without notice, if warranted by the usage of the place, was sufficient, and discharged the defendants from all liability. When the case was before the court the last time, *Redfield*, J., in delivering the judgment, said: "If the law fixes the extent of the contract, in every instance, in the manner assumed, then, most undoubtedly, are the defendants liable in this case, unless they can show, in the manner required, some controlling usage. But if, upon examination, it shall appear that there is no rule of law applicable to the subject, and the extent of the transit is a matter resting altogether in proof, then the course of business at the place of destination, the usage or practice of the defendants, and other carriers, if any, at that port, and at that wharf, become essential and controlling ingredients in the contract itself." See *Richardson v. Goddard*, 23 How. 28.

the parcel were placed in a dark corner of an entrance or back room, without attracting notice or giving information to any one, this circumstance might indicate either wrongful motive or culpable negligence; and such delivery would not be a sufficient one. It is undoubtedly best, in all cases of delivery not to the person himself, to give notice to him, or to one certainly authorized to receive notice for him.

Carriers by land usually deliver the goods they transport, by carrying them to the owner, or where he directs. And generally they can do this as easily as they can bring them into the town where he lives. But this is not the case with one important class of carriers by land; we mean railroads. The freight cars can go only where the rails go, and these terminate in the station-house. If the goods are to be carried further, they must be laden upon wagons or other carriages for that purpose. Moreover, it is usual for the consignor by railroad to send to the consignee notice of the consignment, and very frequently a copy of a receipt, which seems to take the place of a bill of lading, and is sometimes framed in very similar terms. And the arrival of the goods at a certain hour may usually be calculated upon with great certainty. For all these reasons, and some others, it is usual with railroads not to send the goods out of their depots. (t)

(t) *Thomas v. Boston & Providence Railroad Co.* 10 Met. 472. This was an action against the defendants as common carriers, to recover for the loss of a roll of leather. It appeared in evidence that four rolls of leather, the property of the plaintiff, were delivered to the defendants at Providence, to be transported to Boston; that they were so transported, and were deposited at the defendant's depot at Boston; that a teamster, employed by the plaintiff, shortly after called at the depot, with a bill of the freight received by the defendants, and inquired for the leather; that it was pointed out to him by the defendants' agent, Allen, who had charge of the depot; that the teamster then took away two of the rolls, and soon after called again and inquired for the other two; that he was directed where to look for them; and that he found only one. The court held, that under these circumstances, the defendants were not liable as carriers. *Hubbard, J.*, said: "The transportation of goods, and the storage of goods, are contracts of a different character; and though one person or company may render both services, yet the two con-

tracts are not to be confounded or blended; because the legal liabilities attending the two are different. The proprietors of a railroad transport merchandise over their road, receiving it at one depot, or place of deposit, and delivering it at another, agreeably to the direction of the owner or consignor. But from the very nature and peculiar construction of the road, the proprietors cannot deliver merchandise at the warehouse of the owner when situated off the line of the road, as a common wagoner can do. To make such a delivery, a distinct species of transportation would be required and would be the subject of a distinct contract. They can deliver it only at the terminus of the road, or at the given depot where goods can be safely unloaded, and put into a place of safety. After such delivery at a depot the carriage is completed. But, owing to the great amount of goods transported, and belonging to so many different persons, and in consequence of the different hours of arrival, by night as well as by day, it becomes equally convenient and necessary, both for the proprietors of the road and the owners of the goods, that they should

* 189 There is, perhaps, no objection to * this usage strengthening itself into law. But we think in that case, that the

be unladed, and deposited in a safe place, protected from the weather, and from exposure to thieves and pilferers. And where such suitable warehouses are provided, and the goods which are not called for on their arrival at the places of destination, are unladed and separated from the goods of other persons, and stored safely in such warehouses or depots, the duty of the proprietors as common carriers is, in our judgment, terminated. They have done all they agreed to do; they have received the goods, have transported them safely to the place of delivery, and, the consignee not being present to receive them, have unladed them, and have put them in a safe and proper place for the consignee to take them away; and he can take them at any reasonable time. The liability of common carriers being ended, the proprietors are, by force of law, depositaries of the goods, and are bound to reasonable diligence in the custody of them, and consequently are only liable to the owners in case of a want of ordinary care. In the case at bar, the goods were transported over the defendants' road, and were safely deposited in their merchandise depot, ready for delivery to the plaintiff, of which he had notice, and were in fact in part taken away by him; the residue, a portion of which was afterwards lost, being left there for his convenience. No agreement was made for the storage of the goods, and no further compensation paid therefor; the sum paid being the freight for carriage, which was payable if the goods had been delivered to the plaintiff immediately on the arrival of the cars without any storage. Upon these facts, we are of opinion, for the reasons before stated, that the duty of the defendants, as common carriers, had ceased on their safe deposit of the plaintiff's goods in the merchandise depot; and that they were then responsible only as depositaries without further charge, and consequently, unless guilty of negligence, in the want of ordinary care in the custody of the goods, they are not liable to the plaintiff for the alleged loss of a part of the goods." In *Norway Plains Co. v. Boston & Maine Railroad Co.* 1 Gray, 263, it is decided, that the rule requiring carriers to make personal delivery to the consignee does not apply to railroads, transportation by which more resembles sea-carriage than carriage by means of wagons and similar vehicles; that the nature of transportation of freight by railroad is such that the implied contract between the parties is

that the company will transport the goods, discharge them from the cars upon a suitable platform, and there deliver them to the consignee if he is ready to receive them, and if he is not, that they will place them securely and keep them a reasonable time, ready to be delivered when called for; that from this view of the duty and contract between the parties, the company are first common carriers, and after that warehousemen, responsible as the former until the goods are removed from the cars and placed upon the platform, and if, on account of their arrival in the night, or for any reason, the consignee is not then ready to receive them, it is the duty of the company to take care of them, under the liability of warehousemen or keepers of goods for hire. And the court are strongly inclined to be of the opinion that it is not necessary for the company to give notice of the arrival of the goods, but that the nature of the transportation is such as to dispense with it. And see *Smith v. Nashua and Lowell R. R. Co.* 7 Foster (N. H.), 86. But in *Richards v. The London Railway Co.* 7 C. B. 839, it was held, that where a railway company employ porters at their stations to convey passengers' luggage from the railway carriages to the carriages or hired vehicles of the passengers, the liability of the company as carriers continues until the porters have discharged their duty. That was an action on the case against the defendants for the loss of a package. The first count of the declaration stated, that the defendants were the owners and proprietors of a railway for the carriage and conveyance of passengers and their luggage, &c., from A to B, for hire; that the defendants were common carriers for hire in and upon the said railway; that the wife of the plaintiff, at their request, became a passenger in and upon the railway, to be carried and conveyed therein and thereby from A to B, together with her luggage, consisting of a dressing-case, &c., also to be carried and conveyed by the defendants, as such carriers, in and upon the railway from A to B, and there, to wit, at the station or terminus at B, safely and securely delivered for the plaintiff, for reasonable reward to the defendants in that behalf: and the breach alleged was, that the defendants, not regarding their duty, did not use due and proper care in and about the carriage and conveyance of the dressing-case from A to B, but took so little and such bad care in and about the carrying and conveying the same, that by and through

railroad carrier should give notice forthwith, on * the arrival of the goods, to the consignee, if his residence is known, or can be found by any reasonable exertions. We think the law should make this requirement, and this so positively that no usage against it should be permitted to control the law; at least not unless it were quite universal, and well known to all, and there is some disposition to hold the law thus. (*u*)¹

It may be remarked, that, however railroad companies or other inland carriers may adopt the form and phraseology of bills of lading and other maritime contracts, the essential difference in the nature of the duties they undertake, will not be disregarded by the courts. (*v*)

The duty of express companies differs from that of railroad carriers, for they are bound to deliver the goods to the consignee, and make all reasonable exertions for that purpose. (*vv*)² But if after such efforts they cannot so deliver them, they are liable only as warehousemen, for negligence. (*vw*)

the carelessness, negligence, and improper conduct of the defendants in the premises, the dressing-case was lost. It was proved that the plaintiff's wife became a passenger by a first-class carriage, to be conveyed from A to B; that the dressing-case was placed in the carriage under the seat; that on the arrival of the train at B, the porters of the company took upon themselves the duty of carrying the lady's luggage from the railway carriage to the hackney carriage which was to convey her to her residence; and that on her arrival there the dressing-case was missing. *Held*, that the duty of the defendants as common carriers continued until the luggage was placed in the hackney carriage; and that the evidence entitled the plaintiff to a verdict upon the first count. And see *Butcher v. The London & South Western Railway Co.* 29 E. L. & E. 347; s. c. 16 C. B. 13.

(*u*) *Michigan Central Railroad Co. v. Ward*, 2 Mich. 538, overruled in *Mich. C. R. R. Co. v. Hale*, 6 Mich. 243. See *Farmers and Mechanics Bank v. Champlain*

Transportation Co., ante, p. *187, note (*s*); and *Gibson v. Culver, ante*, p. *187, note (*q*), that notice may be dispensed with when usage fully warrants it. See also the language of *Hubbard*, J., quoted in the preceding note, and *Shaw*, C. J., *Norway Plaine Co. v. Boston & Maine Railroad Co.* 1 Gray, 274; and notice was held not necessary, in *Neal v. Wilmington, &c. R. R. Co.* 8 Jones L. 482; *Jeffersonville R. R. Co. v. Cleveland*, 2 Bush, 468.

(*v*) See the opinion of *Grier*, J., in *Hemphill v. Chenie*, 6 W. & S. 62, cited in note (*w*).

(*vv*) *Witbeck v. Holland*, 55 Barb. 443; 38 Howard, Pr. 273, affirmed in 45 N. Y. 13.

(*vw*) *Adams Express Co. v. Darnell*, 31 Ind. 20. The obligation of railroad companies to deliver goods to the consignee's warehouse, is fully considered, and in especial reference to grain elevators, in *Vincent v. Chicago, &c. R. R. Co.* 49 Ill. 33.

¹ *MERCHANTS' DESPATCH CO. v. HALLOCK*, 64 Ill. 284, decided that a carrier's liability, in the absence of the consignee to receive delivery, ceased with the delivery of the goods in a safe warehouse, and that notice to the consignee of their arrival was not required. *Chicago, &c. R. Co. v. Bensley*, 69 Ill. 630; *Rothschild v. Michigan, &c. R. Co.* 69 Ill. 164, to the same point. But if carrier receives dutiable goods, deliverable by law at bonded warehouse, he remains liable as carrier until so delivered in manner specifically provided by law. *Chicago, &c. R. Co. v. Sawyer*, 69 Ill. 285.

² That an express company must deliver goods at the residence or place of business of the consignee, see *American, &c. Co. v. Wolf*, 79 Ill. 430. That a railroad cannot be compelled to deliver grain at an elevator beyond its own line, see *People v. Chicago, &c. R. Co.* 55 Ill. 95; *Hoyt v. Chicago, &c. R. Co.* 93 Ill. 601.

- Carriers by water cannot usually deliver goods at the residence of their consignees without land carriage, and the greatest amount of goods carried by water is consigned to persons whose warehouses, or stores, are adapted to receive such goods by being near the water, and generally on the wharves on which they may be landed. Hence a usage prevails very generally to deliver such goods by landing them on a wharf, and giving immediate notice to the consignees. (w) And it is

(w) *Dixon v. Dunham*, 14 Ill. 324; *Crawford v. Clark*, 15 Ill. 561; *Hyde v. Trent & Mersey Navigation Co.* 5 T. R. 389. In the last case it was held, that where common carriers from A to B charged and received for cartage of goods to the consignee's house at B, from a warehouse there, where they usually unloaded, but which did not belong to them, they must answer for the goods if destroyed in the warehouse by an accidental fire, though they allowed all the profits of the cartage to another person, and that circumstance was known to the consignee. This was a case of carriage by land. The ground upon which the defendants were held liable was, that they made a specific charge for cartage from the warehouse where they unloaded to the house of the consignee. The general question, whether a carrier by land is bound to make a personal delivery, was not decided, though all the judges expressed their opinion upon it; that of Lord Kenyon being against such liability, and that of all the other judges being in favor of it. All the judges however, agreed that a carrier by water, bringing goods from a foreign port, was not bound to make a personal delivery to the consignee. Lord Kenyon, in the course of his opinion, said: "If the defendants here be liable, consider how far the liability of carriers will be extended: it will affect the owners of ships bringing goods from foreign countries to merchants in London. Are they bound to carry the goods to the warehouses of the merchants here, or will they not have discharged their duty on landing them at the wharf to which they generally come? It would be strange, indeed, if the owners of a West Indianman were held liable for any accident that happened to goods brought by them to England, after having landed them at their usual wharf." And Buller, J., said: "It does not appear to me that the difficulties suggested respecting foreign ships exist. When goods are brought here from foreign countries, they are brought under a bill of lading, which is merely an undertaking to carry from port to port. A ship

trading from one port to another has not the means of carrying the goods on land, and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier." And, per Grose, J.: "The case of foreign goods brought to this country depends on the custom of the trade, of which the persons engaged in it are supposed to be cognizant; by the general custom the liability of ship carriers is at an end when the goods are landed at the usual wharf." By the custom of the River Thames, the master of a vessel is bound to guard goods loaded into a lighter, sent for them by the consignee, until the loading is complete, and cannot discharge himself from that obligation by telling the lighterman he has not sufficient hands on board to take care of them. *Catley v. Wintringham, Peake, Cas. 150.* But it has been much contested, whether the master is by the usage bound to take care of the lighter, after it is fully laden, until the time when it can be properly removed from the ship to the wharf. At a trial on this question, it was held that the master was not obliged to do this. *Robinson v. Turpin*, cited in Abbott on Shipping, 335. When ships arrive from Turkey, and are obliged to perform quarantine before their entry into the port of London, it is usual for the consignee to send down persons, at his own expense, to pack and take care of the goods; and therefore, where a consignee had omitted to do so, and goods were damaged by being sent loose to the shore, it was held that he had no right to call upon the master of the ship for compensation. *Dunnage v. Joliffe*, cited in Abbott on Shipping, 335. The general question as to the duty of delivery, in the case of carriers by water bringing goods from a foreign port, was much discussed in the case of *Cope v. Cordova*, 1 Rawle, 203. Rogers, J., delivered the judgment of the court, as follows: "The substance of a bill of lading is a formal acknowledgment of a receipt of goods, and an engagement to deliver them to the consignee or his assigns. And this suit is brought on an

held, that a carrier * by water may land his goods at any * 192 wharf usually used for landing, and is not bound to take

alleged breach of such a contract, in the non-delivery of a crate of merchandise shipped on board the ship Lancaster from Liverpool, and consigned to Raphael Cordova in the usual form. The goods were landed on the wharf of the Liverpool packets, and whether this amounts to a delivery to the consignee is the principal question. It must be conceded, that, by the general custom, the liability of ship-owners is at an end when the goods are landed at the usual wharf, and this seems to be taken by the whole court as a position not open to dispute, in the strongly contested case of *Hyde v. Trent & Mersey Navigation Co.* 5 T. R. 394. The usage in France, although not uniform in every particular, goes to the whole extent of the English doctrine. At Rochelle, when the vessel is moored at the wharf, the merchant freighters, at their own expense and risk, have their merchandise deposited upon the deck of the vessel. From the time when they reach the deck, it is the business of the hands on board to receive and place them in their proper situation. In unloading, the freighters have them taken in like manner from the deck, by their porters, to lower them to the wharf, from which time they are at the merchant's risk, without any liability on the part of the master of the vessel, if they happen to sustain any damage as they are lowered from the vessel. At Marseilles, it is the business of the master to put the merchandise on the wharf, after which he is discharged. 1 Valin, 510. And this rule of the French commercial code is cited with approbation by the learned commentator, in page 636 of his Treatise on the Marine Ordonnance. As the master, in conformity with the prevailing usage in this respect, upon his arrival deposits in the custom-house a manifest, or general list of the cargo, with a designation of all the individuals to whom each parcel of the merchandise should be respectively delivered, and as there are always officers of the customs who attend to the unloading, to superintend, and make a list of all the merchandise which leaves the vessel, for the purpose of ascertaining whether the manifest of the cargo which has been furnished is accurate and faithful, and by this means the lists of these officers constitute a proof of the landing of the merchandise, it is the end of the engagement which the master has contracted by the bill of lading. If, then, disputes arise, it is only when in the bustle of a hasty discharge mistakes occur on

the part of those who convey the merchandise to the warehouses, by introducing articles into one which ought to have gone into another. The error is almost always discovered by ascertaining what parts of the cargo of the vessel have been conveyed to the different warehouses. 'But if it happens,' says the commentator, 'that the error cannot be discovered, the master is always discharged when it appears by the list of the officers of the royal customs that he has caused all the merchandise in his bills of lading to be placed on the wharf.' The ordinances of Rochelle and Marseilles are the text from which, in the manner of our own commentators, he proceeds to deduce the general custom. I understand from the observations of the commentator, that the usage is not confined to Rochelle and Marseilles; but that in France as in Great Britain, it is coextensive with the limits of the kingdom; and in this country we are not without authority to the same purpose. The usage has been found to prevail in a sister city, as appears from a case the name of which is not now recollect, lately determined by Judge *Irving*, in New York. The same point has also been ruled by the Supreme Court of Massachusetts, in *Chickering v. Fowler*, 4 Pick. 371. A promise by a master of a vessel to deliver goods to a consignee does not require that he should deliver them to the consignee personally, or at any particular wharf. It is sufficient if he leaves them at some usual place of unloading, giving notice to the consignee that they are so left. There is an obvious policy in commercial nations conforming to the usages of each other, and it is also important that there be a uniformity of decisions in our domestic tribunals on mercantile questions. As there will be great convenience in the local usage conforming to the general custom, it will be incumbent on those who maintain the contrary to make the exception from the rule plainly appear. In unloading a vessel at the port of Philadelphia, it is usual, as soon as articles of bulk, such as crates, are brought upon deck, to pass them over the side of the ship, and land them on the wharf. The owners station a clerk on the wharf, who takes a memorandum of the goods, and the day they are taken away, and this for the information of his employers. A manifest or report of the cargo is made by the master, and deposited at the custom-house, and the collector, on the arrival of the vessel within his district, puts and keeps on

* 193 them to that which is nearest * or most convenient to the consignee, or that which he specially directs, unless the

board one or more inspectors, whose duty it is to examine the contents of the cargo, and superintend its delivery. And no goods from a foreign port can be unladen or delivered from the ship in the United States, but in open day between the rising and setting of the sun, except by special license; nor at any time without a permit from the collector, which is granted to the consignee upon payment of duties, or securing them to be paid. The holders of a bill of lading are presumed to be well informed of the probable period of the vessel's arrival, and any such arrival is a matter of notoriety in all maritime places. The consignee is previously informed of the shipment; as it is usual for one of the bills of lading to be kept by the merchant, a second is transmitted to the consignee by the post or packet, while the third is sent by the master of the ship, together with the goods. With the benefit of all these safeguards, if the consignee uses ordinary diligence, there is as little danger in this country as in England and France, of inconvenience or loss, whereas the risk would be greatly increased if it should be the duty of the ship-owner, to see to the actual receipt of the goods, and particularly in the case of a general ship with numerous consignments on board, manned altogether by foreigners unacquainted with the language at the port of delivery. I have taken some pains to ascertain the opinion and practice of merchants of the city on this question, which is one of general concern. My inquiries have resulted in this, that the goods, when landed, have heretofore been considered at the risk of the consignee, and that the general understanding has been, that the liability of the ship-owner ceases upon the landing of the goods at the usual wharf. I see no reason to depart from a rule which has received such repeated sanctions, from which no inconvenience has heretofore resulted, and which it is believed in practice has conduced to the general welfare." The learned judge concluded with saying that the court would wish to be understood as giving no opinion on the law which regulates the internal or coasting trade, to which they understood the case of *Ostrander v. Brown*, 15 Johns. 39, to apply; and that they did not consider the present decision as interfering with the principles of that case. It has generally been held, as the learned judge intimates, that the rule is more strict in regard to delivery in the

internal and coasting trade, than in the foreign trade. Thus, in *Wardell v. Mounrillyan*, 2 Esp. 693, which was an action on the case for not delivering an anchor sent by the defendant's hoy, it appeared in evidence that the defendant was the owner of a hoy, which sailed from Deal to Dice's Quay, near London Bridge; that the anchor had been shipped on board this hoy, with a direction to be delivered to Messrs. Bell, Anchram, and Buxton; that the defendant had delivered it at Dice's Quay; that the wharfinger had paid the hoyman the freight, and had given him a receipt for the anchor; and one witness proved that, except in the case of flour, the hoymen never concerned themselves about goods after they had delivered them at the wharf. Lord *Kenyon*, after making some observations upon the evidence, left it to the jury to say what was the custom; and they found a verdict for the plaintiff. So in *Hemphill v. Chenie*, 6 W. & S. 62. That was an action against the defendant, the owner of a keel-boat on the Ohio River, to recover the price of a box of dry goods delivered to him at Pittsburg, and consigned to Rowland, Smith & Co., Louisville. The defendant gave evidence to show that the box of goods in question was carried safely to Louisville, and deposited on the wharf there; and that notice was given to the consignees. The question was whether there was a sufficient delivery. *Grier*, J., in summing up to the jury, said: "It is contended that, according to the custom of the port of Louisville and the other cities on these western rivers, the depositing of goods on the wharf, and giving notice to the consignee, constitute a sufficient delivery in law, whether the consignee actually receives the goods or not. In other words, the care and responsibility of the carrier cease the moment he has deposited goods on the wharf and sent notice to the consignee, and this whether the consignee refuses or neglects to receive them or not. If, in such cases, the carrier may abandon the goods on the wharf, and the property of the distant owners thus be left as a subject of plunder to the first finder, it must be admitted that the subject is one of considerable interest to those whose property is committed to the chances of transportation on these western waters, and has necessarily to pass through the hands of so many different carriers and consignees. It must be apparent to every one, that however much steamboat men

carrier has previously agreed to obey such * direction. (x)¹ * 194
 But in all such cases of landing, and, indeed, in all cases of delivery of goods by a carrier, in any other way than putting them into the actual possession of the consignee, or into his house or store, it is absolutely essential that notice should be given to the consignee, so that he may forthwith take possession of the goods. (y) Nor does a mere casual knowledge * on * 195

and other carriers on our rivers may affect the diction and phraseology of maritime cities in their bills of lading, insurances, &c., yet that a hasty or indiscriminate application of our commercial and maritime code of laws and customs might not be convenient or judicious. Goods may be 'shipped' on board steamboats and canal-boats from the 'port' of Pittsburg to the 'port' of Louisville; and yet it might happen that the rules of commercial law, which regulate trade on the ocean, and freight shipped from Liverpool to Philadelphia, might be very inconvenient of application to our western waters. Hence in *Cope v. Cordova*, 1 Rawle, 203, which decides that 'the liability of the shipowner ceases when the goods are landed at the usual wharf,' many good reasons are given why such a rule exists in the trade between two maritime cities, which cannot apply to this shifting transportation from point to point on our western waters; and the learned judge who delivers the opinion of the Supreme Court in that case is careful to observe, that they do not intend by that decision to interfere with the law that regulates the internal or coasting trade, or at all to dissent from the case of *Ostrander v. Brown*, 15 Johns. 39." The learned judge then proceeded to comment on the unreasonableness of holding such a delivery to be sufficient, and the jury under his instructions found a verdict for the plaintiff. The case was afterwards carried up to the Supreme Court, and that court held the instruction to be correct. To the same effect is *Ostrander v. Brown*, 15 Johns. 39, though the distinction between the internal and coasting trade and foreign trade is not expressly taken. In that case, goods were put on board of the defendant's vessel to be carried to Albany, and, on arriving there, were by the defendant's direction put on the wharf. It was held, that this was not a delivery to the consignee, and that evidence of a usage to deliver goods in this manner was immaterial, but that the defendant was

liable in an action of trover for such part of the goods as was not actually delivered to the consignee.

(x) *Chickering v. Fowler*, 4 Pick. 371.

(y) This was very authoritatively declared by Mr. Justice *Porter*, in *Kohn v. Packard*, 3 La. 224. "The contract of affreightment," said he, "does not impose on the owner of the vessel the obligation to deliver merchandise shipped on board of her to the consignee, at his residence. It is a contract to carry from port to port, and the owners of a vessel fulfil the duties imposed on them, by delivering the merchandise at the usual place of discharge. The authorities cited on argument, as well as the reason of the thing, clearly establish this rule. But though the contract does not require the owners of the vessel to deliver the goods at any other place in the port but that where ships generally discharge their cargoes, it is not to be concluded that they have a right to land the goods at these places and release themselves, by doing so, from all further care and responsibility, without giving notice to the person who is to receive them. The authorities on this subject are contradictory. Some of those cited support fully the position that a landing on the wharf is equivalent to a delivery. We should have reviewed them, had not the counsel who argued the case carefully, on the part of the defendant, very properly refrained from pressing the rule to that extent. We have the high authority of Chancellor *Kent* for saying, that the better opinion is, there must be a delivery on the wharf to some person authorized to receive the goods, or some act which is equivalent to, or a substitute for it. The contrary doctrine appears to us too repugnant to reason and justice to be sanctioned by any one who will follow it out to the consequences to which it inevitably leads. Persons to whom goods are sent may be absent from the port when the ship reaches it; they may be disabled by sickness from attending to their business; they may not be informed of the

¹ See remarks of *Earl*, J., in *Richmond v. Union Steamboat Co.* 87 N. Y. 240, on the effect of usage in modifying a carrier's duty to deliver to the consignee.

the part of the consignee excuse the want of notice. (z) Nor can the goods be put on the wharf on a day that is not by law, usage, or custom, a day of business. (a) Nor may the master heap them confusedly with other goods upon a wharf; but he must, to a reasonable extent, separate and discriminate them. (b) We have seen, that leaving goods in the office, or store, or even in the carriage of the carrier, is no delivery *to* him, to make him responsible for them as carrier, unless he has notice of such delivery, that he may forthwith take charge of the goods and provide for their safety. In the same way, no delivery *by* him discharges him from responsibility, unless the party entitled to the goods has, in fact, or by construction of law, such knowledge of the delivery as will enable him to take charge of them at once. The notice must therefore be prompt and distinct. And indeed it seems to be settled in England, that the landing of goods upon a wharf, with notice, is not a sufficient delivery of them, unless made so by a distinct and established usage, (c)¹

arrival of the vessel. Under such circumstances, or many others similar that may be supposed, it would be extraordinary indeed if the captain were authorized to throw the goods on shore, where they could not fail to be exposed to injury from the weather, and would be liable to be stolen. There would be little difference in such an act and any other that would occasion their loss. Contracts impose on parties not merely the obligations expressed in them, but every thing which by law, equity, and custom, is considered as incidental to the particular contract, or necessary to carry it into effect. La. Code, 1987. Delivery is not merely an incident to the contract of affreightment, it is essential to its discharge, and as there cannot be a delivery without the act of two parties, it is indispensable that the freighter should be apprised when and where the ship-owner, or his agent, is ready to hand over the goods." See also Northern v. Williams, 6 La. An. 578; House v. The Schooner Lexington, 2 N. Y. Leg. Obs. 4; Chickering v. Fowler, 4 Pick. 371; Price v. Powell, 3 Comst. 322; Michigan Central Railroad Co. v. Ward, 2 Mich. 538. But see Mich. C. R. R. Co. v. Hale, 6 Mich. 243. As to

what will constitute a sufficient notice, see Kohn v. Packard, 3 La. 224.

(z) The Ship Middlesex, Cir. Ct. U. S. Mass. May T. 1857, 21 Law Rep. 14.

(a) S. F. M. Co. v. Bark Tangier, Cir. Ct. U. S. Mass. May T. 1857, 21 Law Rep. 6. In this case it was held, that Fast-day was not, in Massachusetts, a day of business, within this rule. But in the case of Richardson v. Goddard, 28 How. 28, the foregoing decision of the Circuit Court was reversed, and the unloading on Fast-day held to be a good delivery, on the ground that there was no law, or general usage, or special custom, forbidding the unloading of a vessel on such a day.

(b) The Ship Middlesex, 21 Law Rep. 14.

(c) Gatliffe v. Bourne, 4 Bing. N. C. 314. In this case, to a count in assumpsit, by A against B, upon a contract by B, safely and securely to carry in a steam-vessel certain goods of A from Belfast to Dublin, and from Dublin to London, and to deliver the same at London to A, or to his assigns, upon payment of freight, — assigning a breach in the non-delivery of the goods at London; B pleaded that the goods were put on board under a bill

¹ Redmond v. Liverpool, &c. Steamship Co. 46 N. Y. 578, was to the effect that a mere deposit of goods by a common carrier by water on his own wharf, without acceptance by the consignee, not separated and set apart from the rest of the cargo, and without a reasonable opportunity and time for their removal, did not discharge the carrier, but that the goods remained at his risk.

and even then, it cannot be the right of the carrier to * abandon them utterly, even if the consignee refuses or neglects to take charge or notice of them. (d)

While the goods are in lighters belonging to or employed by the carriers, and going to or from the wharf, the carriers are liable. (e)

If the carrier be a warehouseman, or if, without being a regular warehouseman, he has, as most common carriers have, a * place of reception and deposit for his goods, it may often be a question of some difficulty, after the transportation is completed, whether the carrier retains that character and its peculiar responsibility. The answer, in general, is this.

of lading, by which they were made deliverable to A, or his assigns, on payment of freight; that after the arrival of the vessel and goods at London, B caused the goods to be unshipped, and safely and securely landed and deposited upon a certain wharf at London, there to remain until they could be delivered according to the bill of lading, — the said wharf being a place at which goods conveyed in steam-vessels from Dublin to London were accustomed to be landed and deposited, for the use of consignees, and a place fit for such purpose; and that the goods, while they remained upon the said wharf, and before a reasonable time for the delivery thereof had elapsed, were accidentally destroyed by fire. It was further pleaded to the same point, that after the arrival of the vessel and goods at London, B was ready and willing to deliver the goods to A, or his assigns, but that neither A nor his assigns was or were there ready to receive the same; whereupon B caused the goods to be landed on the said wharf, there to remain until A or his assigns should come and receive the same, or until the same could be conveyed and delivered to A or his assigns, with the like averment as to the said wharf being a usual and a fit place; and that the goods, while they remained upon the said wharf, and before A or his assigns came or sent for the same, and before B had been requested to deliver the same to A or his assigns, or a reasonable time for conveying them from the said wharf to A or his assigns had elapsed, and before the same could be removed therefrom, were accidentally destroyed by fire. The court held, that both pleas were bad. And *Tindal*, C. J., said: "The defendants, in each of the pleas, profess to substitute a delivery at Fenning's wharf, in the port of London, for and in the place of a delivery 'at the port

(d) See the cases in the preceding note, and *The Peytona*, 2 Curtis, C. C. 21; *The Grafton*, Olcott, 43.

(e) *Morewood v. Pollock*, 18 E. L. & E. 341; s. c. 1 E. & B. 742.

Where, by the known usage and course of business, the goods, when they arrive, are to be placed in the carrier's warehouse or office, and kept there without pay to him until the owner takes them, then his responsibility as carrier ceases upon their arrival and notice to the owner, and a sufficient time has elapsed to give the owner a reasonable opportunity to take them away; (*ee*)¹ because keeping them in his office is now for the benefit of the owner of the goods exclusively, as it is for the interest of the carrier to have them removed, so that they may no longer encumber his office. (*f*) This reason does not apply, where compensation is made for the storage, distinct from that for transportation. But here the two duties of storing and of carrying are perfectly distinct, made so by the undertaking of the party; and the responsibility which belongs to one of these contracts cannot be extended to the other. (*ff*) It has been held, wisely we think, that the liability of a common carrier has not been lost, and that of a warehouseman taken its place, until the goods are placed in a secure warehouse. (*fg*)

Where there is no usage, nor any special agreement, which requires that the goods should be left in the store or office of the carrier after their arrival, then, as we have seen, he is not justified in keeping them there; it is his duty to deliver them at once.

(*ee*) *Wood v. Crocker*, 18 Wis. 345.

(*f*) See *ante*, p. *140, note (*i*), and p. *188, note (*t*).

(*ff*) Where a railroad company gave notice to a consignee that his goods were ready for delivery, and, unless taken away without delay, they would be at his risk,

and he began to take them away, but before all were removed the remainder were burned in the depot, the railroad company were held liable. *Hedges v. Hudson R. R. Co.* 6 Rob. 119.

(*fg*) *Bartholomew v. St. Louis, &c. R. B. Co.* 53 Ill. 227.

¹ *Graves v. Hartford, &c. Co.* 38 Conn. 143. The same is true where a carrier holds goods for delivery to a connecting carrier, his liability continuing until the goods are ready for delivery, and a reasonable time for taking them away has elapsed. *Wood v. Milwaukee, &c. R. Co.* 27 Wis. 541.—In Massachusetts a railroad corporation ceases to be a common carrier and becomes a warehouseman, as matter of law, when it has completed the duty of transportation and assumed the position of warehouseman as matter of fact and according to the usages and necessities of the business in which it is engaged. *Rice v. Hart*, 118 Mass. 201. So in Iowa. *Mohr v. C., &c. R. Co.* 40 Ia. 579. But in New York, a common carrier by railroad which carries goods to their final destination and deposits them in its freight-house ready for delivery, does not cease to be liable as an insurer, for a reasonable time after their arrival, until the consignee can have an opportunity to take charge of them. *Fenner v. Buffalo, &c. R. Co.* 44 N. Y. 505; *Sherman v. Hudson, &c. R. Co.* 64 N. Y. 254; *Faulkner v. Hart*, 82 N. Y. 413. In the last case, goods transported from New York to Boston were put into a warehouse on one day too late for delivery, and destroyed during the ensuing night by fire.—Where a carrier notified a consignee that certain flax was ready for delivery, and that he should hold it "as warehouseman, at owner's sole risk," and the consignee took a part of the flax away, but before he removed the remainder the flax was damaged by wet through the carrier's failure to take reasonable care of it, the carrier was held liable. *Mitchell v. Lancashire & Yorkshire Railway*, L. R. 10 Q. B. 256.

And if he does not deliver them, and so fails in this duty, he continues liable as carrier; or, if not as carrier, still liable absolutely for loss or injury to the goods while in his possession, because that possession is wrongful. (g) And in some

(g) *Miller v. The Steam. Nav. Co.* 13 Barb. 361. In this case goods belonging to the plaintiff were received at the city of New York by the defendants, who were common carriers on the Hudson River, between Albany and New York, to be carried by them to Albany, and there delivered to A, the agent of a line of boats on the Erie canal. The goods were put on board a barge of the defendants at New York, and taken to Albany, where they arrived on the morning of the 17th of August, 1848. A portion of them were unloaded from the barge, and put into a float in the Albany basin, belonging to the defendants, which was a stationary floating craft, kept for the purpose of receiving goods brought up the river, and from which goods were reshipped into canal boats to be taken west. While the goods were in the process of being passed from the barge to the float, and before they were delivered to A, they, together with the barge and float, were destroyed by a fire which originated in the city of Albany, and afterwards spread to the piers and shipping. Held, that the defendants, having contracted to deliver the goods to A, at Albany, they continued to hold the relation of *common carriers* until the goods were so delivered, or until a reasonable time should have elapsed after notice to A of their arrival, and an offer to deliver; and that they were liable for the value. Held, also, that the defendants were not to be treated as *warehousemen* of the goods, after the arrival of the barge at the pier at Albany; that they had no right to warehouse the goods, except in case of the absence of A, or his refusal or neglect to receive them, after notice. *Weller, J.*, said: "It is contended on behalf of the appellants, that upon the arrival of the barge at the pier at Albany, their relation became changed from common carriers to that of warehousemen of the goods in question, and that as there is no negligence imputed to them, and as warehousemen are only liable in case of negligence, no recovery can be had against them. The contract of shipment was to deliver the goods to F. M. Adams, the agent at Albany, of the Rochester City Line, which line the respondent had selected for their transportation west of Albany; and, in my judgment, the appellants continued to hold the relation of common carriers in reference to the goods,

until they were so delivered, or until a reasonable time should have elapsed after notice to the agent of their arrival, and an offer to deliver. We so ruled on a similar question in the case of *Goold and others v. Chapin and Mallory*, 10 Barb. 612. The appellants had no right to warehouse the goods, unless in case of the absence of the person authorized to receive them, or his refusal or neglect to receive them, after reasonable notice. If the contract was to deliver them to Adams, they had no more right to store them at Albany than at New York, or any intermediate point on the river, unless for one of the reasons mentioned. The legal obligations and liabilities of the appellants, as common carriers, were fastened upon them from the time they received the goods in New York, until they had performed the service which the transaction implied, and delivered them agreeably to their contract, unless prevented by the conduct of the owner or his agent. There does not appear to have been any notice given to Adams of the arrival of the goods; no offer to deliver them to him; no act on the part of the appellants, indicating that they desired or intended to change their character from common carriers to that of warehousemen. Adams went on board the barge some two or three hours after its arrival, and saw the trip book. He testifies that he had a boat near by, ready to take the goods from the float, upon which, as appears by the testimony of the captain of the barge, it was the invariable custom of the defendants to ship goods brought by them up the river, before they were delivered on board the canal boats. The goods in question were in the process of being passed from the barge to the float, and before it was completed, and while a portion of them was in the float and the residue in the barge, the fire drove away the hands engaged, and destroyed both the barge and float, with all the goods they contained. Under these circumstances, it is preposterous to contend that there was anything like an attempt or intention to store the goods, or any occasion or justification for storing them, if such had been the intention. On the contrary, the appellants were merely preparing and getting ready to deliver them, but had not commenced the delivery. They were not in fact ready or in a situation to commence

{ } * 198 * cases of non-delivery the carrier may be sued in trover,
 as having converted the goods to his own use. (h)

It must also be remembered, that the consignee must have a reasonable time to receive and remove his goods; and not until this time has elapsed, will they be considered as left in the hands of the carrier as a warehouseman, and under that liability only. (hh)

In general, when the owner or consignee may be considered as himself taking charge of the goods, or when his acts or language justify the carrier in believing that the owner considers

* 199 * himself as in charge of them, then the responsibility of the carrier ends. (i)

The particular obligation of stage-coach proprietors, railroads, and the like, to deliver the baggage of their passengers, has been much considered. These carriers are, principally, carriers of passengers, and only incidentally of the baggage of the passengers, for which they do not generally receive any distinct compensation. Nevertheless, as to this baggage, they come under the general law of common carriers of goods, and are held very strictly, both from the nature of the contract and from motives of public policy, to the obligation of delivering the baggage of each proprietor to him at the end of the journey, in all cases. (j)¹

the delivery. The goods were still in their possession as common carriers to all intents and purposes." See also *Goold v. Chapin*, 10 Barb. 612.

(h) *Bullard v. Young*, 3 Stew. (Ala.) 46. A undertook to carry certain flour for B to a certain place, and having deposited it by the way, C took part of it by mistake. B refusing to receive part only, C received the remainder, and paid A for the whole. This was held to amount to a conversion by A, for which B could maintain trover against him. And per *White*, J.: "Young was a bailee or carrier, who undertook to deposit the flour at a particular place for the plaintiff. This he did not do, but wilfully and of his own accord left it at another place,

whence it was innocently taken by a third person, who paid him, the defendant, for it." See *Rooke v. Midland Railway Co.* 14 E. L. & E. 175.

(i) *McDonald v. Western R. R. Co.* 34 N. Y. 497; *Blumenthal v. Brainerd*, 38 Vt. 402; *Roth v. Buffalo, &c. R. R. Co.* 34 N. Y. 548. See preceding page.

(j) *Thomas v. B. & P. Railroad Corporation*, 10 Met. 472; *Strong v. Natally*, 4 B. & P. 16; *Eagle v. White*, 6 Whart. 505; *Lewis v. The Western Railroad Co.* 11 Met. 509.

(k) *Richards v. The London Railway Co.* 7 C. B. 839; *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, id. 251; *Bomar v. Maxwell*, 9 Humph. 621; *Dill v. So. Car. Railroad Co.* 7 Rich. L. 158.

¹ A railway company is not liable for luggage placed at a passenger's request in the same compartment in which he intends to travel, if lost or stolen without any negligence on its part, *Bergheim v. Great Eastern R. Co.* 3 C. P. D. 221; *Talley v. Great Western R. Co.* L. R. 6 C. P. 44; nor for baggage placed by a passenger in an unlocked state-room, *Gleason v. Goodrich Trans. Co.* 32 Wis. 85; but is liable for baggage kept by a passenger exclusively within his own control and lost through its negligence or that of its servants, and without the passenger's fault, *Kingsley v. Lake Shore, &c. R. Co.* 125 Mass. 54, citing *Bergheim v. Great Eastern R. Co. supra*. That a carrier is not liable for samples of merchandise carried to facilitate sales, see *Pennsylvania R. Co.*

And if such delivery be made erroneously, but innocently, on a forged order, the carrier is still held. (k) But one who delivers to the railroad company, jewels or other things of great value, as common articles, is guilty of a fraud which releases the company from liability as common carriers. (kk)¹

In a recent English case occurs a useful definition of "baggage," or "luggage" as it is called in England, by *Cockburn*, C. J. He holds the true rule to be, "that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities, or to the ultimate purpose of the journey, must be considered as personal luggage." (kl) A surgeon travelling with troops had with him a case of surgical instruments. They were lost by negligence, and the company was held liable. (km) The company was held not liable for money carried by a passenger for a friend, and lost by the company's negligence, the company having no knowledge that the money was so carried. (kn)

As the carrier is bound to deliver the goods, so the owner is bound to receive and remove them, and pay the freight for them. And if the carrier is warranted in delivering the goods, by keeping them at his own office, or warehouse, and giving notice, and if he has given such notice, and the owner delays more than a reasonable time to take them, they are no longer at the risk of the carrier, as a carrier, but as a mere depositary, gratuitously, when he is bound only to slight care, and liable only for gross negligence — or for compensation — when he is bound to ordinary care, and is liable for ordinary negligence — according to the circumstances. (l) So if the freight be not * paid, and * 200

(k) *Powell v. Myers*, 26 Wend. 590.

(kk) *Cincinnati, &c. R. R. Co. v. Marcus*, 38 Ill. 219.

(kl) *Macrow v. Great Western Railway Co.* L. R. 6 Q. B. 612. See *post*, p. * 256.

(km) *Hannibal R. R. Co. v. Swift*, 12 Wallace, 262.

(kn) *National Bank of Greenfield v. M. & C. R. R. Co.* 20 Ohio, 259.

(l) *Powell v. Myers*, 26 Wend. 591, per *Verplanck*, senator. In *Goold v. Chapin*,

10 Barb. 612, the defendants, the proprietors of the Hudson River line of tow-boats,

received on board one of their barges, in the city of New York, goods belonging to merchants in Brockport, to be by them transported to Albany, and there delivered to the agent of a company for transporting goods, &c., on the canal, styled "The Atlantic Line." The goods arrived safely at Albany, on Monday, the 14th of August, and were put on the float belonging to the owners of the barge, which they kept in

v. Miller, 35 Ohio St. 541; and that a manuscript "price-book" is "baggage" of a travelling salesman, see *Gleason v. Goodrich Trans. Co.* 32 Wis. 85.

¹ See *Michigan, &c. R. Co. v. Oehm*, 56 Ill. 293; *Chicago, &c. R. Co. v. Shea*, 66 Ill. 471.

the carrier retains the goods therefor, they are not at his risk as carrier, but as warehouseman or gratuitous bailee. (*m*)

If the owner of goods gives new directions as to their delivery after they are taken by the carrier, of course these directions may be followed by him. And if they are indefinite, or if they require the carrier to be governed by information or directions which he does not receive, he may discharge himself from the obligation of delivery by storing them for the owner, in the best way he can. (*n*) So the carrier is discharged by any new agreement made between him and the owner or shipper, or by the consent of the owner or shipper, to some other disposition of them, which may be express or implied. (*o*) And the shipper may accept the goods at some place short of that to which they should have been carried, and at which, by the original contract, de-

the Albany basin for the purpose of receiving goods brought by their barges, and then transferring them to the canal craft, which came alongside of the float to receive their loading. On the 15th of August, the agent of "The Atlantic Line" was notified on behalf of the proprietors of the Hudson River line, that there were goods on their float for his line, and he was requested to call and take them away. The like notification and request were made to him on the next day, and repeated again on the 17th of August, when the agent said he was taking some goods for another line, and when he got them on he would shove up to the float and take those goods on. But on the same afternoon, the float, with the goods in question, was consumed by fire. The court held, that under the circumstances, the strict liability of the defendants, as common carriers, had ceased at the time of the fire, and that they were then holding the goods as bailees in deposit merely; and the goods having been destroyed without any fault on their part, that they were not liable.

(*m*) *Storr v. Crowley, McClel. & Y.* 129.

(*n*) *Boyle v. McLaughlin*, 4 Har. & J. 291. But a carrier in whose possession goods are left, becomes chargeable as a depositary. *Smith v. Nashua & Lowell R. R. Co.* 7 Foster (N. H.), 86.

(*o*) Thus, if A, for whom goods are transported by a railroad company, authorizes B to receive the delivery thereof, and to do all acts incident to the delivery and transportation thereof to A, and B, instead of receiving the goods at the usual place of delivery, requests the agent of the company to permit the car which contains the goods, to be hauled to a near depot of

another railroad company, and such agent assents thereto, and assists B in hauling the car to such depot, and B there requests and obtains leave of that company to use its machinery to remove the goods from the car; then the company that transported the goods is not answerable for the want of care or skill in the persons employed in so removing the goods from the car, nor for the want of strength in the machinery used for the removal of them, and cannot be charged with any loss that may happen in the course of such delivery to *A. Lewis v. The Western Railroad Co.* 11 Met. 408. And *Dewey, J.*, said: "The duty of the defendants was to transport the article, and deliver it at their depot. But this duty may be modified as to the manner of its performance. The omission of the defendants to remove goods from the cars, and place them in the warehouse, or upon the platform, would not, in all cases, subject them to an action for non-delivery, or for negligence in the delivery. Suppose a bale of goods was transported by them, and, on its arrival at the depot, the owner should step into the car, and ask for a delivery there, and thereupon the goods should be passed over to him in the car, the delivery would be perfect; and if any casualty should subsequently occur, in taking out the bale, the loss would be his. The place and manner of delivery may always be varied with the assent of the owner of the property; and if he interferes to control or direct in the matter, he assumes the responsibility." See *Scothorn v. South Staffordshire Railway Co.* 18 E. L. & E 553; s. c. 8 Exch. 341.

livery should have been made. And such acceptance, * whatever be the motive for it, discharges the carrier, if it be voluntary, and if it be made before any cause of action has arisen against the carrier for non-delivery, or other default. (p) After such cause exists by reason of the injury that has been inflicted, nothing discharges the carrier but a release, or the receipt of something by way of accord and satisfaction. (q)

If the owner or shipper, by his illegal act, prevents or interferes with the delivery of the goods by the carrier, the obligation of delivery is at an end. But only an actual illegality has this effect. (r) An alleged one, if it be not true in fact, does not discharge the carrier; but if, though not true in fact, or although the cause of a seizure or other interference with the goods which prevents their delivery is not substantiated, yet if there be a justifiable cause for such seizure, it would seem reasonable that * the carrier should not be held responsible for the consequences. It would certainly be unjust to hold him so,

(p) *Parsons v. Hardy*, 14 Wend. 215; *Harris v. Rand*, 4 N. H. 259, 555; *Welch v. Hicks*, 6 Cowen, 504; *Lorent v. Kentring*, 1 Nott & McC. 132; *Hunt v. Haskell*, 24 Me. 339. But the goods must be voluntarily received. *Rossiter v. Chester*, 1 Doug. (Mich.) 154. And in *Lowe v. Moes*, 12 Ill. 477, it was held, that the receipt by the owner of a part of a lot of goods is *transitu*, though it would discharge the carrier from all further liability as to such part, would not so discharge him as to the residue.

(q) *Willoughby v. Backhouse*, 2 B. & C. 821; *Baylis v. Usher*, 4 Mo. & P. 790; *Bowman v. Teall*, 23 Wend. 306.

(r) *Goalting v. Higgins*, 1 Camp. 451. This was an action for the non-delivery of ten pipes of wine, shipped at the island of Madeira, on board a vessel of which the defendant was owner, to be carried to Jamaica, and from thence to England. When the vessel arrived off Jamaica, she was seized, with her cargo, for a supposed violation of the revenue laws, and there condemned; but, upon an appeal to the Privy Council of England, the sentence of condemnation was reversed. Upon these facts, Lord Ellenborough held that the defendant was liable, and must seek his remedy against the officers of the government. So in *Spence v. Chadwick*, 10 Q. B. 517, which was assumedly by a shipper on a contract of affreightment. The declaration stated that the plaintiff had

shipped on board the defendant's ship, then in the bay of Gibraltar, and bound for London, calling at Cadiz, certain goods to be safely conveyed to London, and there delivered in good order, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, save risk of boats, &c., excepted, the plaintiff paying freight. The declaration then averred a promise by the defendant so to convey and deliver the cargo, saving the above exceptions; and alleged as a breach that he failed to do so. The defendant pleaded, that the ship in the course of her voyage called at Cadiz, and was then within the jurisdiction of the officers of customs there, and of a certain court of Spain (described in the plea); that while the ship was there, the goods were, according to the law of Spain, lawfully taken out of the ship by the said officers, against the will, and without the default of the defendant, on a charge of suspicion of their being contraband according to the law of Spain, and were confiscated by a decree of the said court, upon the charge aforesaid. Upon demurrer, the court held that the plea alleged no excuse within the express exceptions in the contract; that the decree of confiscation was in itself no answer; and that it did not appear by the plea to have been incurred through any fault of the plaintiff.

where it was the fault of the owner or shipper that such apparent cause for seizure existed.

It has been held that the carrier of goods cannot defend against an action for injury to them, on the ground that the sender, a corporation, could not acquire legal title to them. (*rr*)

Nor is the carrier liable where the goods are thrown overboard from necessity, to save life or property; (*s*) if to save property, all the property that is saved must contribute to make up the loss, under what is termed in the mercantile law, a general average. (*t*) Nor if the goods perish from inherent defect, (*u*)

(*rr*) *Farmers Bank v. Detroit, &c. R. R. Co.* 17 Wis. 372.

(*s*) *Mouse's case*, 12 Rep. 63; *Bird v. Astcock*, 2 Bulst. 280; *s. c. 2 Roll. Abr.* 567; *Halwerson v. Cole*, 1 Speers, 321. In *Kenrig v. Eggleston*, Aleyn, 93, it is said that *Rolle*, C. J., cited *Barcroft's case*, "where a box of jewels was delivered to a ferryman, who, knowing not what was in it, and being in a tempest, threw it overboard into the sea; and resolved that he should answer for it." But Sir *William Jones*, in commenting upon this case, says: "I cannot help suspecting that there was proof in this case of *culpable negligence*, and probably the casket was both *small* and *light* enough to have been kept longer on board than other goods; for in the case of a Gravesend barge, cited on the bench by Lord *Coke*, it appears that the pack which was thrown overboard in a tempest, and for which the bargeman was held *not answerable*, was of great value and *great weight*; although this last circumstance is omitted by *Rolle*, who says only that a master of the vessel had *no information of its contents*." See *Jones on Bailm.* 106.

(*t*) But the owners of goods shipped on deck, and thrown overboard in a storm, are not entitled to general average; nor is the owner of the vessel liable for them as a carrier, in such case. *Smith v. Wright*, 1 Caines, 43; *Lenox v. United Ins. Co.* 3 Johns. Cas. 178; *The Rowena*, Ware, 322. But in *Gillett v. Ellis*, 11 Ill. 579, where goods stowed on the *main deck* of a *propeller* were necessarily cast overboard in a tempest by the order of the master, to preserve the vessel and crew, it was *held*, that the owner of the goods was entitled to the benefit of a general average. And per *Treat*, C. J.: "It is insisted that the plaintiff cannot claim contribution, because his goods were stowed on the deck of the vessel. The general rule undoubtedly is, that the owner of the goods which are placed on the deck of a ship, and are

swept overboard by the action of the wind or waves, or cast into the sea by command of the master, in order to protect the vessel and crew, is not entitled to the benefit of a general average. The cargo on deck, from its situation, increases the difficulty of navigating the ship, and is more exposed to peril than that which is under cover; and, if swept away or cast overboard, the owner must bear the loss, without contribution from the owners of the vessel and the cargo under hatches. But this case does not fall within the operation of this rule. Propellers are a class of vessels but recently introduced in the navigation of the lakes, to which, from the peculiarity of their construction, and the general usage respecting them, this general rule is not applicable. They are double-deckers with two holds. By the general custom prevailing in reference to them, goods stowed on the main deck, or upper hold, are regarded as under hatches, and as safe as those stowed in the lower hold, or where the cargo in ordinary vessels is only considered as under cover. The master is allowed by this general custom to stow the cargo either in the hold, or on the main deck, at his convenience. No distinction is made in the price of transportation by the carrier or in the rates of insurance by the underwriter. The cargo below and between decks is put on the same footing. This universal usage, resulting from the character of the vessel, must govern the rights and liabilities of the owners of the vessel and cargo. The owner of goods, which are stowed on the main deck of a propeller, and necessarily cast overboard by the direction of the master, to preserve the vessel and crew, is, therefore, entitled to the benefit of a general average, as much as the owner of goods that are stowed in the hold would be, under like circumstances."

(*u*) *Farrar v. Adams*, Bul. N. P. 69; *Clark v. Barnwell*, 12 How. 272.

* nor if the owner or shipper has been negligent or fraudulent in not disclosing the peculiar nature of goods requiring peculiar care, by the want of which care they have perished or suffered injury. (v) But the carrier is bound to take all such reasonable care of goods as he knows or should know to be necessary for them.

If the carrier, on the ground of his liability for damages to the goods he undertook to transport, pays for such damages, it is equivalent to a delivery of them in safety, and re-establishes his claim for freight. (w)

SECTION X.

WHERE A THIRD PARTY CLAIMS THE GOODS.

One question in regard to the carrier's obligation to deliver goods to the shipper or consignor, has been much agitated, and perhaps is not quite settled. It arises in the case of another party claiming the goods as owner, and taking them in that character from the carrier. Will such taking excuse the carrier for non-delivery? If the goods are demanded from him by a third party on this ground, can he deliver the goods and justify his conduct? It is quite certain that the carrier cannot himself raise the question of title in a third person, and on that ground refuse delivery to the party originally holding them. (x) And it is undoubtedly the general rule, that the carrier cannot deny * the title of the party from whom he has received the * 204 goods for transportation. In general, no agent can defend against the action of his principal, by setting up the *jus tertii* in

(v) *Edwards v. Sherratt*, 1 East, 604; *Titchburne v. White*, 1 Stra. 145; *Batson v. Donovan*, 4 B. & Ald. 21.

(w) *Hammond v. McClures*, 1 Bay, 101.

(x) Anon., cited in *Laclouch v. Towle*, 3 Esp. 114. This was a case tried before Mr. Justice *Gould*, and was to the following effect. A carrier had a parcel of goods delivered to him, to be carried from Maidstone to London. While the goods lay at his warehouse, a person came there who said the goods were his, and claimed them from the carrier; the carrier said he could not deliver them; but that if he was indemnified he would keep them, and not

deliver them according to order. An indemnity was given; and the goods not being delivered according to order, the party by whom they were delivered to the carrier brought an action against the carrier. The learned judge would not permit him to set up any question of property out of the plaintiff; and held that he, having received the goods from him, was precluded from questioning his title, or showing a property in any other person. And Lord *Kenyon*, before whom the case was cited, admitted it to be law. See also *ante*, p. *142, note (t), and *Great Western R. R. Co. v. McComas*, 33 Ill. 185.

his own favor. (y) On the other hand, if the carrier delivers them to a third party, and it can be shown in an action against him that this third party was the actual and lawful owner, and that the plaintiff, who delivered the goods to the carrier, had no right to them whatever, this certainly is a sufficient defence. (z) It is held, in general, that if he does not yield to an adverse claim

by a third party, he is liable to an action, in case the title

* 205 of *this party be good. (a) The carrier may have his in-

(y) *Nickolson v. Knowles*, 5 Madd. 47; *Myler v. Fitzpatrick*, 6 Mad. & G. 360; *Dixson v. Hammond*, 2 B. & Ald. 310; *Roberts v. Ogilby*, 9 Price, 269; *Hardman v. Willcock*, 9 Bing. 382, n. (a); *Bates v. Stanton*, 1 Duer, 79.

(z) This was settled, after much consideration, in *King v. Richards*, 6 Whart. 418. The defendants in that case were common carriers of goods between New York and Philadelphia, and had signed a receipt of certain goods as received of A. which they promised to deliver to his order. In trover by the indorsees of this paper, who had made advances on the goods, it was held, that the defendants might prove that A had no title to the goods; that they had been fraudulently obtained by him from the true owner; and that upon demand made, they had delivered them up to the latter. *Kennedy*, J., said: "It is said that it would be a breach of trust or an act of treachery, on the part of the bailee, to deliver the goods, even on demand, to the true owner, notwithstanding he has received them from a wrong-doer, because he promised to restore the goods to such wrong-doer. If the bailee in such case receive the goods from the bailor innocently, under the impression made by the bailor that he is the owner thereof, or has the right to dispose of them in the manner he is doing, and therefore promises to return the goods to the bailor, it is very obvious that such a promise ought not to be regarded as binding, because obtained through a false impression, made wilfully by the bailor; and truth, which lies at the foundation of justice, as well as all moral excellence, would seem to require, in every such case, that the goods should be delivered up to the true owner, especially if he demand the same, instead of the wrongfull bailor. But if the bailee knew at the time he received the goods, and made the promise to redeliver them to the bailor, with a view to favor the bailor, that the latter had come wrongfully by them, either by having taken them tortiously or feloniously from the owner; then the bailee thereby

became a participant in the fraud or the felony, and it would be abhorrent to every principle of justice that he should be protected under such circumstances against the demand or claim of the owner. This promise, however, of the bailee, is said to be binding on him only, and is not such as his personal representatives are bound to regard; and the reason assigned for this is because the goods have come to their possession by operation of law. This doctrine, if it were to be allowed, would certainly be singularly anomalous, and unlike, in its effect, to any other promise recognized by the law as binding." See also *Bates v. Stanton*, 1 Duer, 79. The doctrine of the text is fully sustained in the case of *Sheridan v. The New Quay Co.* 93 Eng. C. L. 618. In giving the judgment of the court, *Willes*, J., says,— "The defendants were common carriers and therefore bound to receive the goods for carriage. They could make no inquiry as to the ownership. They have not voluntarily raised the question; it was raised by the demand of the real owner before the defendants had parted with the goods. The law would have protected them against the real owner if they had delivered the goods in pursuance of their employment, without notice of his claim. It ought equally to protect them against the *pseudo* owner, from whom they could not refuse to receive the goods, in the present event of the real owner claiming the goods, and their being given up to him."

(a) *Wilson v. Anderton*, 1 B. & Ad. 450. In this case the captain of a ship, who had taken goods on freight, and who claimed a lien upon them, but whose claim was unfounded, delivered them to the defendant as his bailee. The plaintiff, who was the owner of the goods, demanded them of the defendant, but he refused to deliver them without the directions of the bailor. The court held, that the bailor not having any lien upon the goods, the refusal of the bailee was sufficient evidence of a conversion. Lord *Tenterden*, C. J., said: "A bailee can never be in a

terpleader in equity to ascertain who has the right; but it is not easy to see what adequate means of self-protection he has at common law. And yet he should be permitted, in some way, to demand security of the party whose title seems to him the better, and to whom he is therefore willing to give the goods. And whenever security is refused, there should be no recovery against him, unless the better title of the person claiming the goods was obvious and certain, or there were other circumstances indicating that the carrier had not acted with entire good faith or proper discretion. But, in the present state of the authorities, it seems that if the carrier be called upon by such antagonistic claimants, he must decide between them at his own peril.

If the goods are stopped *in transitu*, this would involve questions which could be answered only by the law of "stoppage *in transitu*," which is elsewhere considered.

* SECTION XI.

* 206

COMPENSATION.

This is sometimes fixed by law; as for incorporated companies, ferries, &c. Where it is not so fixed, the carrier may determine it himself. But having adopted and made known a usual rate, he

better situation than the bailor. If the bailor has no title, the bailee can have none, for the bailor can give no better title than he has. The right to the property may, therefore, be tried in an action against the bailee, and a refusal like that stated in this case has always been considered evidence of a conversion. The situation of a bailee is not one without remedy. He is not bound to ascertain who has the right. He may file a bill of interpleader in a court of equity. But a bailee who forbears to adopt that mode of proceeding, and makes himself a party by retaining the goods for the bailor must stand or fall by his title." *Littledale*, J.: "The question is, whether, under the circumstances stated in this case, the bailee can set up any title against the real owner? What is the situation of a bailee? He has no other title except that which the bailor had. As to the *Nisi Pruis* case before *Gould*, J. [see *ante*, note (x)], it is not applicable to the present point. There

the carrier, on the goods being demanded by a third party, voluntarily identified himself with that party, by proposing to retain them on an indemnity, and offering to set up the title of that party on an action by the bailor. Now a lessee cannot dispute the title of his lessor at the time of the lease, but he may show that the lessor's title has been put an end to; and therefore, in an action of covenant by the lessor, a plea of eviction by title paramount, or that which is equivalent to it, is a good plea, and a threat to distrain or bring an ejectment, by a person having good title, would be equivalent to an actual eviction. So here, if the bailor brought an action against the defendant as bailee, the latter might, on the same principle, show that the plaintiff recovered the value of the goods, or that, on being threatened with an action by a person who had good title to the goods, he had delivered them to him."

is so far bound by it, that, on tender of this rate, he must receive the goods, and can recover no more if they are not prepaid and he carries them; and whether it be fixed by law, or by his own established usage, it must be applied equally and indifferently; all persons being charged the same price for carriage of the same quantity of similar goods for the same distance. (*b*)¹ Where, however, it is not fixed by law, the carrier may change it at his discretion, and all parties are bound who have, or might have, but for their own fault, seasonable knowledge of such change. If the hire to which he is entitled be not paid, he is not bound to deliver the goods; and if he now retains them in his warehouse or place of business, he is liable, in case of loss or injury, only for negligence. His liability is no longer that of a common carrier, but that of a depositary for hire or gratuitously, as the case may be; (*c*) for he now holds the goods by virtue of the right we shall now proceed to consider.

SECTION XII.

OF THE LIEN AND AGENCY OF THE CARRIER.

Whether a private carrier has a lien on the goods for his freight, is not, as we have already said, determined by the * 207 * authorities. Generally, perhaps, it has been considered that one of the distinctions between the private carrier and the common carrier is, that the first has no such lien, while the latter has, and has had for centuries. (*d*) No part of the law of bailments is more firmly established than that the common carrier has this lien. He may not only refuse to carry goods unless the freight is paid to him, but if he carry them, and the freight is

(*b*) See *ante*, p. * 175, note (*k*). It seems that although a carrier need not receive goods until the price of carriage is paid, yet if he does so receive them he can maintain no action for their carriage until the goods are delivered. Barnes *v.* Marshall, 14 E. L. & E. 45; s. c. 18 Q. B. 785.

(*c*) Young *v.* Smith, 3 Dana, 91. See *ante*, p. * 200, note (*m*).
(*d*) Skinner *v.* Upshaw, 2 Ld. Raym. 752; Hunt *v.* Haskell, 24 Me. 339; Hayward *v.* Middleton, 1 Mills, Const. 186; Ellis *v.* James, 5 Ohio, 88; Bowman *v.* Hilton, 11 Ohio, 303; Fuller *v.* Bradley, 25 Penn. St. 120.

¹ Where rates of freight are fixed by statute, an unlawful excess paid under protest can be recovered back with interest, although at the time the action is brought the statute has been repealed. Graham *v.* Chicago, &c. R. Co. 53 Wis. 473.

withheld, he may retain the goods, and obtain his freight from them in any of the ways in which a party enforces a lien on personal property. (e) But a common carrier can acquire no lien on goods belonging to the United States Government for services rendered in transporting such goods. (f) And while he holds goods on this ground, they are not at his risk as a common carrier, for he is responsible only as any other party who holds property as security for debt.

All liens may be abandoned, or waived, or lost. And it has been held that a refusal by a bailee to give up the goods without giving his lien as a reason, is a waiver. (g) And a lien may be lost, as by a repeal of the statute creating it, without affecting the contract. (h)

It has been questioned whether a common carrier, who carries goods of a party, but without his order or knowledge, can maintain a lien for the freight. Generally the owner would have the right to refuse such service, and to require that the goods should be replaced, or he might have his action for intermeddling with his property. But if the facts were such as to * leave * 208 to the owner only the option between receiving his goods or rejecting them, must he either refuse the goods, or by accepting, give the carrier all the rights which he would have had if he had himself placed them in the hands of the carrier? If a thief in Albany steals one hundred barrels of flour from an owner who intends to send it to Boston, and the thief, for his own purposes, sends it by railroad to Boston, and there the owner's agent discovers the flour, and recognizes it by marks and numbers, can the owner or the owner's agent get possession of the flour, only by paying the freight, and so discharging the lien of the railroad? If a service has been distinctly rendered to the owner, and he

(e) See *Hunt v. Haskell*, 24 Me. 339; *Fox v. McGregor*, 11 Barb. 41.—A relinquishment of possession by a carrier, or other person who has a lien on property, is an abandonment of the lien. By a transfer of the possession, the holder is deemed to yield up the security he has by means of the custody of the property, and to trust only to the responsibility of the owner, or other person liable for the charge. *Bailey v. Quint*, 22 Vt. 464; *Forth v. Simpson*, 13 Q. B. 689; *Bigelow v. Heaton*, 6 Hill (N. Y.), 43; s. c. 4 Denio, 496. But *seem to*, per *Boardsley*, J., that the lien may be retained after delivery by the agree-

ment of the parties. *Id.* And it is so held in *Sawyer v. Fisher*, 32 Me. 28. So if a carrier be induced to deliver goods to the consignee, by a false and fraudulent promise of the latter that he will pay the freight as soon as they are received, the delivery will not amount to a waiver of the carrier's lien, but he may disaffirm the delivery, and sue the consignee in replevin. *Bigelow v. Heaton*, *supra*.

(f) *Dufolt v. Gorman*, 1 Minn. 301.

(g) *Dorrs v. Morewood*, 10 Barb. 188; *Hanna v. Phelps*, 7 Ind. 21.

(h) *Lambard v. Pike*, 33 Me. 141; *Bangor v. Goding*, 35 Me. 73.

accepts that service and holds the benefit of it, on general principles he must pay for it. Whether that rule would apply here would depend upon the peculiar circumstances of the case. But if it would, it does not follow that the carrier is entitled to his lien. He may have a rightful claim for freight, which he may otherwise enforce, but still have no lien for it on the goods transported. If the lien of the common carrier be connected with his peculiar obligation to carry for all who offer, (i) and his peculiar responsibility as an insurer against everything but the act of God or the public enemy, these three, the lien, the obligation, and the responsibility, existing only together, and in dependence on each other, then it would follow that he has no such lien, unless he was under a legal obligation to carry the goods for the thief. Such an obligation, in the present extension of our internal interchange of property, and with the existing facilities of locomotion, would make the common carrier the most efficient assistant of the thief. We cannot doubt that he may always inquire into the title of one who offers him goods; that he must so inquire if there be any facts which would excite suspicion in a man of ordinary intelligence and honesty; and that if the person offering the goods is neither the owner nor his authorized agent, the carrier is under no obligation to receive and carry them.

* 209 And then again it follows, * that if he carries goods for one who is neither the owner nor his agent, he carries what he was under no obligation to carry, and therefore cannot maintain his carrier's lien for the freight. This conclusion seems to us, on the whole, most conformable to the prevailing principles of law, and to the actual condition of the carrier's business in this country, and to the present weight of authority. (j)

(i) "The doctrine of lien originated in certain principles of the common law, by which a party, who was compelled to receive the goods of another, was also entitled to retain them for his indemnity; thus carriers and innkeepers had, by the common law, a lien on the goods entrusted to their charge." Smith, Merc. Law, 558.

(j) This question has been considerably discussed within the last few years. We have already seen that an innkeeper in such a case has a lien. See *ante*, p. *156, note (u). See also *Fitch v. Newberry*, 1 Doug. (Mich.) 1, where the court say: "There is an obvious ground of distinction between the cases of carrying goods by a common carrier, and the furnishing *keeping* for a horse by an innkeeper. In the latter case it is equally for the *benefit* of the owner to have his horse fed by the innkeeper, in whose custody he is placed, whether left by the thief, or by himself or agent; in either case food is necessary for the preservation of his horse, and the innkeeper confers a *benefit* upon the owner by feeding him. But can it be said that a carrier confers a benefit on the owner of goods by carrying them to a place where, perhaps, he never designed, and does not wish them to go? Or as in this case is the owner of goods benefited by having them taken and transported by one trans-

* It is settled that when the carrier cannot find the consignee; or learns that he is a swindler, and would cheat * 210

portation line, at their own price, when he had already hired and paid another to carry them at a less price ? ” The first case in which the same question arose, in regard to a carrier, is that of the Exeter carrier, cited by Lord Holt, in *York v. Grenough*, 2 Id. Raym. 866. There it appeared that one A stole goods, and delivered them to the Exeter carrier to be carried to Exeter. The right owner finding the goods in the possession of the carrier, demanded them of him, upon which the carrier refused to deliver, without being paid for the carriage. The owner brought trover, and it was held, that the carrier might justify detaining the goods against the right owner for the carriage, for when A brought them to him he was obliged to receive them and carry them ; and therefore, since the law compelled him to carry them, it would give him a remedy for the premium due for the carriage. The decision evidently met with the approval of Lord Holt. On the authority of this case, the opinion seems generally to have prevailed in the profession and among text-writers, that innkeepers and common carriers stand upon the same ground in this respect. See *King v. Richards*, 6 Whart. 423. But several late cases seem to have established the contrary doctrine, in this country at least, in accordance with what we have stated in the text. The first case, since that of the Exeter carrier, in which this question has been directly considered, is *Fitch v. Newberry*, 1 Doug. (Mich.) 1, already cited. In that case, the plaintiffs, by their agents, shipped goods at Port Kent, on Lake Champlain, consigned to themselves at Marshall, Michigan, care of H. C. & Co., Detroit, by the New York and Michigan line, who were common carriers, and with whom they had previously contracted for the transportation of the goods to Detroit, and paid the freight in advance. During their transit, and before they reached Buffalo, the goods came into the possession of carriers doing business under the name of the Merchants Line, without the knowledge or assent of the plaintiffs, and were by them transported to Detroit, consigned by H. P. & Co. of Buffalo to the care of the defendants, and delivered to the defendants, who were personally ignorant of the manner in which they came into the possession of the Merchants Line, and of the contract of the plaintiffs with the New York and Michigan line although they, and also H. P. & Co., were agents for and part owners

in the Merchants Line. The defendants being warehousemen and forwarders, received the goods and advanced the freight upon them from Troy, N. Y., to Detroit. On demand of the goods by the plaintiffs, the defendants refused to deliver them until the freight advanced by them, and their charges for receiving and storing the goods were paid, claiming a lien on the goods for such freight and charges. The plaintiffs thereupon brought replevin ; and the court, after much consideration, held, that the plaintiffs were entitled to the possession of the goods without payment to the defendant of such freight and charges, and that the defendants had no lien for the same. This decision is supported by the case of *Van Buskirk v. Furrington*, 2 Hall, 561. There property was sold on a condition with which the buyer failed to comply, and shipped the goods on board the defendant’s vessel. On the defendant’s refusal to deliver the goods to the owner, he brought trover, and was allowed to recover the value, although the defendant insisted on his right of lien for the freight. See also *Collman v. Collins*, 2 Hall, 569. The same point arose directly in the case of *Robinson v. Baker*, 5 Cush. 137, in which Fletcher, J., after reviewing and commenting upon the authorities which we have cited, says : “ Thus the case stands upon direct and express authorities. How does it stand upon general principles ? In the case of *Saltus v. Everett*, 20 Wend. 267, 275, it is said : ‘ The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his consent, and, consequently, that even the honest purchaser under a defective title cannot hold against the true proprietor.’ There is no case to be found, or any reason or analogy anywhere suggested in the books, which would go to show that the real owner was concluded, by a bill of lading—not given by himself, but by some third person, erroneously or fraudulently. If the owner loses his property, or is robbed of it, or it is sold or pledged without his consent, by one who has only a temporary right to its use, by hiring or otherwise, or a qualified possession of it for a specific purpose, as for transportation, or for work to be done upon it, the owner can follow and reclaim it in the possession of any person, however innocent. Upon this settled and universal principle, that no man’s property can be taken from him without his consent, express or implied, the books are

the consignor, he is bound to protect the owner and consignor, and for that purpose to hold the goods, or store them in some proper way for his use. (k) And so he is if the consignee * 211 refuses to receive * the goods. (l) He would be bound to give notice to the consignor only, if that, under the circumstances, would be reasonable care ; and this, it would seem, is a question for the jury. (m)

The carrier may also be a factor to sell for the owner ; and this by express instructions, or by usage of trade. (n) When this is the case, after the carrier has transported the goods, and is engaged in his duty as a factor for sales, he is responsible only as a factor, or for his negligence or default, and not as a carrier. But after he has sold the property, and has received the price which he is to return to the owner, his responsibility as a carrier revives, and in that capacity he is liable for any loss of the money. (o)

full of cases, many of them hard and distressing cases, where honest and innocent persons have purchased goods of others, apparently the owners, and often with strong evidence of ownership, but who yet were not the owners, and the purchasers have been obliged to surrender the goods to the true owners, though wholly without remedy for the money paid. There are other hard and distressing cases of advances made honestly and fairly by auctioneers and commission merchants, upon a pledge of goods by persons apparently having the right to pledge, but who in fact had not any such right, and the pledgees have been subjected to the loss of them by the claim of the rightful owner. These are hazards to which persons in business are continually exposed by the operation of this universal principle, that a man's property cannot be taken from him without his consent. Why should the carrier be exempt from the operation of this universal principle ? Why should not the principle of *caveat emptor* apply to him ? The reason, and the only reason given, is, that he is obliged to receive goods to carry, and should therefore have a right to detain the goods for his pay. But he is not bound to receive goods from a wrong-doer. He is bound only to receive goods from one who may rightfully deliver them to him, and he can look to the title, as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods, unless the freight or pay for the carriage is first paid to him ; and he may in all cases secure the payment of the

carriage in advance. In the case of *King v. Richards*, 6 Whart. 418, it was decided that a carrier may defend himself from a claim for goods by the person who delivered them to him, on the ground that the bailor was not the true owner, and therefore not entitled to the goods. The common carrier is responsible for the wrong delivery of goods, though innocently done, upon a forged order. Why should not his obligation to receive goods exempt him from the necessity of determining the right of the person to whom he delivers the goods, as well as from the necessity of determining the right of the persons from whom he receives the goods ? ”

(k) *Stevenson v. Hart*, 4 Bing. 476; *Duff v. Budd*, 3 Br. & B. 177.

(l) *Crouch v. G. W. R. Co.* 2 Hurl. & N. 491.

(m) *Hudson v. Baxendale*, 2 Hurl. & N. 575.

(n) *Stone v. Waitt*, 31 Me. 409; *Williams v. Nichols*, 13 Wend. 58; *The Waldo, Daveis*, 161.

(o) Thus, where the owners of a steam-boat, which ran upon the Ohio River, took produce to be carried and sold by them for a certain freight, and were bringing back in the same vessel the money which they obtained on the sale of the produce, when the vessel and the money were accidentally consumed by fire; it was held, that under the usage of trade in the western waters, they were acting as common carriers in going, as factors in selling the produce, and as common carriers in bringing back the money, and

* The common principles of agency apply to the carrier; * 212
he is liable for the acts of those whom he employs and au-

were liable for its loss, notwithstanding the accident. Harrington *v.* McShane, 2 Watts, 443. And per Sergeant, J.: "The question of the defendants' responsibility in the present case depends on the character in which they held this money when the loss occurred. If they were merely factors they are not responsible; if they were carriers the reverse must be the case. Had the flour been lost in the descending voyage, by a similar accident, there could be no doubt whatever of the defendants' liability; they were certainly transporting it in the character of carriers. On their arrival at the port of destination, and landing the flour there, this character ceased, and the duty of factor commenced. When the flour was sold, and the specific money, the proceeds of sale, separated from other moneys in the defendants' hands, and set apart for the plaintiffs, was on its return to them by the same boat, the character of carrier reattached. The return of the proceeds by the same vessel is within the scope of the receipt and of the usage of trade, as proved, and the freight paid may be deemed to have been fixed with a view to the whole course of the trade, embracing a reward for all the duties of transportation, sale, and return. If the defendants, instead of bringing the money home in their own vessel, had sent it on freight by another, there would have been to the plaintiffs the responsibility of a carrier, and there ought not to be less if they chose to bring it themselves. If they had mixed the money with their own, they would have no excuse for non-payment. The defendants can be relieved from responsibility only by holding that the character of carrier never existed between these parties at all, or that if it existed, on the descending voyage, it ceased at its termination, and that of factor began and continued during the ascending voyage. But if the defendants bring back in the same vessel other property, the proceeds of the shipment, whether specific money or goods, they do so as carriers, and not merely as factors." So where a master of a vessel, employed in the transportation of goods between the cities of Albany and New York, received on board a quantity of flour to be carried to New York, and there sold in the usual course of such business for the ordinary freight; and the flour was sold by the master at New York for cash, and while the vessel was lying at the dock, the cabin was broken open and

the money stolen out of the master's trunk, while he and the crew were absent; it was held, that the owners of the vessel were answerable for the money to the shippers of the flour, though no commissions, or a distinct compensation, beyond the freight, were allowed for the sale of the goods and bringing back the money, such being the duty of the master, in the usual course of the employment, where no special instructions were given. Kemp *v.* Coughtry, 11 Johns. 107. And, *per curiam*: "Had the property which was put on board this vessel for transportation been stolen before it was converted into money, there could be no doubt the defendants would have been responsible. But the character of common carrier does not cease upon the sale of the property. According to the testimony in this case, the sale of the goods and return of the proceeds to the owner is a part of the duty attached to the employment, where no special instructions are given. The contract between the parties is entire, and is not fulfilled on the part of the carrier, until he has complied with his orders, or has accounted with the owner for the proceeds, or brought himself within one of the excepted cases. The sale in this case was actually made, and the money received; and had it been invested in other property, to be transported from New York to Albany, there would be no question but the character of common carrier would have continued. It can make no difference whether the return cargo is in money or goods. A person may be a common carrier of money, as well as of other property. Carth. 485. Although no commission or distinct compensation was to be received upon the money, yet according to the evidence, it appears to be a part of the duty attached to the employment, and in the usual and ordinary course of the business, to bring back the money when the cargo is sold for cash. The freight of the cargo is the compensation for the whole; it is one entire concern. And the suit may be brought against the owners of the vessel. The master is considered their agent or servant, and they are responsible for the faithful discharge of his trust." See also, Taylor *v.* Wells, 3 Watts, 65; Emery *v.* Hersey, 4 Greenl. 407.—It should be observed, however, that Mr. Justice Story has made some strictures upon the case of Kemp *v.* Coughtry, for which see Story on Bailm. §§ 547, 548.

thorizes to act for him. But a party may contract with the servant alone, and then can hold him only. (p)

SECTION XIII.

OF THE RESPONSIBILITY OF THE CARRIER BEYOND HIS OWN ROUTE.

The question, when the carrier is liable beyond his own route, has been recently much considered, and is not yet quite settled. If carriers for different routes, which connect together, associate for the purpose of carrying parcels through the whole line, and share the profits, they are undoubtedly partners, and each is liable *in solidis* for the loss or injury of goods which he undertakes to carry, in whatever part of the line it may have happened. (q)¹ So if they connect temporarily, as for an excursion party. (qq) And a railroad thus connected with other railroads is a common carrier as to passengers beyond its own limits, and is bound to receive any who offer. (qr) There can be no doubt that a carrier may agree to carry beyond his own regular route; and then, however the agreement be evidenced, the carrier is liable to the point of ultimate destination. (qs) If the carriers be not dis-

(p) See *ante*, p. *181, note (a).

(q) Thus, where A and B were jointly interested in the profits of a common stage-wagon, but, by a private agreement between themselves, each undertook the conducting and management of the wagon, and his own drivers and horses, for specified distances; it was *held*, notwithstanding this private agreement, that they were jointly responsible to third persons for the negligence of their drivers throughout the whole distance. *Waland v. Elkins*, 1 Stark. 272; s. c. *nom.* *Weyland v. Elkins*, Holt, 227. See also *Fromont v. Coupland*, 2 Bing. 170; *Helsby v. Mears*, 5 B. & C. 504; *Collins v. B. & E. R. Co.* 1 Hurl. & N. 517; *Wilby v. W. C. R. Co.* 2 Hurl. & N. 703. So where an association was formed between shippers on Lake Ontario, and the owners of canal boats on the Erie canal, for the transportation of goods

and merchandise between the city of New York and the ports and places on Lake Ontario and the river St. Lawrence, and a contract was entered into by the agent of such association, for the transportation of goods from the city of New York to Ogdensburg, on the river St. Lawrence, and the goods were lost on Lake Ontario; it was *held*, that all the defendants were answerable for the loss, although some of them had no interest in the vessel navigating the lake, in which the goods were shipped. *Fairchild v. Slocum*, 19 Wend. 329; s. c. 7 Hill (N. Y.), 292; *Cincinnati, &c. R. R. Co. v. Spratt*, 2 Duval, 41.

(q) *Najac v. Boston, &c. R. R. Co.* 7 Allen, 329.

(r) *Wheeler v. San Francisco R. R. Co.* 31 Cal. 46.

(s) *Morse v. Brainard*, 41 Vt. 550; *Mosher v. Southern Express Co.* 38 Ga.

¹ But where goods arrived in a damaged condition, and the carrier, on delivering the goods to the owner, presented a bill for freight and back charges, under a usage by which each one of successive carriers paid all back charges, it was *held*, that in the absence of evidence as to how or where the injury occurred, and the carrier having no connection with any other roads, that the owner could not recoup the damages. *Knight v. Prov. &c. R. Co.* 18 R. I. 572. See *Marquette R. Co. v. Kirkwood*, 45 Mich. 51; *Detroit, &c. R. Co. v. McKenzie*, 43 Mich. 609.

tinctly associated, but * are so far connected that they * 213 undertake, or authorize the public to suppose that they undertake, for the whole line, they should be responsible as before. (r) But undoubtedly a carrier may receive a parcel to carry as far as he goes, and then to send it further by another carrier. And where this is clearly the case, his responsibilities as carrier and as forwarder are entirely distinct. (s) The difficulty is in determining between these cases; the weight of authority, until recently, seemed to be in favor of the rule, that a carrier who knowingly received a parcel directed or consigned to any particular place, undertook to carry it there himself, unless he made known a different purpose and undertaking to the owner. (ss)¹ This is still the English doctrine, and in conformity therewith it has been decided that the owner has no contract with the second carrier, and cannot recover of him for damage done on his part of the route. (t) But the American decisions have importantly qualified, if they have not overthrown, the English authorities. The prevailing rule in this country may now be said to cast upon the carrier no responsibility as a carrier beyond his own route (requiring, of course, due care in forwarding the parcel) unless the usage of the business, or of the carrier, or his conduct or language, shows that he takes the parcel, *as carrier*, for the whole route. (u)² And his receipt of payment

37; *Tuckerman v. Stevens, &c.* Transportation Co. 3 Vroom, 320; *Southern Express Co. v. Shea*, 38 Ga. 519.

(r) *Weed v. The S. & S. Railroad Co.* 19 Wend. 534; *Peet v. Chicago, &c. R. R. Co.* 20 Wis. 594.

(s) *Garside v. Trent & Mersey Navigation Co.* 4 T. R. 581; *Ackley v. Kellogg, 8 Cowen, 223; Pennsylvania, &c. R. R. Co. v. Schwarzenberger*, 45 Penn. St. 208; *Lowell Wire Fence Co. v. Sargent*, 8 Allen, 189.

(ss) So held in Illinois, &c. R. R. Co. v. Johnson, 34 Ill. 389.

(t) *Coxon v. Great Western Railway Co.* 5 H. & N. 274. See also *directors of B. & E. Railway Co. v. Collins*, 5 H. & N. 969, where the House of Lords sustain this doctrine.

(u) The leading English case upon this point is *Muschamp v. The L. & P. Junction Railway Co.* 8 M. & W. 421. The defendants were the proprietors of the Lancaster and Preston Junction Railway,

¹ It is still the rule in Illinois, that a carrier receiving goods for full compensation to carry to a certain place, without any contract limiting its liability, and the goods are delivered to another carrier in good order at its terminus, is responsible for delivery at that place, although it is beyond its terminus. *Adams Ex. Co. v. Wilson*, 81 Ill. 339. So in Missouri. *Halliday v. St. Louis, &c. R. Co.* 74 Mo. 159.

² The liability of an intermediate common carrier for the safety of goods delivered to him for carriage is discharged by their delivery to and acceptance by a succeeding carrier or his authorized agent, *Pratt v. Railway Co.* 95 U. S. 43; *Washburn, &c. Co. v. Prov. &c. R. Co.* 113 Mass. 490; and he is not relieved of responsibility by storing them in a warehouse at the terminus of his route, *Bancroft v. Merchants' Despatch Co.* 47 Ia. 262. See also *Root v. Great Western R. Co.* 45 N. Y. 524; *Skinner v. Hall*, 60 Me. 477; *Hadd v. U. S., &c. Co.* 52 Vt. 335; *Ill. Cent. R. Co. v. Frankenberg*, 54 Ill. 88; *Chicago, &c. R. Co. v. Montfort*, 60 Ill. 175; *St. Louis, &c. R. Co. v. Learned*, 103 Ill. 293.

* 214 for the whole route, * would be evidence going far to prove such undertaking. (v)¹ Hence the purchase of what is

and carried on business on their line between Lancaster and Preston, as common carriers. At Preston, the defendants' line joined that of the North Union Railway. The plaintiff, a stone mason, living at Lancaster, had gone into Derbyshire in search of work, leaving his box of tools to be sent after him. His mother accordingly took the box to the railway station at Lancaster, directed to the plaintiff at a place beyond Preston, in Derbyshire, and requested the clerk at the station to book it. She offered to pay the carriage in advance for the whole distance, but was told by the clerk that it had better be paid at the place of delivery. It appeared that the box arrived safely at Preston, but was lost after it was despatched from thence by the North Union Railway. The plaintiff brought this action to recover for the loss of the box. *Rolfe, B.*, before whom the case was tried, stated to the jury, in summing up, that where a common carrier takes into his care a parcel directed to a particular place, and does not, by positive agreement, limit his responsibility to a part only of the distance, that is *prima facie* evidence of an undertaking to carry the parcel to the place to which it is directed; and that the same rule applied, although that place were beyond the limits within which he, in general, professed to carry on his trade of a carrier. On a motion for a new trial, the Court of Exchequer held the instruction to be correct. Lord Abinger said: "It is admitted by the defendants' counsel, that the defendants contract to do something more with the parcel than merely to carry it to Preston; they say the engagement is to carry it to Preston and there to deliver it to an agent, who is to carry it further, who is afterwards to be replaced by another, and so on until the end of the journey. Now that is a very elaborate kind of contract; it is in substance giving to the carriers a general power, along the whole line of route, to make at their pleasure fresh contracts,

which shall be binding upon the principal who employed them. But if, as it is admitted on both sides, it is clear that something more was meant to be done by the defendants than carrying as far as Preston, is it not for the jury to say what is the contract, and *how much* more was undertaken to be done by them? Now, it certainly might be true that the contract between these parties was such as that suggested by the counsel for the defendants; but other views of the case may be suggested quite as probable; such, for instance, as that these railway companies, though separate in themselves, are in the habit, for their own advantage, of making contracts, of which this was one, to convey goods along the whole line to the ultimate terminus, each of them being agents of the other to carry them forward, and each receiving its share of the profits from the last. The fact that, according to the agreement proved, the carriage was to be paid at the end of the journey, rather confirms the notion that the persons who were to carry the goods from Preston to their final destination were under the control of the defendants, who consequently exercised some influence and agency beyond the immediate terminus of their own railway. Is it not, then, a question for the jury to say what the nature of this contract was; and is it not as reasonable an inference for them to draw that the whole was one contract, as the contrary? I hardly think they would be likely to infer so elaborate a contract as that which the defendants' counsel suggest, namely, that as the line of the defendants' railway terminates at Preston, it is to be presumed that the plaintiff, who intrusted the goods to them, made it part of his bargain that they should employ for him a fresh agent, both at that place and at every subsequent change of railway or conveyance, and on each shifting of the goods give such a document to the new agent as should render him re-

(v) See the preceding note; and especially *Farmers & Mechanics Bank v. Champlain Transportation Company*, 23

Vt. 186, 209. See also *Williams v. Vanderbilt*, 28 N. Y. 217, and *Lock Company v. W. & N. R. R.* 48 N. H. 339.

¹ *Ins. Co. v. Railroad Co.* 104 U. S. 146, affirms the rule that a carrier, in the absence of a special contract, is liable only until he delivers to the next carrier, in spite of the fact that through transportation was undertaken by a despatch company under contracts with the several connecting lines, and that the freight money received at established tariff rates was divided by agreement between the several lines in proportion to the length of their respective roads. See also *Whitworth v. Erie R. Co.* 87 N. Y. 413; *Barter v. Wheeler*, 49 N. H. 9.

called a through ticket of an * agent authorized by sun- * 215 dry carriers to sell such a ticket, and the price of which is

sponsible. Suppose the owner of goods sent under such circumstances, when he finds they do not come to hand, comes to the railway office and makes a complaint, then, if the defendants' argument in this case be well founded, unless the railway company refuse to supply him with the name of the new agent, they break their contract. It is true that, practically, it might make no great difference to the proprietor of the goods which was the real contract, if their not immediately furnishing him with a name would entitle him to bring an action against them. But the question is, Why should the jury infer one of these contracts rather than the other? Which of the two is the most natural, the most usual, the most probable? Besides, the carriage-money being in this case one undivided sum, rather supports the inference that although these carriers carry only a certain distance with their own vehicles, they make subordinate contracts with the other carriers, and are partners *inter se* as to the carriage-money; a fact of which the owner of the goods could know nothing, as he only pays the one entire sum at the end of the journey, which they afterwards divide as they please. Not only, therefore, is there some evidence of this being the nature of the contract, but it is the most likely contract under the circumstances; for it is admitted that the defendants undertook to do more than simply to carry the goods from Lancaster to Preston. The whole matter is therefore a question for the jury, to determine what the contract was, on the evidence before them. . . . In cases like the present, particular circumstances might no doubt be adduced to rebut the inference which *prima facie* must be made of the defendants having undertaken to carry the goods the whole way. The taking charge of the parcel is not put as conclusive evidence of the contract sued on by the plaintiff; it is only *prima facie* evidence of it; and it is useful and reasonable for the benefit of the public that it should be so considered. It is better that those who undertake the carriage of parcels for their mutual benefit, should arrange matters of this kind *inter se*, and should be taken each to have made the others their agent to carry forward." This case is fully approved and confirmed by the case of Watson v. The A. N. & B. Railway Co. 3 E. L. & E. 497, in the Queen's Bench. That was an action for the recovery of damages sustained by the plaintiff, by reason of the non-delivery, in proper time, of

plans and models sent by him from Grantham to Cardiff. The defendants' railway extended only as far as Nottingham, where it was joined by another railway, which was continued to Bristol. It appeared that a person of the name of Chevins had been appointed by the defendants as their station-master at Grantham, to receive and deliver parcels to be sent by the railway from that place, and that in such capacity he had received the package in question, which was directed to Cardiff; and there was some evidence to show that Chevins had told the plaintiff that the package would arrive at Cardiff in time. The station-master had said, when the package was delivered to him, that he could receive payment for it only so far as Nottingham, as he had no rates of payment beyond; and thereupon the words on the package "paid to Bristol," were erased, and the words, "paid to Nottingham," substituted by Chevins, but this was done without the knowledge of the plaintiff, and the original direction was left on the package, which, being detained at Bristol, did not arrive at Cardiff in due time. The court held that the defendants were liable. Patterson, J., said: "The case of Muschamp v. The Lancaster and Preston Junction Railway Co., is directly in point; and if carriers receive a package to carry to a particular place, whether they themselves carry it all the way or not, they must be said to have the conveying of it to the end of the journey, and the other parties to whom they may hand it over are their agents. We must adhere to this principle, and the company are clearly liable, unless the facts show that their responsibility has determined. Their not having taken the amount of the carriage is immaterial, and is explained by the fact of their not knowing what that amount would be. Chevins appears to have been the agent of the defendants; he receives the parcel to carry it to Cardiff, and makes out an invoice which the defendants have refused to produce. Now, putting these circumstances together, there is abundant evidence that they contracted to carry the package to Cardiff, and they were guilty of negligence in detaining it at Bristol." And per Erle, J.: "The first question is, whether there is any evidence of the defendants having contracted: and I think the person to whom the package was delivered must be taken to be the agent of the company. Then, having received a parcel to be conveyed to Cardiff, when their line only

* 216 shared in certain proportions by all of them, * would estop the carriers from denying a partnership for the whole line ;

extends to Nottingham, do they make themselves liable for its carriage beyond their own line ? This question was much considered in *Muschamp v. The Lancaster & Preston Junction Railway Co.*, and I think it was there properly decided, that where goods are received at one terminus for conveyance to another, the company are answerable for all the intermediate termini, and the receipt of such goods is *prima facie* evidence of such liability." The same doctrine was declared by the Supreme Court of New York, in the case of *St. John v. Van Santvoord*, 25 Wend. 660. But their judgment in that case was reversed by the Court for the Correction of Errors. See 6 Hill (N. Y.), 157. The English rule is said also to have been adopted in *Bennett v. Filyaw*, 1 Fla. 403. See *Angell, Com. Car.* 100. A somewhat similar question arose in the case of *Wilcox v. Parmelee*, 3 Sandf. 610. There the plaintiff purchased in the city of New York a quantity of merchandise, which the defendant undertook to forward from thence to Fairport, Ohio, by a written agreement, for fifty cents by sail, and sixty-five cents for 100 lbs. by steam. Those goods marked "steam," to go by steam, all other goods "to be shipped by vessel from Buffalo." Certain goods were marked to go by steam, but they were sent forward from Buffalo in a sailing vessel, and were lost in a gale on Lake Erie. It appeared that the defendant owned a line of boats on the canal between Albany and Buffalo, but that he had no vessels on Lake Erie. *Held*, that the defendant, by the terms of his contract, was a common carrier from New York to Fairport, and not merely on the canal; and that he was liable for the loss.—The English rule is condemned in very strong terms by Mr. Justice *Redfield*, in the case of *Farmers & Mechanics Bank v. Champaign Transportation Co.* 23 Vt. 186, 209. In speaking of the obligation of the carrier to make a personal delivery, the learned judge says: "There has been an attempt to push one department of the law of carriers into an absurd extreme, as it seems to us, by a misapplication of this rule of the carrier being bound to make a personal delivery. That is, by holding the first carrier, upon a route consisting of a succession of carriers, liable for the safe delivery of all articles at their ultimate destination. *Muschamp v. The L. & P. Railway Co.* 8 M. & W. 421, is the only English case much relied upon in favor of any such proposition, and that case is, by

the court, put upon the ground of the particular contract in the case; and also, that 'All convenience' is in favor of such a rule, 'and there is no authority against it,' as said by Baron *Rofé*, in giving judgment. *St. John v. Van Santvoord*, 25 Wend. 660, assumed similar ground. But this court, in this same case (16 Vt. 52), did not consider that decision as sound law, or good sense; and it has since been reversed in the Court of Errors. *Van Santvoord v. St. John*, 6 Hill (N. Y.), 158, and this last decision is expressly recognized by this court, 18 Vt. 131. *Weed v. Schenectady & S. Railroad Co.* 19 Wend. 534, is considered by many as having adopted the same view of the subject. But that case is readily reconciled with the general rule upon this subject, that each carrier is only bound to the end of his own route, and for a delivery to the next carrier, by the consideration that in this case there was a kind of partnership connection between the first company and the other companies, constituting the entire route, and also that the first carriers took pay, and gave a ticket through, which is most relied upon by the court. But see the opinion of *Walkworth*, Ch., in *Van Santvoord v. St. John*, 6 Hill (N. Y.), 158. And in such cases, where the first company gives a ticket, and takes pay through, it may be fairly considered equivalent to an undertaking to be responsible throughout the entire route. The case of *Bennett v. Filyaw*, 1 Fla. 403, is referred to in *Angell, Com. Car.* § 95, n. 1, as favoring this view of the subject. The rule laid down in *Garside v. Trent & Mersey Nav. Co.* 4 T. R. 581, that each carrier, in the absence of special contract, is only liable for the extent of his own route, and the safe storage and delivery to the next carrier, is undoubtedly the better, the more just and rational, and the more generally recognized rule upon the subject. *Ackley v. Kellogg*, 8 Cowen, 223. This is the case of goods carried by water from New York to Troy, to be put on board a canal boat at that place, and forwarded to the north, and the goods were lost by the upsetting of the canal boat, and the defendants were held not liable for the loss beyond their own route. The cases all seem to regard this as the general rule upon this subject, with the exception of those above referred to; one of which (8 M. & W. 421), considers it chiefly a matter of fact, to be determined by the jury as to the extent of the undertaking; one (25 Wend. 660) has been dis-

and at the same time would perhaps permit the * plaintiff, * 217 if his person or goods were injured on any part of the route,

regarded by this court, and reversed by their own Court of Errors (6 Hill (N. Y.), 158); one (19 Wend. 534) is the case of ticketing through upon connected lines; and one (1 Fla. 403) I have not seen." And in *Nutting v. Conn. River R. R. Co.* 1 Gray, 502, it was held, that a railroad corporation, receiving goods for transportation to a place situated beyond the line of their road, on another railroad, which connects with theirs, but with the proprietors of which they have no connection in business, and taking pay for the transportation over their own road only, is not liable, in the absence of any special contract, for the loss of the goods, after their delivery to the proprietors of the other railroad. And *Metcalf*, J., delivering the opinion of the court, said: "On the facts of this case, we are of opinion that there must be judgment for the defendants. Springfield is the southern terminus of their road; and no connection in business is shown between them and any other railroad company. When they carry goods that are destined beyond that terminus, they take pay only for the transportation over their own road. What, then, is the obligation imposed on them by law, in the absence of any special contract by them, when they receive goods at their depot in Northampton, which are marked with the names of consignees in the city of New York? In our judgment, that obligation is nothing more than to transport the goods safely to the end of their road, and there deliver them to the proper carriers to be forwarded towards their ultimate destination. This the defendants did, in the present case, and in so doing, performed their full legal duty. If they can be held liable for a loss that happens on any railroad besides their own, we know not what is the limit of their liability. If they are liable in this case, we do not see why they would not also be liable if the boxes had been marked for consignees in Chicago, and had been lost between that place and Detroit, on a road with which they had no more connection than they have with any railroad in Europe. . . . The plaintiff's counsel relied on the case of *Muschamp v. Lancaster & Preston Junction Railway*, 8 M. & W. 421, in which it was decided by the Court of Exchequer, that when a railway company take into their care a parcel directed to a particular place, and do not, by positive agreement, limit their responsibility to a part only of the distance, that is *prima facie* evidence of an undertaking to carry

the parcel to the place to which it is directed, although that place be beyond the limits within which the company in general profess to carry on their business of carriers. And two Justices of the Queen's Bench subsequently made a like decision. *Watson v. Ambergate, Nottingham, & Boston Railway*, 3 E. L. & E. 497. We cannot concur in that view of the law; and we are sustained in our dissent from it by the Court of Errors in New York, and by the Supreme Courts of Vermont and Connecticut. *Van Santvoord v. St. John*, 6 Hill (N. Y.), 157; *Farmers & Mechanics Bank v. Champlain Transportation Co.* 18 Vt. 140, and 23 Vt. 209; *Hood v. N. York & N. Haven Railroad Co.* 22 Conn. 1. In these cases, the decision in *Weed v. Saratoga & Schenectady Railroad Co.* 19 Wend. 534 (which was cited by the present plaintiff's counsel), was said to be distinguishable from such a case as this, and to be reconcilable with the rule, that each carrier is bound only to the end of his route, unless he makes a special contract that binds him further." See also, on this subject, *Fowles v. Great Western Railway Co.* 16 E. L. & E. 531; s. c. 7 Exch. 699; *Scothorn v. South Staffordshire Railway Co.* 18 id. 553; s. c. 8 Exch. 341; *Wilson v. York, Newcastle, & Berwick Railway Co.* id. 557; *Walker v. York & North Midland Railway Co.* 22 id. 315; s. c. 2 E. & B. 750; *Hellaby v. Weaver*, 17 Law Times, 271; *Briggs v. Boston, &c. R. R. Co.* 6 Allen, 246; *Darling v. Boston, &c. R. R. Co.* 11 Allen, 295; *Converse v. Norwich, &c. R. R. Co.* 33 Conn. 166; *Detroit, &c. R. R. Co. v. Farmers' Bank*, 20 Wis. 122; *Salinger v. Simmons*, 8 Abb. Pr. (n. s.) 409; *Gass v. New York, &c. R. Co.* 99 Mass. 220; *Knight v. Portland, &c. R. R. Co.* 56 Me. 234. In the case of *Hood v. New York & New Haven Railroad Co.* 22 Conn. 1; s. c. id. 502, it was held, that the corporate power of a railroad did not extend to a contract for the carriage of a person by staging beyond their own length of road, and that the fact that they had been for a long time in the habit of making and executing such contracts, could not estop them from setting up this lack of power when sued by a person to whom they had given a ticket for conveyance beyond their line of route, and who was injured on such passage. See also, as recent American cases, holding what we think the American doctrine in regard to connected railroad companies, *Elmore v. Naugatuck R. R. Co.* 23 Conn. 457; *N. R. R. Co. v. Waterbury*

to sue the carrier, on whose route the injury took place, * 218 * separately. (w)¹ But when a carrier is in possession of goods to be delivered to a subsequent carrier for transportation, his liability as insurer will continue, even though the second carrier, after notice and request to receive the goods, has neglected for an unreasonable time to do so. In order to exonerate himself, the first carrier must in some way clearly indicate his renunciation of the relation of carrier. (x)² If the owner proves the delivery of the goods to the first carrier, in good order, and the delivery of them to the second carrier, this last will be held unless he proves that they were not injured while in his hands, or were not in good condition when he received them. (xx)

A railroad is certainly liable for losses to persons or goods in the cars of other railroads which it receives and transports on its own. (y) And it has been held in Massachusetts, that a railroad corporation, chartered by the laws of that Commonwealth, and leasing a branch of their railroad to a railroad corporation out of the State, is still liable as a common carrier for goods lost on that branch. (z) In New York, where one railroad company allowed another railroad company to run its cars over the road

Button Co. 24 Conn. 468. In this last case, the court held, that a railroad company could not contract to carry beyond its own limits. But see Noyes v. R. & B. R. R. Co. 1 Williams, 110; Hart v. R. & S. R. R. Co. 4 Seld. 37; Kyle v. L. R. R. Co. 10 Rich. L. 382. It may be added, that the case of Muschamp v. L. & F. R. Co., and Scotthorn v. S. S. R. Co. 8 Exch. 341, are confirmed in the case of Crouch v. G. W. R. Co. 2 Hurl. & N. 491, 3 id. 183. And see also Willey v. West. C. R. Co. Exchequer Chamber, 1858, 21 Law Rep. 372; Northern R. R. Co. v. Fitchburg R. R. Co. 6 Allen, 254; Simmons v. Law, 8 Bosw. 213; McCann v. Baltimore R. R. Co. 20 Md. 202.

(w) Where a plaintiff had bought in Washington a through ticket for Cincin-

nati, and brought an action for loss of baggage against the Little Miami Railroad Company, alleging that the defendants had united with four other companies in a partnership, for the purpose of furnishing through-tickets, and had a common agent in Washington; the action was sustained by the Superior Court in Cincinnati, Spencer, J., giving a very able and elaborate opinion, 7 Am. Law Reg. 427.

(x) Goold v. Chapin, 20 N. Y. 259.

(xx) Smith v. N. Y., &c. R. R. Co. 43 Barb. 225.

(y) Schopman v. B. & W. R. R. Co. 9 Cush. 24. But see Coxon v. Great Western Railway Co. 5 H. & N. 274.

(z) Langley v. B. & M. R. R. Co. 10 Gray, 103.

¹ Railroad Co. v. Campbell, 36 Ohio St. 647, declared that a carrier, receiving pay for through transportation over several connecting lines, was liable for the negligence of any one of them, and that a restriction of the amount of liability printed on the ticket would not excuse, in the absence of proof by the carrier of an agreement to that effect.

² Hooper v. Chicago, &c. R. Co. 27 Wis. 81. If the next carrier is not ready to receive the goods, and the first carrier stores them in a warehouse, his liability will not be changed to that of warehouseman. Ill. Cent. Railroad v. Mitchell, 68 Ill. 471, citing Michigan, &c. R. Co. v. Mineral Springs Manuf. Co. 16 Wall. 318.

of the first, and a passenger being injured brought an action against both companies, the joinder was sustained. (a)

How far the carrier can lessen his responsibility by his own acts, and especially by notices defining or entirely withdrawing his liability, has been much disputed. As the greater part of the cases in which this question occurs, or is likely to occur, relate to the property of passengers, we will consider this question under the next topic. (aa)

* SECTION XIV.

* 219

COMMON CARRIERS OF PASSENGERS.

The carrier of passengers is not liable for them in the same way in which the carrier of goods is liable. The rule, the exception, and the limitation and reason of the exception are now all perfectly well settled. By the general rule, the liability of the common carrier does not depend upon his negligence, because he insures the owners of all the goods he carries against all loss or injury that does not come from the act of God or the public enemy. The exception to this, in the case of the carrier of passengers, is, that he is liable only where the injury has arisen from his own negligence; and the limitation to this exception is, that he is thus liable for injuries resulting from the slightest negligence on his part. (b) If the carrier cannot guard against a certain danger,

(a) *Colgrove v. N. Y. & H. R. R. Co.* 6 Duer, 382.

(aa) For recent cases as to notices by carriers of goods, see *Judson v. Western R. R. Co.* 6 Allen, 486; *Steele v. Townsend*, 1 Ala. 1; *Thayer v. St Louis, &c. R. R. Co.* 22 Ind. 26; *Falvey v. Northern Co.* 15 Wis. 129; *Hays v. Kennedy*, 3 Grant, 851; *York Co. v. Central R. R. Co.* 3 Wallace, 100.

(b) *Derwort v. Loomer*, 21 Conn. 246; *Fuller v. Naugatuck Railroad Co.* id. 558; *Caldwell v. Murphy*, 1 Duer, 283; *Hege-man v. Western R. R. Co.* 16 Barb. 353; *Nashville & C. R. R. Co. v. Messino*, 1 Sneed, 220. This was very authoritatively declared by Lord Chief Justice *Eyre*, in the case of *Aston v. Heavan*, 2 Esp. 533. That was an action against the defendants, as proprietors of a stage-coach, to recover damages received by the plaintiff in consequence of the upset-

ting of the defendants' coach. The defense relied upon was, that the coach was driving at a regular pace on the Hammersmith road, but that on the side was a pump of considerable height, from whence the water was falling into a tub below; that the sun shone brightly, and being reflected strongly from the water, the horses had taken fright and run against the bank at the opposite side, where the coach was overset. And per *Eyre*, C. J.: "This action is founded entirely in negligence. It has been said by the counsel for the plaintiff, that whenever a case happens, even where there has been no negligence, he would take the opinion of the court whether defendants circumstanced as the present, that is, coach owners, should not be liable in all cases, except where the injury happens from the act of God or the king's enemies. I am of opinion, the cases of

it is then his duty to warn the passengers of it, and if he fails to do this he is liable for injury to them. But if he gives this warn-

the loss of goods by carriers, and the present, are totally unlike. When that case does occur, he will be told that carriers of goods are liable by the custom, to guard against frauds they might be tempted to commit, by taking goods intrusted to them to carry, and then pretending they had lost or been robbed of them; and because they can protect themselves; but there is no such rule in the case of the carriage of the persons. This action stands on the ground of negligence only." To the same effect is the ruling of Sir *James Mansfield*, in *Christie v. Griggs*, 2 Camp. 79. That was an action of assumpsit against the defendant as owner of the Blackwall stage, on which the plaintiff, a pilot, was travelling to London, when it broke down, and he was greatly bruised. The first count imputed the accident to the negligence of the driver; the second, to the insufficiency of the axle-tree of the carriage. The defendant introduced evidence to show that the axle-tree had been examined a few days before it broke, without any flaw being discovered in it; and that, when the accident happened, the coachman, a very skilful driver, was driving in the usual track, and at a moderate pace. And, per *Mansfield*, C. J., in summing up to the jury: "As the driver has been cleared of everything like negligence, the question for the jury will be as to the sufficiency of the coach. If the axle-tree was sound, as far as human eye could discover, the defendant is not liable. There is a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier is answerable at all events. But he does not warrant the safety of passengers. His undertaking as to them goes no further than this, that as far as human care and foresight can go, he will provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff has no remedy for the misfortune he has encountered." See also *Harris v. Costar*, 1 C. & P. 636; *White v. Boulton, Peake*, Cas. 81; *Crofts v. Waterhouse*, 3 Bing. 319. Such also has been repeatedly declared to be the law in this country. Thus, in the case of *Derwort v. Looner*, 21 Conn. 246, one of the latest cases on this subject, *Elsworth*, J., says: "The rule of law on this subject is fully established in our own courts and elsewhere, and is not controverted by the learned counsel in this case. The principle is, that in the case of com-

mon carriers of passengers, the highest degree of care which a reasonable man would use, is required. This rule applies alike to the character of the vehicle, the horses and harness, the skill and sobriety of the driver, and to the manner of conducting the stage under every emergency or difficulty. The driver must, of course, be attentive and watchful. He has, for the time being, committed to his trust the safety and lives of people, old and young, women and children, locked up as it were in the coach or rail-car, ignorant, helpless, and having no eyes or ears or power to guard against dangers, and who look to him for safety in their transportation. The contract to carry passengers differs, it is true, from a contract to carry freight; but in both cases the rule is rigorous and imperative; in the latter, the carrier is answerable at all events, except for the act of God and the public enemy; while in the former, the most perfect care of prudent and cautious men is demanded and required. The stage owner does not warrant the safety of passengers; yet his undertaking and liability as to them go to this extent, that he, or his agent, shall possess competent skill, and that, as far as human foresight and care can reasonably go, he will transport them safely. He is not liable for injuries happening to passengers, from sheer accident or misfortune, where there is no negligence or fault, and where no want of caution, foresight, or judgment, would prevent the injury. But he is liable for the smallest negligence in himself or his driver." See also *Fuller v. The Naugatuck Railroad Co.* 21 Conn. 557; *Hall v. Connecticut River Steamboat Co.* 13 Conn. 819; *McKinney v. Neil*, 1 McLean, 540; *Maury v. Talmadge*, 2 id. 157; *Farish v. Reigle*, 11 Gratt. 697; *Stokes v. Saltonstall*, 13 Pet. 181; *Stockton v. Frey*, 4 Gill, 406; *Camden & Amboy R. R. Co. v. Burke*, 13 Wend. 626; *Hollister v. Nowlen*, 19 Wend. 286; *Hege-mann v. W. R. R. Co.* 8 Kern. 9; *Curtis v. R. & S. R. R. Co.* 20 Barb. 282; *Frink v. Potter*, 17 Ill. 406; *Martin v. G. N. R. Co.* 30 E. L. & E. 473; s. c. 16 C. B. 179; *Willis v. L. I. R. R. Co.* 32 Barb. 398.—In the case of *Boyce v. Anderson*, 2 Pet. 150, the question arose, whether the rule applicable to the carriage of goods, or that applicable to the carriage of passengers, should be applied to the case of negro slaves. That was an action brought by the owner of slaves, against the proprietor of a steamboat on the Mississippi,

ing, a passenger who voluntarily encounters the danger cannot

to recover damages for the loss of the slaves, alleged to have been caused by the negligence or mismanagement of the captain and commandant of the boat. The case came up on error from the Circuit Court for the District of Kentucky. The court below instructed the jury, among other things, "that the doctrine of common carriers did not apply to the case of carrying intelligent beings, such as negroes;" and the Supreme Court held this instruction to be correct. *Marshall*, C. J., said: "There being no special contract between the parties in this case, the principal question arises on the opinion expressed by the court, 'that the doctrine of common carriers does not apply to the case of carrying intelligent beings, such as negroes.' That doctrine is, that the carrier is responsible for every loss which is not produced by inevitable accident. It has been pressed beyond the general principles which govern the law of bailment, by considerations of policy. Can a sound distinction be taken between a human being in whose person another has an interest, and inanimate property? A slave has volition, and has feelings which cannot be entirely disregarded. These properties cannot be overlooked in conveying him from place to place. He cannot be stowed away as a common package. Not only does humanity forbid this proceeding, but it might endanger his life or health. Consequently, this rigorous mode of proceeding cannot safely be adopted, unless stipulated for by special contract. Being left at liberty, he may escape. The carrier has not and cannot have the same absolute control over him that he has over inanimate matter. In the nature of things, and in his character, he resembles a passenger, not a package of goods. It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods. There are no slaves in England, but there are persons in whose service another has a temporary interest. We believe that the responsibility of a carrier for injury which such person may sustain, has never been placed on the same principle with his responsibility for a bale of goods. He is undoubtedly answerable for any injury sustained in consequence of his negligence, or want of skill; but we have never understood that he is responsible further. The law applicable to common carriers is one of great rigor. Though to the extent to which it has

been carried, and in the cases to which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried further, or applied to new cases. We think it has not been applied to living men, and that it ought not to be applied to them." The learned judge, in a subsequent part of his opinion, intimated that the carrier of passengers was bound only to ordinary diligence; but whatever he said to that effect cannot be considered as law, and was virtually overruled in the subsequent case of *Stokes v. Saltonstall*, 13 Pet. 181, 192. See also, as to the liability of a carrier of slaves, *Clark v. McDonald*, 4 McCord, 223; *Williams v. Taylor*, 4 Port. (Ala.) 224. If any portion of a carrier's route is attended with peculiar danger, he is bound to give his passengers notice thereof. Thus, in *Laing v. Colder*, 8 Penn. St. 479, which was an action on the case for negligence, whereby the plaintiff's arm was broken while he was travelling in the railroad car of the defendants, it appeared that the accident occurred while the car was passing over a bridge, which was so narrow that the plaintiff's hand, lying outside of the car-window, was caught by the bridge, and his arm broken. The defendants gave evidence to show that, during the journey, warning had been given by their agent to a passenger named Long, of the danger of putting his feet or arms out of the window, and that he sat so near the plaintiff, that the warning must have been heard by the latter. They also proved that printed notices were put up in the cars warning passengers not to put their arms or heads outside the windows, and that, immediately before reaching the bridge, notice was given in a loud voice to passengers to keep their heads and arms inside the car. Upon this evidence, *Eldred*, P. J., instructed the jury, "that a carrier of passengers was bound to furnish suitable conveyances, such as with due care and proper attention would carry passengers safely, unless interrupted by some accident which no human wisdom could foresee. That he must give notice of approaching danger, or of the dangerous places on the route, if some are more dangerous than others. This notice must be full and complete to all persons who travel, whether learned or unlearned. The slightest negligence in any of these particulars makes him liable for all damages. That in the present case the presumption was there had been negligence, and it was for the defendants to show they had done everything in their power

hold the carrier responsible. (*bb*) It is no defence to the * 220 * carrier, that the negligence was that of his agent (as of the conductor of a car), or that it was wilful on the part of the agent. (*c*) And a railroad company which permits another company to use its road, is liable for damage caused to passengers itself is carrying, by the negligence of the servants of the other company which is permitted to use the road. (*cc*)¹

to relieve themselves, or that it resulted from the plaintiff's negligence and folly. That a printed notice of the danger of passengers putting their hands out of the windows was not sufficient; but if they had given the plaintiff sufficient warning as they approached the bridge, this would discharge them." The case was carried up to the Supreme Court of Pennsylvania, and that court held the instruction to be correct. *Bell*, J., in delivering the judgment said: "The slightest neglect against which human prudence and foresight may guard, and by which hurt or loss is occasioned, will render them (common carriers) liable to answer in damages. Nay, the mere happening of an injurious accident raises *prima facie* a presumption of neglect, and throws upon the carrier the *onus* of showing it did not exist. Above all, if there be in any part of the road a particular passage more than ordinarily dangerous, or requiring superior circumspection on the part of a passenger, the conductor of the vehicle is bound to give due notice of it, and a failure to do so will make his principal responsible." See also *Dudley v. Smith*, 1 Camp. 167; *Derwort v. Loomer*, 21 Conn. 245; *Maury v. Talmadge*, 2 McLean, 157; *Sales v. Western Stage Co.* 4 Iowa, 547; *Johnson v. Winona R. R. Co.* 11 Min. 286. So, if through the default of a coach-proprietor in neglecting to provide proper means of conveyance, a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach, whereby his leg is broken, the proprietor will be responsible in damages, although the coach was not actually overturned. *Jones v. Boyce*, 1 Stark. 498. This case was much considered in *Stokes v. Saltonstall*, 13 Pet. 181, and the doctrine it contains fully confirmed. See also to the same effect, *Ingalls v. Bills*, 9 Met. 1; *Eldridge v. Long Island Railroad Co.* 1 Sandf. 87; *Edwards v. Lord*, 49 Me. 279; *Alden v. New York, &c. R. R. Co.* 26 N. Y. 102; *Thayer v.*

St. Louis, &c. R. R. Co. 22 Ind. 26. As to what will constitute that degree of negligence for which a carrier of passengers will be held liable, it must of course depend upon the circumstances of each case; and is principally a question of fact for the jury, with proper instructions from the court. See *Derwort v. Loomer*, 21 Conn. 245. In *Crofts v. Waterhouse*, 3 Bing. 319, the driver of a stage-coach gathered a bank, and upset the coach. He had passed the spot where the accident happened twelve hours before, but in the interval a landmark had been removed. In an action for an injury sustained by this accident, *Luttedale*, J., before whom the cause was tried, told the jury, that as there was no obstruction in the road, the driver ought to have kept within the limits of it; and that the accident having been occasioned by his deviation, the plaintiff was entitled to a verdict. A verdict having been returned accordingly, the Court of Common Pleas granted a new trial, on the ground that the jury should have been directed to consider whether or not the deviation was the effect of negligence. And per *Best*, C. J.: "The coachman was bound to keep in the road if he could; and the jury might, from his having gone out of the road, have presumed negligence, and on that presumption have found a verdict for the plaintiff. But the learned judge, instead of leaving it to the jury to find whether there was any negligence, told them that the coachman having gone out of the road, the plaintiff was entitled to a verdict. This action cannot be maintained unless negligence be proved; and whether it be proved or not is for the determination of the jury, to whom in this case it was not submitted."

(*bb*) *Brockway v. Lascala*, 1 Edm. Sel. Cas. 135.

(*c*) *Weed v. Panama Railroad Co.* 5 Duer, 198; s. c. 17 N. Y. 362.

(*cc*) *Railroad Co. v. Barrow*, 5 Wallace, 90.

¹ *Thomas v. Rhymney Railway Co.* L. R. 6 Q. B. 266. And a railroad company using sleeping or drawing-room cars belonging to another company is liable to its

A person is a passenger who with intent to become a passenger, is riding to a station in a carriage run by the company to carry passengers to their station, although he has not bought a ticket nor formally announced his purpose; and, if injured, the company are liable. (cd)

* A carrier, who is not a *common carrier*, may be liable * 221 for injury to a passenger caused by his default; but not to one who rides * in his carriage, without any bargain, and * 222 without his authority. (d) Whether a common carrier is liable to a passenger to whom he has *given* passage, and from whom he has, therefore, no right to demand fare, is not so certain; but he would certainly be liable for gross negligence, and probably liable for any negligence. (e) He is certainly not ex-

(cd) *Buffett v. Troy, &c. R. R. Co.* 40 N. Y. 168.

(d) *Lygo v. Newbold*, 9 Exch. 302.

(e) This question arose in the case of *The Philadelphia & Reading Railroad Co. v. Derby*, 14 How. 468, in the Supreme Court of the United States, but was not decided. The court, however, strongly intimated an opinion in the affirmative. The circumstances of the case were these. The action was brought to recover damages for an injury suffered by the plaintiff on the railroad of the defendants. The plaintiff was himself a stockholder in the defendants' railroad company, and the president of another. He was on the road of the defendants by invitation of the president of the company, not in the usual passenger cars, but in a small locomotive car used for the convenience of the officers of the company, and paid no fare for his transportation. The injury to his person was occasioned by coming into collision with a locomotive and tender, in the charge of an agent or servant of the company, which was on the same track, and moving in an opposite direction. Another agent of the company, in the exercise of proper care and caution, had given orders to keep this track clear. The driver of the colliding engine acted in disobedience and disregard of these orders, and thus caused the collision. The court below instructed the jury, that if the plaintiff was lawfully

on the road at the time of the collision, and the collision and consequent injuries to him were caused by the *gross negligence* of one of the servants of the defendants, then and there employed on the road, he was entitled to recover, notwithstanding the circumstances given in evidence, and relied upon by the defendants' counsel, as forming a defence to the action; namely, that the plaintiff was a stockholder in the company, riding by the invitation of the president, paying no fare, and not in the usual passenger cars, &c. The Supreme Court held this instruction to be correct, and *Grier, J.*, in speaking of the grounds of a carrier's duty, said: "This duty does not result alone from the consideration paid for the service. It is imposed by the law, even where the service is gratuitous. 'The confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it.' See *Coggs v. Bernard*, and cases cited in 1 Smith, Lead. Cas. 95. It is true a distinction has been taken in some cases between simple negligence and great or gross negligence, and it is said that one who acts gratuitously is liable only for the latter. But this case does not call upon us to define the difference (if it be capable of definition), as the verdict has found this to be a case of gross negligence. When carriers undertake to convey persons by the power-

passengers for injuries received by the negligence of such other company or its servants, although a special ticket is necessary for riding on such cars, as by the fall of a berth, *Penn. Co. v. Roy*, 102 U. S. 451; or for a wrongful removal therefrom by a porter, *Thorpe v. N. Y. Cent. R. Co.* 76 N. Y. 402. *Pullman Palace Car Co. v. Taylor*, 65 Ind. 153, decided that a sleeping-car company was liable to one hiring a particular berth in a sleeping car, for a certain distance, by reason of its substitution of another car for its own convenience.

* 223 cused by mere non-payment, unless payment has been demanded and refused. (*ee*) * It has been held in New York, that a contract between a railroad company and a gratuitous passenger, exempting the company from liability under any circumstances of negligence on the part of its agents, is not against law or public policy, and is valid; (*f*)¹ and it has been held in Illinois, just otherwise. (*ff*)² But it would seem that an owner of cattle transported on a railroad, who goes along in charge of them, is not such a gratuitous passenger. (*g*) It may be remarked, that a servant, travelling with his master, may recover for a loss, although his master bought and paid for the ticket. (*h*)

The reason of the difference between his liability as to passengers, and as to goods, is this. The carrier of goods has absolute control over them while they are in his hands; he can fasten them with ropes, or box them up, or put them under lock and key. But the carrier of passengers must leave to them some power of self-direction, some freedom of motion, some care of * themselves. It would be wrong, therefore, to hold him to as absolute a responsibility as in the case of goods;

ful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.' And the doctrine laid down in that case was reaffirmed, as not only resting on public policy, but on sound principle, in *Steamboat New World v. King*, 16 How. 409. But see *Boyce v. Anderson*, 2 Pet. 150, 158, where it is said, that the carrier of a slave without reward would be liable only for gross negligence. See also *Williams v. Tay-*

lor, 4 Port. (Ala.) 234. In *Fay v. Steamer New World*, 1 Cal. 348, it was decided that a common carrier, transporting gold dust gratuitously, was not liable in case of loss, unless negligent. See *Gordon v. Grand Street R. R. Co.* 40 Barb. 546; *Indiana, &c. R. R. Co. v. Mundy*, 21 Ind. 48; *Ohio R. R. Co. v. Mahling*, 30 Ill. 9. (ee) *Hurt v. Southern R. R. Co.* 40 Miss. 201.

(f) *Wells v. New York Central R. R.*
Co. 24 N. Y. (10 Smith) 181.

(f) Illinois R. R. Co. v. Read, 87 Ill. 484.

(g) Perkins v. New York Central R. R. Co. 24 N. Y. (10 Smith) 222; Flinn v. Philadelphia R. R. Co. 1 Houston, 489.

(h) *Marshall v. York, N. & B. Co.* 11 C. B. 898, 855.

¹ And in New Jersey, *Kinney v. Central R. Co.* 5 Vroom, 513. In England it is held that a drover who travels free "at his own risk" cannot recover for injuries resulting from a railroad company's negligence, *Gallin v. London, &c. R. Co.* L. R. 10 Q. B. 212; even if "gross," *McCawley v. Furness R. Co.* L. R. 8 Q. B. 57; nor if travelling on one railroad in continuation of his journey under such an agreement with another railroad, *Hall v. North Eastern R. Co.* L. R. 10 Q. B. 437. The holder of a "drover's ticket" cannot use it for stop-over purposes contrary to a regulation of the railroad company. *Dietrich v. Penn. R. Co.* 71 Penn. St. 432.

² So in Indiana. *Ohio, &c. R. Co. v. Selby*, 47 Ind. 471. See however *Arnold v. Ill. Cent. R. Co.* 83 Ill. 273.

it is, however, held that the carrier of passengers is liable for the goods of the passenger put under his care in the same way that he is for other goods. (h) But still the policy of the law applies to the carrier of passengers as to the carrier of goods. It admits only so much mitigation of the rule, as that he is liable only when he is guilty of *some* negligence; but if in the least degree negligent, he is liable, because the law holds him to do all that care and skill can do for the safety of his passengers. Only when all this is done, and he can show that the injury complained of is not to be attributed to any default whatever on his part, or on the part of any one for whom he is responsible, is he discharged from his liability. It seems to have been held decidedly, that the *onus* to prove that he is not in fault, rests on him. (i) Some question, however, may exist on this point. We should express our own view of the law * thus. The plaintiff * 225 must not merely prove that he has sustained injury; but

(h) *Merrill v. Grinnell*, 30 N. Y. 594.

(i) *Christie v. Griggs*, 2 Camp. 70. This was an action of assumpait against the defendant, as owner of the Blackwall stage, on which the plaintiff, a pilot, was travelling to London, when it broke down and he was greatly bruised. The first count imputed the accident to the negligence of the driver; the second, to the insufficiency of the axle-tree of the carriage. The plaintiff having proved that the axle-tree snapped asunder at a place where there was a slight descent, from the kennel crossing the road; that he was in consequence precipitated from the top of the coach; and that the bruises he received confined him several weeks to his bed: there rested his case. *Best*, Serjeant, contended strenuously that the plaintiff was bound to proceed further, and give evidence, either of the driver being unskillful, or of the coach being insufficient. But per *Mansfield*, C. J.: "I think the plaintiff has made a *prima facie* case by proving his going on the coach, the accident, and the damage he has suffered. It now lies on the other side to show that the coach was as good a coach as could be made, and that the driver was as skilful a driver as could anywhere be found. What other evidence can the plaintiff give? The passengers were probably all sailors like himself; and how do they know whether the coach was well built or whether the coachman drove skilfully? In many other cases of this sort it must be equally impossible for the plaintiff to give the evidence required. But when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it be unfounded, and it is now incumbent on the defendant to make out that the damage in this case arose from what the law considers a *mere accident*." The same point was ruled by Lord Denman at *Nisi Prius*, in *Carpue v. The L. & B. Railway Co.* 5 Q. B. 747: it was decided by the Court of Exchequer, in *Skinner v. London, Brighton, & South-coast Railway Co.* 2 E. L. & E. 860; s. c. 6 Exch. 787, and has been repeatedly confirmed in this country. Thus, in *Ware v. Gay*, 11 Pick. 106, it was held, that, if in an action by a passenger against the proprietors of a stagecoach, for an injury occasioned by the insufficiency of the coach, the plaintiff proves, that while the coach was driven at a moderate rate upon a plain and level road, without coming in contact with any other object, one of the wheels came off and the coach overset, whereby the plaintiff was hurt, the law will imply negligence, and the burden of proof will rest upon the defendants to rebut this legal inference, by showing that the coach was properly fitted out and provided. To the same effect are *Stokes v. Saltonstall*, 18 Pet. 181; *Stockton v. Frey*, 4 Gill, 406; *McKenney v. Neil*, 1 McLean, 540; *Farish v. Reigle*, 11 Gratt. 697; *Brehm v. Great Western R. R. Co.* 34 Barb. 258; *Boyce v. Cal. Stage Co.* 25 Cal. 460. And see *ante*, p. * 222, note (d).

- * 226 carry * them the whole route ; (*m*) to demand no more than the usual and established compensation ; to treat all
- * 227 his passengers alike ;¹ * to behave to all with civility and propriety ; (*n*) to provide suitable carriages and means of transport ; (*o*)² and to keep the roads in good condition

Amherst, and onward to Francestown. A third person ran a coach to and from Nashua and Lowell, and the defendant agreed with the proprietor of the coach connecting with his line, that he would not receive passengers who came from Lowell to Nashua in the coach of such third person on the same day that they applied for passage to places above Nashua. The plaintiff was notified at Lowell of this arrangement, but notwithstanding came from Lowell to Nashua in that coach, and then demanded a passage in the defendant's coach to Amherst, tendering the regular fare. *Held*, that the defendant was bound to receive him, there being sufficient room, and no evidence that the plaintiff was an unfit person to be admitted, or that he had any design of injuring the defendant's business.

(*m*) *Dudley v. Smith*, 1 Camp. 167. In this case the plaintiff took a seat on the outside of the defendant's coach, to be conveyed from a place called the Red Lion, in the Strand, to Chelsea. It appeared that she was so conveyed safely as far as the Cross Keys Inn, at Chelsea, where the coach was accustomed to stop. When the coach arrived before the gateway of this inn, leading to the stable-yard, the coachman requested the plaintiff to alight there, as the passage into the yard was *very awkward*. She said, as the road was dirty, she would rather be driven into the yard. He then advised her to stoop, and drove on. The consequence was, that she was struck violently on the shoulders and back by a low archway in the passage, by which she was severely injured. It appeared in evidence that the archway was only twelve inches higher than the top of the coach. Upon this evidence, Lord *Ellenborough*, in summing up to the jury, said : "The defendant was bound to carry the plaintiff from the usual place of taking up to the usual place of setting down. As coach-owner, therefore, he was answerable for the negligent acts of his servant, till the plaintiff was set down at

the usual place for passengers alighting at Chelsea. This appears, for the inside passengers at least, to have been the yard. If the coachman had said to her, 'the others will be safe in proceeding, but you must go down here, as you cannot remain upon the coach without danger to your life,' she could only have blamed her own imprudence for what followed. But he should have given her the materials to judge, if he was to leave her to make her election. He told her the passage was *awkward*, whereas, according to the evidence, it was *impracticable*." See also *Massiter v. Cooper*, 4 Esp. 260. In *Coppin v. Braithwaite*, 8 Jur. 876, it is said to have been ruled by *Rolfe*, B., at *Nisi Prius*, that a carrier having received a pickpocket, as a passenger, on board his vessel and taken his fare, he cannot put him on shore at an intermediate place, so long as he is not guilty of any impropriety. But see the preceding note. — In *Ker v. Mountain*, 1 Esp. 27, it was ruled by Lord *Kenyon*, that if a person engages a seat in a stage-coach, and pays at the same time only a deposit, as half the fare, for example, and is not at the inn ready to take his seat when the coach is setting off, the proprietor of the coach is at liberty to fill up his place with another passenger; but if, at the time of engaging his seat, he pays the whole of the fare, in such case the proprietor cannot dispose of his place, but he may take it at any stage of the journey that he thinks fit.

(*n*) *Chamberlain v. Chandler*, 3 Mason, 242.

(*o*) *Christie v. Griggs*, 2 Camp. 79; *Curtis v. Drinkwater*, 2 B. & Ad. 169; *Bremner v. Williams*, 1 C. & P. 414; *Israel v. Clark*, 4 Esp. 259; *Crofts v. Waterhouse*, 3 Bing. 319; *Sharp v. Grey*, 9 Bing. 457. An opinion seems to be intimated in several of the cases that the carrier is bound to *warrant* the sufficiency of his coach. Thus, in *Israel v. Clark*, 4 Esp. 259, Lord *Ellenborough* is reported to have said, that carriers were bound by law to provide sufficient carriages for the

¹ A State statute which seeks to compel passenger carriers between different States to carry colored and white persons in the same cabin is unconstitutional so far as it applies to such carriers. *Hall v. De Cuir*, 95 U. S. 485.

² See also *Meier v. Penn. R. Co.* 64 Penn. St. 225.

where the carrier owns them; (oo) to maintain a reasonable

safe conveyance of the public who had occasion to travel by them; and that at all events he should expect a clear *land-worthiness* in the carriage to be established. So in *Bremner v. Williams*, 1 C. & P. 414, *Best*, C. J., says, he considers that every coach proprietor *warrants* to the public that his stage-coach is equal to the journey it undertakes. And finally, in *Sharp v. Grey*, 9 Bing. 457, *Bosanquet*, J., says, that if a coach, when it starts upon its journey, is not *roadworthy*, the proprietor is liable for the consequences, upon the same principle as a ship-owner who furnishes a vessel which is not seaworthy. And in *Bennett v. The P. & O. Steamboat Company*, 6 C. B. 775, 782, upon *Sharp v. Grey* being cited by Sir *John Jervis*, Attorney-General, who decided, in substance, that a coach proprietor is bound to use all ordinary care and diligence to provide a safe vehicle, *Cresswell*, J., interrupting him, said: "It goes a little further than that; it lays down that he is bound *at all events* to provide a sound coach." But the contrary was ruled in *Christie v. Griggs*, 2 Camp. 79, by Sir *James Mansfield*, who held, that only the same measure of diligence was required of a passenger carrier, in the construction and care of his coach, as in all other matters appertaining to the conveyance of his passengers. See the case stated, with the learned judge's opinion, *ante*, p. * 219, note (b). And the doctrine of this case was clearly established as the law in this country, by the case of *Ingalls v. Bills*, 9 Met. 1. That was an action to recover damages for an injury received by the plaintiff from a defect in the defendants' coach. The defendants introduced evidence tending to prove that they had taken all possible care, and incurred extraordinary expense, in order that the coach should be of the best materials and workmanship; that, at the time of the accident, the coach, so far as could be discovered from the most careful inspection and examination externally, was strong, sound, and sufficient for the journey; and that they had uniformly exercised the utmost vigilance and care to preserve and keep the same in a safe and roadworthy condition. But the evidence further tended to prove that there was an internal defect or flaw in the iron of the axle-tree, at the place where it was broken, about three-eighths of an inch in length, and

wide enough to insert the point of a fine needle or pin; which defect or flaw appeared to have arisen from the forging of the iron, and which might have been the cause of the breaking; that the said defect was entirely surrounded by sound iron one quarter of an inch thick; and that the flaw or defect could not possibly have been discovered by inspection and examination externally. The learned judge, before whom the cause was tried, instructed the jury that the defendants were bound by law, and an implied promise on their part, to provide a coach, not only apparently, but really, road-worthy; that they were liable for any injury that might arise to a passenger from a defect in the original construction of the coach, although the imperfection was not visible, and could not be discovered upon inspection and examination. The defendant excepted, and moved for a new trial, which was granted. *Hubbard*, J., after a very thorough and able examination of the cases, concluded his opinion thus: "The result to which we have arrived, from the examination of the case before us, is this: That carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against; and that if an accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense." Such also would seem, from the case of *Grote v. The C. & H. Railway Company*, 2 Exch. 251, to be the doctrine now held in England. That was an action against a railway company to recover compensa-

(oo) *Hanley v. Harlem R. R. Co.* 1 Edm. Sel. Cas. 359.

* 228 * degree of speed ; (*p*) and to have servants and agents competent for their several employments ; and for the default of his servants or agents, in any of the above particulars, or generally, in any other points of duty, the carrier is directly responsible, (*q*)¹ as well as for any circumstance

tion for an injury received by the plaintiff by the breaking down of a bridge over which he was passing in a passenger train. It appeared at the trial that the services of an eminent engineer had been engaged in the construction of the work. *Williams*, J., before whom the cause was tried, told the jury that the question was, whether the bridge was constructed and maintained with sufficient care and skill, and of reasonably proper strength with regard to the purposes for which it was made ; and that, if they should think not, and that the accident was attributable to any such deficiency, the plaintiff would be entitled to recover. The counsel for the defendants objected, that the defendants would not be liable unless they had been guilty of negligence either in constructing or maintaining the bridge. His lordship, however, left the question to the jury, subject to his previous direction. Upon an application to the Court of Exchequer for a new trial, *Pollock*, C. B., said : "It does not at present distinctly appear whether or not the attention of the jury was directed to the proposition, that if a party in the same situation as that in which the defendants are, employ a person who is fully competent to the work, and the best method is adopted and the best materials are used, such party is not liable for the accident. If the jury have been directed in conformity with this rule, there is no ground for the present application. It cannot be contended that the defendants are not responsible for the accident merely on the ground that they have employed a competent person to construct the bridge. Upon this point we will consult our learned brother." On a subsequent day the Chief Baron said, that they had consulted the learned judge, who reported to them that he had directed the jury in conformity with the above proposition, and that therefore there would be no rule. This case, however, shows that it would not be sufficient to exempt a coach proprietor from liability, that he had employed a skilful workman to construct his coach ; it must appear that it was actually con-

structed with all possible care and skill. — So a passenger carrier will be held to the greatest vigilance in examining and inspecting his vehicles from time to time. Thus, in *Bremner v. Williams*, 1 C. & P. 414, it was ruled by *Best*, C. J., that a coach proprietor ought to examine the sufficiency of his coach previous to each journey ; and if he does not, and by the insecurity of the coach a passenger is injured, an action is maintainable against the coach proprietor for negligence, though the coach had been examined previous to the second journey before the accident ; and though it had been repaired at the coach-maker's only three or four days before. And see *New Jersey Railroad Company v. Kennard*, 21 Penn. St. 208.

(*p*) See *Mayor v. Humphries*, 1 C. & P. 251 ; *Carpue v. L. & B. Railway Co.* 5 Q. B. 747. See also the charge of *Best*, C. J., to the grand jury, 8 C. & P. 694, note (*b*).

(*q*) The owner is liable for an accident which happens from the driver's intoxication ; but not if from his physical disability, arising without his fault, from extreme and unusual cold, which rendered him incapable for the time of doing his duty. *Stokes v. Saltonstall*, 13 Pet. 181. See also *McKinney v. Neil*, 1 McLean, 550 ; *Peck v. Neal*, 8 id. 24. The rule stated in the text received a very strong application in the case of *McElroy v. Nashua & Lowell R. R. Corporation*, 4 Cush. 400. It was an action on the case to recover damages of the defendants, for an injury alleged to have been sustained by the female plaintiff, while riding as a passenger in the defendants' cars from Lowell to Nashua. The alleged injury happened in consequence of the careless management of a switch, by which the Concord Railroad connected with and entered upon the defendants' road. The switch was provided by the proprietors of the Concord Railroad, and attended by one of their servants, at their expense. It was held, that the defendants were liable. And *Shaw*, C. J., said : "The court are of opinion, upon the facts agreed, that the defendants are liable to the plaintiffs

¹ Thus a carrier is liable for the malicious assault of its servant on a passenger, *Stewart v. Brooklyn, &c. R. R.* 90 N. Y. 588 ; although accused of stealing the passenger's watch, *Chicago, &c. R. Co. v. Flexman*, 103 Ill. 546.

of aggravation which attended * the wrong. A passenger * 229 may be ejected from a car for non-payment of fare, or other sufficient reason ; and it is held, that, if so ejected for non-payment, he cannot by climbing into the car and tendering his fare acquire a right to be carried. (*qq*) For whatever reason a passenger is expelled from a railroad car, care must be taken not to injure him ; but if one attempts wrongfully to enter a car, force may be used to prevent him. (*qr*) It has indeed been held, that to eject a passenger from a railroad car while in motion, is so far like an attempt to take life, as to justify the same resistance on the part of a passenger. And though he is still liable to ejection in a proper manner for refusing to pay fare, his resistance to the attempt to expel him without stopping the car, does not present a case of concurrent negligence on his part. The carrier of passengers, in any way, is always bound to give them a sufficient opportunity to alight. (*qs*) If a railroad company carries a passenger in a caboose attached to a freight car, and he pays the usual fare, he has all the rights of an ordinary passenger. (*qt*)¹ In some States, as in Illinois, a railroad company is prohibited by statute from ejecting passengers for non-payment of fare, excepting at a station.

The paramount duty of a railroad company is to look to the safety of the persons and property it transports. And it has been

for the damage sustained by the wife whilst travelling in their cars. As passenger carriers, the defendants were bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of the passengers. The wife having contracted with the defendants, and paid fare to them, the plaintiffs had a right to look to them, in the first instance, for the use of all necessary care and skill. The switch in question, in the careless or negligent management of which the damage occurred, was a part of the defendants' road, over which they must necessarily carry all their passengers ; and although provided for, and attended by, a servant of the Concord Railroad Corporation, and at their expense, yet it was still a part of

the Nashua & Lowell Railroad, and it was within the scope of their duty to see that the switch was rightly constructed, attended, and managed, before they were justified in carrying passengers over it." See also Nashville & C. Railroad Co. v. Messino, 1 Sneed, 220 ; Grote v. The C. & H. Railway Co. 2 Exch. 261, cited *ante*, p. * 227, note (o) ; Tuller v. Talbot, 23 Ill. 357.

(*qq*) O'Brien v. Boston, &c. R. R. Co. 15 Gray, 20. See State v. Campbell, 8 Vroom, 309.

(*qr*) Kline v. Central Pacific, &c. R. R. Co. 37 Cal. 400.

(*qs*) Fairmount R. R. Co. v. Stutler, 54 Penn. St. 375.

(*qt*) Edgerton v. N. Y., &c. R. R. Co. 39 N. Y. 227 ; and see Dillaye v. N. Y. Central R. R. Co. 56 Barb. 80.

¹ Creed v. Penn. R. Co. 86 Penn. St. 139 ; Dunn v. Grand Trunk R. Co. 58 Me. 187 ; Ind., &c. R. Co. v. Beaver, 41 Ind. 493 ; Lucas v. Milwaukee R. Co. 33 Wis. 41. Indianapolis, &c. R. Co. v. Horst, 93 U. S. 291, decided that a person taking a cattle train is entitled to demand the highest possible degree of care and diligence, regardless of the kind of train he takes.

held that a steamer carrying passengers is bound to protect them from any violence which may be expected from disorderly persons on board, although these persons are soldiers who were received by the steamer on compulsion, (*qu*) and the duty of avoiding unnecessary injury to animals straying upon the road is subordinate to this. (*r*) And he is liable for the acts of partners, or *quasi* partners, in the same manner that the carrier of goods is liable. (*s*) On the other hand, the carrier may make and enforce all reasonable regulations in reference to his business, or to the buildings connected therewith; as the depots of railroads, and

* 230 * the like; (*t*) but notice that the carrier would not be liable for injuries to passengers caused by negligence of its servants, would be unreasonable and inoperative. (*tt*) The passengers are bound to comply with all reasonable regulations; and to show their tickets when asked. (*u*)¹

As the carrier is bound to make all proper provision for the safety and comfort of his passengers, he must have power to do so; and on this ground, as well as in defence of his own rights, he may refuse to receive, or may remove from the car or carriage, a passenger whose condition or conduct is such as to endanger other passengers or cause them material discomfort.² A decision

(*qu*) *Flint v. Norwich, &c. Transportation Co.* 6 Blatchf. 158.

(*r*) *Sandford v. Eighth Av. R. R. Co.* 33 N. Y. (9 Smith) 343. See also *Louisville & Frankfort R. R. Co. v. Ballard*, 2 Met. (Ky.) 177.

(*s*) *Dwight v. Brewster*, 1 Pick. 50; *Champion v. Bostwick*, 11 Wend. 571; 18 id. 175; *Walrand v. Elkins*, 1 Stark. 277; *Fromont v. Coupland*, 9 J. B. Moore, 319; *Cobb v. Abbot*, 14 Pick. 289; *Wet-*

more v. Baker, 9 Johns. 807; *Green v. Beesley*, 2 Bing. N. C. 108; *Stockton v. Frey*, 4 Gill, 406.

(*t*) *Hall v. Power*, 12 Met. 482.

(*tt*) *Flinn v. Philadelphia R. R. Co.* 1 Houston, 469.

(*u*) *Hibbard v. N. Y. & E. R. R. Co.* 15 N. Y. 455; *Willis v. L. I. R. R. Co.* 32 Barb. 398; *Illinois, &c. R. R. Co. v. Whittemore*, 43 Ill. 420.

¹ Although a season-ticket passenger. *Downs v. N. Y., &c. R. Co.* 36 Conn. 287.—A railroad company has a right to provide and insist that its passenger tickets shall be used upon the day when issued. *Elmore v. Sands*, 54 N. Y. 512. If a commutation ticket is lost, for which a receipt was given requiring the showing of the ticket to the conductor when requested, stating that no duplicate would be issued and subjecting the ticket to its regulations, the company after such loss can exact full fare. *Ripley v. N. J., &c. R. Co.* 2 Vroom, 388. That ejection is justified by a failure to have a stop-over check, although through a conductor's mistake, see *Yorton v. Milwaukee R. Co.* 54 Wis. 234; and by a refusal to pay extra fare under the circumstances, see *Lake Shore, &c. R. Co. v. Pierce*, 47 Mich. 277.—A regulation setting apart a car in each passenger train for the separate use of women and men accompanying them, is reasonable, but a male passenger without a seat in the other cars may peaceably use such a car. *Bass v. Chicago, &c. R. Co.* 36 Wis. 450; 42 Wis. 654. See *Peck v. N. Y. Cent., &c. R. Co.* 70 N. Y. 587, that an excess of force used to prevent a male passenger from entering such a car renders the company liable.

² An ugly and boisterous drunkard may be expelled, and the company is not liable for his subsequent death on the track. *Railway Co. v. Valleyey*, 32 Ohio St. 345. See also *Philadelphia, &c. R. Co. v. Larkin*, 47 Md. 155. It is for the jury to say whether

has lately been made in Massachusetts, in reference to a street or horse-railroad car, which it may be hoped will be maintained as law in reference to all passenger cars. It is that a conductor need not wait for an act of violence, profanity, or other misconduct, but may expel a passenger whose conduct or condition makes it reasonably certain that he will cause annoyance to other passengers. (*uu*)

The carrier, whether of goods or passengers, is liable for an injury to strangers, if this be caused by the negligence of the driver or conductor; (*v*) as if he runs over one, or otherwise injures him, while he is walking on a public way. (*w*) And where such an injury results in death, no action is given by the common law to the personal representatives of the deceased; (*x*) and if one be given by statute, the damages therein must be wholly confined to pecuniary injuries, and will not extend to mental suffering occasioned to the survivors. (*y*) Under the statute of New York it has been held, that it is immaterial whether such death is instantaneous or consequential. (*z*) Also, that, under the provisions of the statute, a husband cannot recover for the loss of his wife's services to him, he not being of kin to his wife in a legal sense. (*a*) Nor is it a defence for the carrier that the road was out of order, nor that the reins or harness broke, for he should have had better ones. (*b*) But if the person injured caused the injury, in some degree, by his own negligence, and was capable of ordinary care and caution, he cannot recover damages, unless the negligence of the party who did the injury was so extreme as to imply malice; (*c*) but it is no defence to the carrier that the

(*uu*) *Vinton v. Middlesex R. R. Co.* 11 Allen, 304.

(*v*) *Stables v. Eley*, 1 C. & P. 614; *Sleath v. Wilson*, 8 id. 807; *Joel v. Morrison*, 6 id. 501. And if a horse and cart are left in the street, without any person to watch them, the owner is liable for any damage done by them, though it be occasioned by the act of a passer-by, in striking the horse. *Illidge v. Goodwin*, 5 C. & P. 190. See also *Lynch v. Nurdin*, 1 Q. B. 29.

(*w*) *Boss v. Lytton*, 5 C. & P. 407; *Cotterill v. Starkey*, 8 id. 691; *Hawkins v. Cooper*, id. 473; *Wynn v. Allard*, 5 W. & S. 524.

(*x*) *Carey v. Berkshire R. R. Co.* 1 *Cush.* 475.

(*y*) *Blake v. Midland Railway Company*, 10 E. L. & E. 437; s. c. 18 Q. B. 98. Under the New York statute the remedy is restricted to an injury done within the State. *Whitford v. Panama R. R. Co.* 23 N. Y. (9 Smith) 465.

(*z*) *Brown v. Buffalo & S. L. R. R. Co.* 22 N. Y. (8 Smith) 191.

(*a*) *Dicheno v. New York Central R. R. Co.* 23 N. Y. (9 Smith) 168.

(*b*) *Cotterill v. Starkey*, 8 C. & P. 691; *Welsh v. Lawrence*, 2 Chitt. 262.

(*c*) *Woolf v. Beard*, 8 C. & P. 373; *Cotterill v. Starkey*, id. 691; *Wynn v. Allard*, 5 W. & S. 524; *Cook v. Champlain Transportation Co.* 1 Denio, 91; *Brownell v. Flagler*, 5 Hill (N. Y.), 282; *Barnes v. Cole*, 22 Wend. 188; *Rathbun*

it is due care for the conductor to attempt to remove such a passenger while the car is in motion. *Murphy v. Union Railway*, 118 Mass. 228.

negligence of a third party contributed to cause the damage. (cc) And here, * also, as to the question of negligence on the part of the carrier, the rule, making it the duty of the plaintiff to prove affirmatively that he was not guilty of negligence, cannot be considered as universal. (d)

So the carrier is liable for injury done to property by the way-side, unless he can discharge himself from want of care. (e) But a railroad company, authorized by the legislature to use locomotive engines, is not responsible for damage by fire occasioned by sparks from an engine, if every precaution has been taken and every approved means adopted to prevent injury from fire, and its servants are not guilty of negligence. (f) But if negligent,

v. Payne, 19 id. 390; *Perkins v. Eastern Railroad Company*, 20 Me. 307; *May v. Princeton*, 17 Met. 442; *Parker v. Adams*, 12 id. 415; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; s. c. 4 Comst. 349; *Brown v. Maxwell*, 6 Hill (N. Y.), 592; *Trow v. Vt. Central R. R. Co.* 24 Vt. 487; *N. Y. & E. R. R. Co. v. Skinner*, 19 Penn. St. 298. See also *White v. Winnissinmet Co.* 7 Cush. 180; *Willetts v. Buffalo & Rochester R. R. Co.* 14 Barb. 586; *Murch v. Concord Railroad Corporation*, 9 Foster (N. H.), 9; *Damont v. N. O. & Carrollton R. R. Co.* 9 La. An. 441; *Kerwhaker v. Cleveland C. & C. R. R. Co.* 8 Ohio St. 172; *Galena & Chicago Union R. R. Co. v. Yarwood*, 15 Ill. 408; *Richardson v. Wil. & Man. R. R. Co.* 8 Rich. L. 120. And see the instructive case of *Railroad Company v. Aspell*, 23 Penn. St. 147. *Willoughby v. Horridge*, 16 E. L. & E. 437; s. c. 12 C. B. 742. But if the injury be voluntary and intentional, the party committing it will be liable, notwithstanding the party injured was guilty of negligence. Therefore, where the plaintiff, being the owner of a lamb, allowed it to escape into the highway, where it mingled with a flock of sheep which the defendant was driving along; and he, knowing this fact, made no attempt to separate the lamb from the flock, but delivered the whole to a drover in pursuance of a sale previously made, by whom they were taken off to market; it was held, that these facts were sufficient to authorize a verdict in favor of the plaintiff for the value of the lamb, though it was not included in the sale to the drover, and the defendant received nothing on account of it. *Brownell v. Flagler*, 5 Hill (N. Y.), 282. See also *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255, 267, per *Beardaley*, C. J., *Cook v. The Champlain Transportation Co.* 1 id. 91;

Wynn v. Allard, 5 W. & S. 524; *Rathbun v. Payne*, 19 Wend. 399; *Clay v. Wood*, 5 Esp. 44. So where the party injured is a child of tender years or otherwise incapable of ordinary care and caution. *Lynch v. Nurdin*, 1 Q. B. 29. In this case the defendant left his horse and cart unattended in the street. The plaintiff, a child seven years old, got upon the cart in play; another child incautiously led the horse on; and the plaintiff was thereby thrown down and hurt. It was held, that the defendant was liable in an action on the case, though the plaintiff was a trespasser, and contributed to the injury by his own act. This case is confirmed by *Birge v. Gardiner*, 19 Conn. 507, and *Robinson v. Cone*, 22 Vt. 218. But see *contra*, *Hartfield v. Roper*, 21 Wend. 615, confirmed by *Brown v. Maxwell*, 6 Hill (N. Y.), 592, and *Monger v. Tonawanda R. R. Co.* 4 Comst. 349. See *Blakeman v. B. & E. Railway Co.* 92 Eng. C. L. 1085, as to the liability of a railroad company for mischief caused by the breaking of a crane, which they had lent gratuitously, knowing it to be unsafe. *Fox v. Town of Glastenbury*, 27 Conn. 204.

(cc) *Eaton v. Boston, &c. R. R. Co.* 11 Allen, 500.

(d) *Johnson v. Hudson River R. R. Co.* 20 N. Y. (6 Smith) 65; *Wilds v. Same*, 24 N. Y. (10 Smith) 430.

(e) *Davies v. Mann*, 10 M. & W. 546; *Cook v. The Champlain Transportation Co.* 1 Denio, 91. The Court of Appeals of Maryland held, that the act of the Assembly of that State, changes the *onus* of proof as to negligence, from the owner of stock injured by a railroad train, where the common law leaves it to the defendant company. *Keech v. B. & W. R. R. Co.* 17 Md. 32.

(f) *Vaughan v. Taff Vale R. Co.* 5 H. & N. 679.

it would seem that the mere distance of the property burned is not a defence: (*ff*) but if sparks from an engine set fire to a house, and from this fire is communicated to another house and destroys it, the company is not liable for this last house; the rule, "*causa proxima non remota*," applying. (*fg*) There are quite a number of cases in which the liability of a railroad company for injuries to property near the railroad has arisen. It would seem that the company is not liable for such injury, unless it be caused by some negligence or default on their part, as to their cars or engines, or of their servants in the use of them. (*fh*)

Railroad companies are liable, not only for injuries to property, but to persons who are not passengers. In all our States they are required to take certain precautions when crossing common roads, as by signals, whistles, ringing the bell, &c. But it is wisely held, that their duty is to take *sufficient* care when crossing roads; and a mere compliance with these requirements, if not sufficient in any given case from its peculiar circumstances, leaves them liable. (*fi*)

A railroad company is also liable for injury to one of its own servants, if the company have been guilty of negligence, but not otherwise. (*fj*)

In cases of injury by collision, he whose negligence causes * the injury is responsible. What is called the law * 232 of the road, is, in this country, little more than that each party shall keep to the right; in England, each party keeps to the left. At sea, a vessel going free must give way to one on the wind; one on the larboard tack gives way to one on the starboard tack. And steamers must give way to sailing vessels. These rules, as to vessels, are based upon the simple principle, that the vessel which can alter her course most easily must do so; and they are often qualified by an application of this principle. (*g*) An observance of these rules, or a disregard of them, is often very important in determining the question of negligence; especially where the parties meet very suddenly. But the law of the

(*ff*) *Smith v. London, &c. R. R. Co.*
L. R. 6 C. P. 14.

(*fg*) *Pennsylvania R. R. Co. v. Kerr,*
22 Penn. St. 353.

(*fh*) See *Indianapolis, &c. R. R. Co. v. Paramore*, 31 Ind. 148; and *Fitch v. Pacific R. R. Co.* 45 Mo. 822.

(*fi*) *Richardson v. New York Central R. R. Co.* 45 N. Y. 846.

(*fj*) *Harrison v. Central R. R. Co.* 1 Rob. 482; *Nashville R. R. Co. v. Elliott*, 1 Cold. 611; *Hands v. London, &c. R. R. Co.* Law Rep. 2 Q. B. 439, n.

(*g*) *Lowry v. The Steamboat Portland*, 1 Law Rep. 818; *Lockwood v. Lashell*, 19 Penn. St. 344.

road alone does not decide this question ; for a violation of it may be for good cause, or under circumstances which negative the presumption of negligence which might otherwise arise from it. (h)

It is said that he who suffers injury from collision caused by the negligence of another, cannot recover damages if he was himself at all negligent, and if his negligence helped to cause the injury. In some cases this principle has been applied with great rigor, and asserted in very broad terms ; but it is obvious, that, as a general rule, it must be considerably modified. It is impossible that he who seeks redress for a wrong which he has sustained by the negligence of another, should always lose all right, where he has himself been in any way negligent. There must be some comparison of the negligence of the one party with that of the other, as to its intensity, or the circumstances which excuse it, or the degree in which it enters as a cause into the production of the injury complained of. In each case, it must be a question of mixed law and fact, in which the jury, under the direction of the court, will inquire whether the defendant

was guilty of so great a degree of negligence as, in the
* 233 * particular case, will render him liable, and then, whether
the plaintiff was also guilty of so much negligence as to
defeat his claim. (i)

As the carrier of goods must allow a consignee a reasonable time to receive and remove his goods, so a carrier of passengers is bound to allow his passengers a reasonable time to leave the cars or carriages. (ii) And this is the time within which prudent persons usually get off the cars in like circumstances. (ij)

(h) See *Pluckwell v. Wilson*, 5 C. & P. 375; *Kennard v. Burton*, 25 Me. 39; *Chaplin v. Hawes*, 3 C. & P. 554; *Clay v. Wood*, 5 Esp. 44; *Wayde v. Carr*, 2 Dow. & R. 256; *Butterfield v. Forrester*, 11 East, 60; *Turley v. Thomas*, 8 C. & P. 103; *Wordsworth v. Willan*, 5 Esp. 273; *Mayhew v. Boyce*, 1 Stark. 423; *McLean v. Sharpe*, 2 Harring. (Del.) 481.

(i) See *Rigby v. Hewitt*, 5 Exch. 240; *Greenland v. Chaplin*, id. 248; *Thorogood v. Bryan*, 8 C. B. 115; *Kennard v. Burton*, 25 Me. 39; *Marriott v. Stanley*, 1 Man. & G. 568; *Clayards v. Dethick*, 12 Q. B. 439; *Beatty v. Gilmore*, 16 Penn. St. 463; *Trov v. Vermont Central R.R. Co.* 24 Vt. 487; *Catlin v. Hills*, 8 C. B. 123; *Bridge v. The Grand Junction Railway Co.* 3 M.

& W. 244; *Davies v. Mann*, 10 id. 546; *Robinson v. Cone*, 22 Vt. 218; *Moore v. Inhabitants of Abbot*, 32 Me. 46; *Munroe r. Leach*, 7 Met. 274; *Churchill v. Rosebeck*, 16 Conn. 359; *Carroll v. N. Y. & N. H. R. R. Co.* 1 Duer, 571. In C. B. & Q. R. R. Co. v. *Dewey*, 28 Ill. 255, it is said, that if the negligence of one party is only slight, and that if the other appears gross, a recovery may be had. See also *ante*, p. * 230, note (e). *Fox v. Town of Glastenbury*, 29 Conn. 204; *Willis v. L. I. R. R. Co.* 82 Barb. 398.

(ii) *Southern R. R. Co. v. Kendrick*, 40 Miss. 374; *Jeffersonville R. R. Co. v. Hendrick*, 26 Ind. 228.

(ij) *Inchoff v. Chicago R. R. Co.* 20 Wis. 344.

Several cases have come before the courts, raising the question, as to the obligation of carriers of passengers in respect to providing for their safety when leaving the cars or boat. In an English case a hulk was hired by a steamer company, to which the steamer came, and in which passengers bought tickets, and from which they went on board the steamer. A passenger fell down a hatchway negligently open in the hulk, and recovered damages. (*ik*) In three English cases, when the train stopped the last car was beyond the platform. The name of the station was called, and the passenger stepping out fell on the rails and was hurt; and it was held that he could not recover. (*i7*)¹ In a fourth case the train went too far, and the leading car was opposite the parapet of a bridge. Here, too, a passenger stepped on the parapet, which resembled a platform, and was hurt. He recovered damages, on the ground that he was invited to step out at a dangerous place, and the conductor was negligent in not stopping the train earlier. (*im*) In a case in Indiana, where the train ran by the station, and stopped over a culvert, and the conductor called the name of the station, and a passenger getting out fell into the culvert, the company was held liable. (*in*)

In this country railroad companies usually check the baggage of passengers, giving a duplicate check to the passengers. The question has arisen how long the passenger may leave a trunk thus checked in the depot, and still hold the company to their liability as carriers. It is impossible to give a precise rule. The passenger is not bound to take his baggage with him at once; but he cannot leave it in the depot a considerable time, for his own convenience, and hold the company liable, except as warehouse-

(*ik*) *John v. Bacon*, L. R. 5 C. P. 437. See also *Gaynor v. Old Colony, &c. R. R. Co.* 100 Mass. 208.

(*i7*) *Cockle v. London, &c. R. R. Co.* L. R. 5 C. P. 457; *Bridges v. North London R. R. Co.* L. R. 5 C. P. 459; *Praeger v. Bristol, &c. R. R. Co.* L. R. 5 C. P. 400, n. 1.

(*im*) *Whittaker v. Manchester, &c. R. R. Co.* L. R. 5 C. P. 464, n. 8.

(*in*) *Columbus, &c. R. R. Co. v. Farrell*, 31 Ind. 408. See also *Delamatyr v. Milwaukee, &c. R. R. Co.* 24 Wis. 578, and *Dillaye v. N. Y. Central R. R. Co.* 42 N. Y. 468.

¹ In these cases, on appeal, it was held that the several plaintiffs could recover. *Cockle v. London, &c. R. Co.* L. R. 7 C. P. 321; *Bridges v. North London R. Co.* L. R. 7 H. L. 213; *Praeger v. Bristol, &c. R. Co.* 24 L. T. (n. s.) 105. So *Hartwig v. Chicago, &c. R. Co.* 49 Wis. 358, where the caboose passenger car was stopped beyond a platform and opposite a cattle guard, into which the plaintiff fell on his way to the car. The starting a train suddenly, either backwards or forwards, after stopping at a station, so as to throw a passenger off, is negligence. *Milliman v. N. Y. Cent., &c. R. Co.* 66 N. Y. 642. See *Lewis v. London, &c. R. Co.* L. R. 9 Q. B. 66; *Weller v. London, &c. R. Co.* L. R. 9 C. P. 126; *Robson v. North Eastern R. Co.* 2 Q. B. D. 85.

men, for negligence. Twenty-four hours have been held too long a delay; and, in another case, not too long. (i)

SECTION XV.

OF SPECIAL AGREEMENTS AND NOTICES.

We have seen how severe a responsibility is cast upon the common carrier by the law; and it is a very interesting question, how far he may remove it or lessen it, with or without the concurrence of the other party. Can the carrier do this by a special contract with the owner of the goods? and, if so, is a notice by the carrier brought home to the owner equivalent to such contract? and if the carrier cannot in this way relieve himself entirely from his responsibility, can he lessen and qualify it? Some of these questions are not yet definitely settled.

There is no doubt that, originally, this responsibility was considered as beyond the reach of the carrier himself. It is but about fifty years since he was permitted to qualify or control it by his own act. And courts have been influenced in their opinion of his rights in this respect, by the view they have taken of the nature of his responsibility. The more they have regarded it as created by the law for public reasons, the less willing have they been that it should be placed within the control of one or both parties to be modified at their pleasure.

The first question is, Can the peculiar responsibility of the common carrier be destroyed by express contract between him-

self and one who sends goods or takes them with him, so * 234 as to * reduce the carrier's liability to that of a private carrier, and make him liable only for his own default? It seems to be well settled by the weight of authority that this * 235 may be done; (j)¹ although * in some of the cases in which

(i) Compare *Holdridge v. Utica, &c.* R. R. Co. 56 Barb. 191; 34 N. Y. 548; with *Mote v. Chicago R. R. Co.* 27 Iowa 22.

(j) It seems now to be perfectly set- tied in this country and in England, that

a special contract between the owner of goods and a carrier, limiting the common-law liability of the latter, is valid. It is wholly unnecessary to cite authorities to

¹ In *Ayres v. Western R. Co.* 14 Blatchford, 9, a stipulation that the company would not be liable as carriers for goods "after their arrival at their place of destination and unloading at the company's warehouse" was held ineffectual to excuse an accidental loss of the goods while stored in transit. Where a bill of lading exempts a carrier

it is allowed, it is intimated that this is a departure from the ancient principles of the common * law. It has also * 236

show that such is the case in England; for, although, as we shall presently see, scarcely a volume of English reports appears which does not contain more or less cases concerning contracts of this description, no question is ever made as to their validity. Nor do we conceive this to be a departure from the ancient principles of the common law; for it nowhere appears that such contracts were ever prohibited as contravening the policy of the law. "There is no case," says Lord *Ellenborough*, in *Nicholson v. Willan*, 5 East, 507, "to be met with in the books, in which the right of a carrier thus to limit, by special contract, his own responsibility, has ever been, by express decision, denied." It should be observed, moreover, that this question is not at all affected by the Carriers Act, 2 Geo. IV. & 1 Wm. IV. c. 68, for by the 8th section of that act it is provided, that nothing in the act contained shall in any wise affect any special contract for the conveyance of goods and merchandise. See the act fully stated, *post*, p. * 241, note (r). On this side of the Atlantic we are not aware of any case in which the validity of such contracts is denied until *Cole v. Goodwin*, 19 Wend. 251 (1838). There the defendants, who were stage-coach proprietors, had published a notice to the effect that all baggage sent by their line would be at the risk of the owners. The question was, whether such notice, brought home to the knowledge of the plaintiff, should exempt the defendants from their common-law liability. And it was held, that it should not. And Mr. Justice *Cowen*, who delivered the opinion, declared that there was no difference between such notice brought to the plaintiff's knowledge and an express contract; that both were evidence of an agreement between

the parties to limit the carrier's liability; but that both were void as contravening the policy of the law. In 1840, the case of *Jones v. Voorhees*, 10 Ohio, 145, was decided by the Supreme Court of Ohio. That case raised precisely the same question that was raised in *Cole v. Goodwin*; and, although the decision went no further than to declare that a notice brought to the plaintiff's knowledge did not exempt the defendant from his common-law liability, *Wood*, J., who delivered the opinion of the court, manifested a strong inclination to adopt the views of Mr. Justice *Cowen*, in their full extent. In 1842 came the case of *Gould v. Hill*, 2 Hill (N. Y.), 623. That was an action brought in the Superior Court of the city of New York against the defendants, as common carriers, to recover the value of certain goods delivered to them to be transported from New York to Philadelphia. On delivering the goods in question to the defendants, they gave the plaintiffs a memorandum, which stated, among other things, that the defendants would not hold themselves responsible in case of loss by fire. The goods were destroyed by fire on their passage; and evidence was given tending to show that the loss was not occasioned by the negligence or want of care of the defendants. The court charged the jury, that under the circumstances the defendants were chargeable only for a loss resulting from negligence. The plaintiff excepted, and the jury having returned a verdict for the defendants, upon which judgment was rendered, a writ of error was sued out from the Supreme Court. And per *Cowen*, J.: "In this case the common carriers, instead of alleging a general notice restricting their liability to the plaintiffs and all others, furnished them

from loss by fire without negligence, the burden is on the plaintiff to show loss by fire through negligence, and where a rebellious mob has burned the goods, the carrier is not liable. *Wertheimer v. Penn. R. Co.* 17 Blatchford, 421. A notice that the carrier "is not to be held liable for any loss or damage by fire" will not excuse negligence; but he can restrict his liability to a certain sum, unless the true value of the goods sent is stated, *Muser v. Holland*, 17 Blatchford, 412; and on the consignor's refusal to disclose such value on inquiry, no more than such sum can be recovered, *Mathew v. American Express Co.* 9 Bissell, 293. Where a carrier stipulates for exemption from liability as such while goods are "at any of their stations awaiting delivery," and also that goods must be moved "during business hours," he is liable on his failure to give notice of their arrival so as to allow such removal in business hours, the goods being injured by the delay. *McKinney v. Jewett*, 90 N. Y. 267. Where also a shipper assumed "all risks and loss of its property by fire, when in the charge or custody of the carrier," the latter, having agreed to deliver "at the warehouse of the shipper," was not allowed to recover freight on goods destroyed by accidental fire. *N. Y. Cent. &c. R. Co. v. Standard Oil Co.* 87 N. Y. 486.

been said in some late cases in this country, particularly in one

with a special acceptance in writing, which they received, and delivered the goods accordingly. This constitutes undoubted evidence of assent on their part. One exception was, of casualties occasioned by fire; and the loss arose from that cause. The servants of the defendants were called as witnesses to make out a case of care; and the jury, under the charge of the court, allowed this as a defence. For myself I shall do little more than refer to my opinion in *Cole v. Goodwin* (19 Wend. 281), and the reason for such opinion as stated in that case. It was to the effect, that I could no more regard a special acceptance as operating to take from the duty of the common carrier, than a general one. I collect what would be a contract from both instances, provided it be lawful for the carrier to insist on it; and such is the construction which has been given to both by all the courts. The only difference lies in the different kinds of evidence by which the contract is made out. When the jury have found that the goods were delivered with intent to abide the terms of the general notice, I understand a contract to be as effectually fastened upon the bailor as if he had reduced it to writing. Indeed, the contrary construction would, I think, be to tolerate a fraud on the part of the bailor. The true ground for repudiating the general notice, is, therefore, its being against public policy; and this ground goes not only to the evidence — the mode in which you are to prove the assent — but to the contract itself. After forbidding the carrier to impose it under the form of a general notice, therefore, we cannot consistently allow him to do the same thing in the form of a special notice or receipt. The consequences to the public would be the same, whether we allow one form or the other." The judgment was accordingly reversed; *Nelson*, C. J., dissenting. We are not aware that this decision has ever been sanctioned by any court in this country. It received the approbation of Mr. Justice *Nisbet*, in *Fish v. Chapman*, 2 Ga. 349; but that case did not call for any decision upon the question. On the other hand, in 1848, the Supreme Court of the United States, in the case of *The New Jersey Steam Nav. Co. v. Merchants Bank*, 6 How. 344, denied the authority of *Gould v. Hill*, and held such a contract to be valid. *Nelson*, J., said: "As the extraordinary duties annexed to his employment concern only, in the particular instance, the parties to the transaction, involving simply rights

of property, — the safe custody and delivery of the goods, — we are unable to perceive any well-founded objection to the restriction, or any stronger reasons forbidding it, than exist in the case of any other insurer of goods, to which his obligation is analogous; and which depends altogether upon the contract between the parties. The owner, by entering into the contract, virtually agrees, that in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment; but as a private person who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence. The right thus to restrict the obligation is admitted in a large class of cases founded on bills of lading and charter-parties, where the exception to the common-law liability (other than that of inevitable accident) has been, from time to time, enlarged, and the risk diminished, by the express stipulation of the parties. The right of the carrier thus to limit his liability in the shipment of goods has, we think, never been doubted." Since that time, *Gould v. Hill* has been expressly overruled in New York in three cases; one in the Supreme Court, and two in the Superior Court of the city of New York. We allude to *Parsons v. Monteath*, 13 Barb. 358; *Dorr v. N. J. Steam Nav. Co.* 4 Sandf. 136, and *Stoddard v. The Long Island R. R. Co.* 5 Sandf. 180; *Dorr v. New Jersey Steam Nav. Co.* 1 Kern. 485; *The Mercantile Mutual Ins. Co. v. Chase*, 1 E. D. Smith, 115. *Dorr v. N. J. Steam Nav. Co.* was an action against the defendants as common carriers upon the Long Island Sound, between New York and Stonington, to recover damages for the loss of goods. The declaration averred that the plaintiffs, who were merchants in New York, shipped the goods in question on board the steamer Lexington, in the defendant's line, to be carried to Stonington; that on the same evening, the steamer was consumed by fire on her passage, and the plaintiffs' goods destroyed. The defendants pleaded that the goods in question were received by them under a special contract, by reason of a clause and notice inserted in their bill of lading, which was set forth in the plea, and which contained, among other things, that the goods in question were to be transported to Stonington, *danger of fire, &c., excepted*. The plea then averred, that the liability of the defendants was restricted by the exception of the casualties mentioned in the bill of

in New York, (k) that no such contract * is valid or * 237

lading, and that the loss in question was occasioned by one of the excepted casualties, and was without the fault or negligence of the defendants. To this plea the plaintiffs demurred. And *Campbell*, J., in pronouncing judgment upon the demurrer in favor of the defendants, said: "The question presented for our consideration is, whether common carriers can, by special contract, restrict their liabilities for losses which occur otherwise than by the act of God or the public enemies. If the point were now for the first time raised, we should have considered it, if not entirely free from difficulty, at least as not leaving much room for doubt as to the correctness of the conclusion at which we have arrived. The judgment of a majority of the late Supreme Court, pronounced in the case of *Gould v. Hill*, 2 Hill (N. Y.), 623, was cited and urged on the part of the plaintiffs as settling the law in this State, that a common carrier cannot, by special contract, limit his liability. Though the court was divided in opinion, the cause does not seem to have been carried to the court for the correction of errors, and we are not therefore sure of what would have been the decision of the court of last resort. But the clear conviction of all of us, that the case of *Gould v. Hill* was not correctly decided, supported as we are by the Supreme Court of the United States (*MERCHANTS BANK v. NEW JERSEY STEAM NAVIGATION COMPANY*, 6 How. 344), and the great importance of the question to a commercial people, especially the importance of uniformity between the courts of the State and Union in the rules of law regulating commercial transactions, compel us respectfully to dissent from the judgment in that case." *Stoddard v. LONG ISLAND R. R. CO.* is to the same effect. In *Parsons v. Monteath*, the defendants being common carriers on the Erie Canal between Albany and Buffalo, and occupying a warehouse on the pier at Albany, their agent in New York received goods there belonging to the plaintiff, and gave a receipt or shipping-bill therefor, in the name of the defendants, by which they agreed to transport the goods to Brighton Locks, "the danger of the lakes, of fire, &c., and acts of Providence excepted." The goods reached Albany on the morning of August 17, 1848, and were taken from the tow-boats into the defendant's

warehouse on the pier. On the same day a fire broke out in the city of Albany, by which the warehouse was consumed; and the plaintiff's goods, being removed by the defendants' agent into a canal boat in the basin, were destroyed by the fire. Held, that the defendants sustained the relation of common carriers of the goods at the time the fire broke out, and when the goods were destroyed; and that the rules of law incident to that relation applied to them; but that they had a right to circumscribe or limit their common-law liability as common carriers by agreement; and that, having expressly excepted the risk of loss by fire, they were not liable for the value of the goods. *Wells*, J., said: "Were it not for the late case of *Gould v. Hill* (*supra*), I should have no hesitation in holding the contract between the parties as valid and binding, and one to which we were bound to give effect. To do so would be in accordance with a long and unbroken course of decision in England, and in many of our sister States, and in all of them, I believe, where the question has arisen, excepting Ohio; and would be in harmony with the views of all the elementary writers on the subject. It is unnecessary to go into a particular examination of the authorities cited. I content myself with the remark, that the doctrine is fully asserted by *Story*, *Chitty*, *Kent*, and *Angell*, and most abundantly sustained by the authorities to which they refer. But in the case of *Gould v. Hill* (*supra*), Justice *Cowen* held a contrary doctrine; that it was not competent for a common carrier to restrict, by special contract, his common-law liability; and that where the defendant, being a common carrier, on receiving the plaintiff's goods for transportation, gave him a memorandum by which he promised to forward the goods to their place of destination, *danger of fire, &c.*, excepted, the defendant was liable for a loss by fire although not resulting from negligence. The learned Justice puts his decision wholly on the ground of public policy, and refers to his reasoning in the case of *Cole v. Goodwin* (19 Wend. 251); the substance of which is (p. 281), that a common carrier's business is of a public nature; that he is a public servant, and bound to perform the duties of his office, and that he should no more be permitted to limit or vary his obligations or liabilities by contract, than a sheriff,

(k) *Gould v. Hill*, 2 Hill (N. Y.), 623.

has any efficacy. But this case seems to rest upon a previous decision, (*l*) that the carrier's responsibility is not affected by a notice from him made known to the other party; and upon the difficulty of distinguishing this from an express contract.

Undoubtedly it may be difficult to discriminate very clearly between the case where the carrier and the sender expressly agree

that the carrier shall not be responsible for the property,

* 238 * and that in which the carrier says to the sender, "If you send goods by me, I will not be responsible for them," and

or jailer, or any other officer appointed by law. The only question with me is, how far we are bound by the case of *Gould v. Hill*, and whether the maxim, *stare decisis*, in consequence of it is to govern the present case. It is the only reported case where this precise question has been decided in that way in this State. No case that I am aware of has followed it, affirming the doctrine. *Nelson*, then Chief Justice of this court, dissented from the decision. I am disposed therefore to think, in view of the great importance of the question, and its connection with so large a branch of the commerce of the country, that we ought to take the responsibility of overruling it, providing we think it not in accordance with the settled law of the land. It is a question in relation to which, almost above all others, the law should be uniform throughout the commercial world, especially among the different States of the Union. It relates to transactions, which, in their nature, expand themselves over and through extensive districts of country, and to places widely separated from each other. No one can fail to perceive the great inconvenience that must result from having different and hostile rules on the subject prevailing between the different Atlantic cities, or between them and the Western States. If it be true, as I think is undeniable, that by the law as entirely settled in England, and in most of the United States, and as held by the most eminent jurists of the country, a common carrier may, by special contract with his employer, limit his liability and relax the rigor of the common-law rule applicable to his position, I think we ought not to hesitate in giving the law, so declared, effect in the case at bar, notwithstanding the isolated authority in this court which stands opposed to it. I think the rule as laid down by Justice *Cowen*, should be regarded as a deviation from the true one, from which the court should return at the earliest opportunity, and that, too, notwithstanding we

might, were the question entirely open, prefer a different one." The learned judge then proceeds to declare his disapproval of *Gould v. Hill* upon principle, admitting the question to be still an open one, and concludes: "In every light that I have been able to view the question, I am forced to the conclusion, that the rule in *Gould v. Hill*, is not, and ought not to be, the law; that it is opposed to reason as well as to authority, and ought not to be followed." And in the case of *Moore v. Evans*, 14 Barb. 524, *Gould v. Hill* is again explicitly overruled. See also *Stoddard v. Long Island R. R. Co.* 5 Sandf. 180; *Dorr v. The New Jersey Steam Navigation Co.* 1 Kern. 485. The result is, that there is no case which is any longer to be regarded as an authority, that decides that an express contract between the owner of goods and a carrier, limiting the liability of the latter is void. For cases, besides those already cited, which hold that such a contract is valid and binding, see the following: *Swindler v. Hilliard*, 2 Rich. L. 286; *Camden & Amboy Railroad Co. v. Baldau*, 16 Penn. St. 67; *Bingham v. Rogers*, 6 W. & S. 496; *Beckman v. Shouse*, 5 Rawle, 179; *Reno v. Hogan*, 12 B. Mon. 63; *Farmers & Mechanics Bank v. Champlain Transportation Co.* 28 Vt. 186; *Kimball v. Rutland & B. R. R. Co.* 26 Vt. 247; *Sager v. The Portsmouth R. R. Co.* 31 Me. 228; *Walker v. York & N. Midland R. Co.* 3 Car. & K. 279; *Roberts v. Riley*, 15 La. An. 103. See also the editor's notes to *Austin v. The M. S. & L. Railway Co.* 11 E. L. & E. 606; *s. c.* 11 C. B. 454, and *Carr v. The L. & Y. Railway Co.* 14 E. L. & E. 340; *s. c.* 7 Exch. 707, where the cases are collected. And *Slim v. The Northern Railway Co.* 26 E. L. & E. 297; *s. c.* 14 C. B. 647; *Smith v. N. Y. Centr. R. R. Co.* 29 Barb. 132. To what extent a carrier may thus exempt himself from his common-law liability, we shall inquire in another note.

(*l*) *Cole v. Goodwin*, 19 Wend. 251.

the sender thereafter, without reply, sends goods by him. But we think there may be a real difference. The rule of law, derived from public policy, may not go so far as to say that the carrier and the sender shall not agree upon the terms on which the goods are to be transported; but it may nevertheless say, that the carrier has neither the right to force such an agreement on the sender, nor to infer, *merely from his silence*, that he accepts the proposed terms. (m)¹ He may be silent, either because he assents to them, or because he disregards them, and chooses to stand upon the rights which the law secures to him. The passenger who may be about to enter a boat or a car with his baggage, learns, by reading the ticket which he buys, that if he puts that baggage on board it will be at his own risk all the way. He has a right to disregard such notice; to say it is not true; to deliver his baggage to the proper person, placing it under the responsibilities which lie upon the carrier by the general law. To hold otherwise would be to say, not merely that carrier and sender may agree to relieve the carrier from his peculiar liability, but that the carrier has a right to force this agreement on the sender; which is a very different thing. (n)²

(m) In *Simons v. Great Western R. Co.* 2 C. B. (n. s.) 620, the plaintiff was told by the clerk, who offered a paper to be signed, "that the signature was a mere form," and it was held, that the goods were not delivered to the carriers under the special contract.

(n) The question whether a public notice, brought to the knowledge of the bailor, will constitute such special contract, or be equivalent thereto, is per-

haps not entirely settled, but the decided weight of authority is that it will not. The first case in which it was expressly ruled that such a notice was valid and binding, is that of *Maving v. Todd*, 1 Stark. 72, decided in 1815. For several years previous to this, as we shall presently see, carriers had been in the habit of publishing notices to the effect that they would not be responsible for goods beyond a certain value, unless their true

¹ Where a passenger deposited goods at a cloak-room of a railway station, and received a ticket therefor, on the back of which he saw certain conditions restricting the liability of the company, but did not read them, it was held, that the goods were deposited subject to the conditions, and, being applicable to a loss of the goods, the company was not liable, the conditions not having been complied with. *Harris v. Great Western R. Co.* 1 Q. B. D. 515. See *Parker v. South Eastern R. Co.* 1 C. P. D. 618; 2 C. P. D. 416. But *Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470, decided that if the person receiving the ticket does not know that there is any writing on the back of the ticket, he is not bound by a condition printed on the back.

² That the mere buying a ticket and taking baggage checks do not constitute such an agreement, see *Baltimore, &c. R. Co. v. Campbell*, 36 Ohio St. 647. That assent to the carrier's limitation of liability must be express, see *Gaines v. Union Trans. Co.* 28 Ohio St. 418; that the receipt cannot limit liability against negligence, see *Boscowitz v. Adams Ex. Co.* 93 Ill. 523; and that, if assented to, it is binding, though not signed by the shipper, see *Erie R. Co. v. Wilcox*, 84 Ill. 239. See *Railroad Co. v. Manuf. Co.* 16 Wall. 318, to the point that an unsigned printed notice on the back of a receipt does not amount to a special contract limiting the carrier's common-law liability, although the receipt may have been taken by the consignee without dissent. Where a receipt contained exemptions in favor of companies other than the carrier receiving, the latter cannot take the benefit of them. *MERCHANTS' TRANS. CO. v. Bolles*, 80 Ill. 473.

It has been held recently in Massachusetts, that there is no

value was disclosed, and freight paid accordingly; and these notices had received the sanction of the courts. In the case of *Ellis v. Turner*, 8 T. R. 531, decided in 1800, a notice of a different character made its appearance. It was an action against the defendants as ship-owners for the loss of goods. They had published a notice to the effect that they would not be answerable for any loss or damage that might happen to any cargo, unless such loss or damage should be occasioned by the want of ordinary care and diligence in the master and crew, in which case they would pay £10 per cent on the loss or damage, provided such payment did not exceed the value of the vessel, but that they were willing to insure against all accidents, on receiving extra freight in proportion to the value. The case, however, went off upon another point, so that the validity of the notice did not come in question. In 1804, came the case of *Lyon v. Mells*, 8 East, 428, in which a notice of the same import had been given. But this case also went off without drawing in question the validity of the notice. In 1818, in the case of *Evans v. Soule*, 2 M. & Sel. 1, a notice appeared which extended the exemption of the carrier still further. That also was an action against the owner of a vessel. He had given notice that he should not consider himself liable to make good to any extent any loss or damage arising from any accident or misfortune whatever, unless occasioned by the actual negligence of the master or mariners. The plaintiff's counsel did not deny the validity of the notice, but contended that it had been waived. The court merely decided that it had not been waived, and gave judgment for the defendant. Thus stood the cases when *Maving v. Todd* came up, in 1815. This was an action against the defendants, who were lightermen, for the loss of goods intrusted to them to carry. It appeared that the goods, while in the defendants' custody, had been accidentally destroyed by fire, and the question was, whether they were liable for the loss. It appeared that they had so limited their responsibility by a notice, that it did not extend to a loss by fire. *Holroyd*, for the plaintiff, submitted "whether the defendants could exclude their responsibility altogether. This was going further than had been done in the case of carriers, who had only limited their responsibility to a certain amount." But, per Lord *Ellenborough*: "Since they can limit it to a particular sum, I think they

may exclude it altogether, and that they may say, we will have nothing to do with fire." *Holroyd*: "They were bound to receive the goods." Lord *Ellenborough*: "Yes, but they may make their own terms. I am sorry the law is so; it leads to very great negligence." The next year came the case of *Leeson v. Holt*, 1 Stark. 186. The plaintiff in this case had sent some chairs by the defendant, who was a common carrier. The defendant had given a notice to the effect that all household furniture sent by him would be entirely at the risk of the owner as to damage, breakage, &c. Lord *Ellenborough*, in summing up to the jury, said: "If this action had been brought twenty years ago, the defendant would have been liable, since, by the common law, a carrier is liable in all cases except two; where the loss is occasioned by the act of God, or of the king's enemies, using an overwhelming force, which persons with ordinary means of resistance cannot guard against. It was found, that the common law imposed upon carriers a liability of ruinous extent, and, in consequence, qualifications and limitations of that liability have been introduced from time to time, till, as in the present case, they seem to have excluded all responsibility whatsoever; so that, under the terms of the present notice, if a servant of the carriers had, in the most wilful and wanton manner, destroyed the furniture intrusted to them, the principals would not have been liable. If the parties in the present case have so contracted, the plaintiff must abide by the agreement, and he must be taken to have so contracted, if he chooses to send his goods to be carried after notice of the conditions. The question then is, whether there was a special contract. If the carriers notified their terms to the person bringing the goods, by an advertisement, which, in all probability, must have attracted the attention of the person who brought the goods, they were delivered upon those terms; but the question in these cases always is, whether the delivery was upon a special contract." This is the last that we hear of notices of this character in England, until they were finally put an end to by the Carriers Act already alluded to. See the act, post, p. *241, note (r). On this side of the Atlantic these notices were extensively discussed, for the first time, in *Hollister v. Nowlen*, 19 Wend. 234, and *Cole v. Goodwin*, id. 251. These cases were decided in 1888. The defendants in both cases were coach proprietors, and had

legal presumption that a passenger on a railroad read a notice

published notices to the effect that all baggage sent by their lines would be at the risk of the owners. The Supreme Court of New York, after a most careful consideration of the question, declared that the notices were of no avail; that the defendants were, notwithstanding, subject to all their common-law liability. Mr. Justice *Cowen*, who delivered the opinion in the last case, placed the judgment of the court, as we have already seen, on grounds of public policy, which extended equally to such notices and to special contracts. But in the former case the opinion was delivered by Mr. Justice *Bronson*, and he took the ground that such notices were not, upon sound principles of construction, equivalent to a special contract. Upon this point he uses the following language: "Conceding that there may be a special contract for a restricted liability, such a contract cannot, I think, be inferred from a general notice brought home to the employer. The argument is, that where a party delivers goods to be carried, after seeing a notice that the carrier intends to limit his responsibility, his assent to the terms of the notice may be implied. But this argument entirely overlooks a very important consideration. Notwithstanding the notice, the owner has a right to insist that the carrier shall receive the goods subject to all the responsibilities incident to his employment. If the delivery of goods under such circumstances authorizes an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier. If a coat be ordered from a mechanic, after he has given the customer notice that he will not furnish the article at a less price than one hundred dollars, the assent of the customer to pay that sum, though it be double the value, may perhaps be implied; but if the mechanic had been under a legal obligation, not only to furnish the coat, but to do so at a reasonable price, no such implication could arise. Now the carrier is under a legal obligation to receive and convey the goods safely, or answer for the loss. He has no right to prescribe any other terms; and a notice can, at the most, only amount to a proposal for a special contract, which requires the assent of the other party. Putting the matter in the most favorable light for the carrier, the mere delivery of goods, after seeing a notice, cannot warrant a stronger presumption that the owner intended to

assent to a restricted liability, on the part of the carrier, than it does that he intended to insist on the liabilities imposed by law; and a special contract cannot be implied where there is such an equipoise of probabilities." To the same effect are the remarks of *Redfield*, J., in *Farmers and Mechanics Bank v. The Champlain Transportation Co.* 23 Vt. 186, 205. "We are more inclined," says he, "to adopt the view which the American cases have taken of this subject of notices by common carriers, intended to qualify their responsibility, than that of the English courts, which they have, in some instances, subsequently regretted. The consideration that carriers are bound, at all events, to carry such parcels, within the general scope of their business, as are offered to them to carry, will make an essential difference between the effect of notices by them, and by others who have an option in regard to work which they undertake. In the former case, the contractor having no right to exact unreasonable terms, his giving public notice that he shall do so, where those who contract with him are not altogether at his mercy, does not raise the same presumption of acquiescence in his demands as arises in those cases where the contractor has the absolute right to impose his own conditions. And unless it be made clearly to appear, that persons contracting with common carriers expressly consent to be bound by the terms of such notices, it does not appear to us that such acquiescence ought to be inferred." And see *Kimball v. Rutland & B. R. R. Co.* 26 Vt. 247. The same doctrine is held in *Crouch v. London & North-Western R. Co.* 14 C. B. 256; *Clark v. Faxton*, 21 Wend. 153; *N. J. Steam Nav. Co. v. Merchants Bank*, 6 How. 344; *Dorr v. N. J. Steam Nav. Co.* 4 Sandf. 186; *Parsons v. Monteath*, 13 Barb. 353; *Stoddard v. The Long Island Railway Co.* 5 Sandf. 180; *Fish v. Chapman*, 2 Ga. 394; *Moses v. Boston & M. R. R. Co.* 4 Foster (N. H.), 71; *Davidson v. Graham*, 2 Ohio St. 181. See *ante*, note (j). Some of our courts, however, even since *Hollister v. Nowlen*, and *Cole v. Goodwin* were decided, have held similar notices valid. But they have generally done so with reluctance, and upon the ground that they considered themselves bound by the decisions of their predecessors. See *C. & A. Railroad Co. v. Baldauf*, 16 Penn. St. 67; *Laing v. Colder*, 8 Penn. St. 479; *Bingham v. Rogers*, 6 W. & S. 500. See also *Sager v. The Portsmouth Railroad Co.* 31 Me. 228. We think there cannot be

on the back of a check given him, having on its face the words, "look on the back." (*nn*) In Louisiana a carrier receiving a package of gold with knowledge of its contents, defended against a claim for its value, by showing that the printed receipt which mentioned no amount, limited the liability of the carrier to fifty dollars, unless the actual value were stated on the receipt, and the defence was held insufficient. (*no*)¹ A notice given to a person only employed to deliver the goods to the carrier, is not sufficient unless the bailor has knowledge of it; (*np*) nor is a written or printed notice which cannot easily be read, as where one was covered up by the revenue stamp. (*ng*)² The agreement by which the liability of the carrier is limited, must indeed be proved like any other contract. (*nr*)

- * 239 * A carrier binds himself also by his contracts; and it is held, that a railroad company is bound by its advertised time-tables, * perhaps as by its contract, and certainly as by its representation, to which it was its duty to conform. (*o*) But it has been held in England that there is no contract that a train will arrive at the hour at which it usually arrives. (*oo*)³

But although the common carrier cannot, by a mere notice, * extinguish his peculiar liability, yet he can in this way materially modify and qualify it. (*p*) A public notice, so spread abroad that all might know it, and brought to the distinct knowledge of the sender, would undoubtedly justify

much doubt that the doctrine so firmly established in New York, and in the Supreme Court of the United States, will generally be adopted in this country, wherever the question still remains open.

(*nn*) *Malone v. Boston, &c. R. R. Co.* 12 Gray, 388; *Blumenthal v. Brainerd*, 38 Vt. 402; *Adams Ex. Co. v. Nock*, 2 Duvall, 562.

(*no*) *Kember v. Southern Express Co.* 22 La. An. 150.

(*np*) *Fillebrown v. Grand Trunk R. R. Co.* 55 Me. 462.

(*ng*) *Perry v. Thompson*, 98 Mass 249.

(*nr*) *Southern Ex. Co. v. Purcell*, 37 Ga. 108.

(*o*) *Denton v. G. N. R. Co.* 5 E. & B. 860.

(*oo*) *Lord v. Midland R. R. Co.* Law Rep. 2 C. P. 339.

(*p*) *Pardington v. S. W. R. Co.* 1 Hurl. & N. 892.

¹ In *Oppenheimer v. U. S. Ex. Co.* 69 Ill. 60, it was held that a carrier receiving a package of jewelry worth \$3,800, without knowledge of its value, and giving a similar receipt, had a good defence on the ground of unfair conduct on the part of the shippers of the goods.

² Where a passenger in a dimly lighted car delivers his baggage check to an express messenger, and receives in return a card or receipt on which the check number is entered, and which also contains an agreement limiting the liability of the express company, printed in much smaller type than the rest of the card, and illegible where the passenger is sitting, such printed matter does not form a contract between the parties. *Blossom v. Dodd*, 43 N. Y. 264.

³ For a discussion of a railroad company's liability for want of punctuality, see *Le Blanche v. London, &c. R. Co.* 1 C. P. D. 286.

the carrier who proposed to confine himself to certain departments, or to exclude certain classes of goods, and in accordance therewith refused to take parcels of the excluded description. For a common carrier does not necessarily agree to take all sorts of goods, any more than he does to carry them to all places. An express between Boston and New York does not agree to carry a load of hay, or a cargo of cotton. The carrier has a right to refuse, without notice, articles which obviously differ from his usual course of business, and he has also a right to define and limit that business, and give notice accordingly. (q)

So too, he has a right to say to all the world and to each sender, that he will not carry goods beyond a certain value; or that, if he carries such goods, he must be paid for it by a premium on the increased risk. This is reasonable; and it is consistent with public policy, because it tends to give the carrier exact knowledge of what he carries, and of what risks he runs, and thus to induce him to take the proper care, and proportion his caution and his means of security to the value of the goods. (r) But in the con-

(q) *Wise v. G. W. R. Co.* 1 Hurl. & N. 63.

(r) The notices now alluded to have often been confounded with those which exempt the carrier absolutely from his liability, and which, as we have seen in note (n), *ante*, are not held valid. But it is very important that the two should be kept distinct. We have seen that there are but two cases in the English books, and those *Nisi Prius* cases, in which the latter have been expressly sanctioned; and that they were entirely put an end to by the Carriers Act. On the other hand, the former were sanctioned by the courts at an earlier date, were recognized in a vast number of cases previous to the Carriers Act, were established and regulated by that act, and have never, that we are aware of, been repudiated by any court in this country or in England. The case of *Nicholson v. Willian*, 5 East, 507, is generally considered as the one in which they were first sanctioned by a judicial decision. There the defendant was a coach proprietor and had published a notice, the purport of which was that he would not be accountable for any package whatever (if lost or damaged), above the value of £5, unless insured and paid for at the time of delivery. The action was brought to recover for the loss of a parcel delivered to the defendant to carry, containing goods to the value of £58. No disclosure was made

of the true value of the parcel, nor was any extra freight paid; and the court held that the defendant was protected by his notice. From this time until the passage of the Carriers Act, effect was given to similar notices in *Harris v. Packwood*, 3 Taunt. 264 (1810); *Beck v. Evans*, 18 East, 244 (1812); *Levi v. Waterhouse*, 1 Price, 280 (1815); *Bodenham v. Bennett*, 4 id. 31 (1817); *Smith v. Horne*, 8 Taunt. 144 (1818); *Birkett v. Willan*, 2 B. & Ald. 356 (1819); *Batsou v. Donovan*, 4 id. 21 (1820); *Garnett v. Willan*, 5 id. 53 (1821); *Sleat v. Flagg*, id. 342 (1822); *Duff v. Budd*, 3 Br. & B. 177 (1822); *Marsh v. Horne*, 5 B. & C. 322 (1826); *Brooke v. Pickwick*, 4 Bing. 218 (1827); *Riley v. Horne*, 5 Bing. 217 (1828); *Bradley v. Waterhouse*, Mood. & M. 154 (1828), and many other cases. In this state of things, the Carriers Act, 2 Geo. IV. and 1 Wm. IV. ch. 68, was passed. It is entitled, "An Act for the more effectual Protection of Mail Contractors, Stage-Coach Proprietors, and other Common Carriers for Hire, against the Loss of, or Injury to, Parcels or Packages delivered to them for Conveyance or Custody, the Value and Contents of which shall not be declared to them by the Owners thereof." The first section recites: "That whereas by reason of the frequent practice of bankers and others of sending by the public mails, stage-coaches, wagons, vans, and other public convey-

struction of the notice, it is held that all restrictions must be

ances by land, for hire, parcels and packages containing money, bills, notes, jewelry, and other articles of great value, in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage-coach proprietors, and common carriers for hire, is greatly increased: And whereas through the frequent omission, by persons sending such parcels and packages, to notify the value and nature of the contents thereof, so as to enable such mail contractors, stage-coach proprietors, and other common carriers, by due diligence, to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors, stage-coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses ;" and enacts : "That from and after the passing of this act, no mail contractor, stage-coach proprietor, or other common carrier by land, for hire, shall be liable for the loss of, or injury to, any article or articles, or property of the descriptions following, that is to say, gold or silver coin of this realm or of any foreign state, &c. (enumerating various kinds of goods), contained in any parcel or package which shall have been delivered, either to be carried for hire, or to accompany the person of any passenger, in any mail or stage-coach or other public conveyance, when the value of such article or articles, or property aforesaid, contained in such parcel or package, shall exceed the sum of £10, unless at the time of delivery thereof at the office, warehouse, or receiving-house, of such mail contractor, stage-coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles, or property, shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package." Sect. 2 enacts : "That when any parcel or package, containing any of the articles above specified, shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of £10, it shall be lawful for such mail contract-

ors, stage-coach proprietors, and other common carriers, to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving-house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid, over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles, and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid, at such office, shall be bound by such notice without further proof of the same having come to their knowledge." Sect. 3 enacts : "That when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the person receiving such increased rate of charge, or accepting such agreement, shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage-coach proprietor, or other common carrier as aforesaid, shall not have, or be entitled to, any benefit or advantage under this act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge." Sect. 4 enacts : "That from and after the first of September now next ensuing, no public notice or declaration heretofore made, or hereinafter to be made, shall be deemed or construed to limit or in anywise affect the liability at common law of any such mail contractor, stage-coach proprietor, or other public common carrier as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them, but that all and every such mail contractors, stage-coach proprietors, and other common carriers as aforesaid, shall, from and after the 1st September, be liable as at the common law, to answer for the loss of [or] any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding." Sect. 5 enacts : "That for the purposes of this act, every office,

taken most strongly against the carriers. (rr) And it is held,

warehouse, or receiving-house, which shall be used or appointed by any mail contractor, or stage-coach proprietor, or other common carrier as aforesaid, for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving-house, warehouse, or office, for such mail contractor, stage-coach proprietor, or other common carrier, and that any one or more of such mail contractors, stage-coach proprietors, or common carriers, shall be liable to be sued by his, her, or their name or names only, and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor or copartner in such mail, stage-coach, or other public conveyance, by land, for hire, as aforesaid." Sect. 6 enacts: "That nothing in this act contained shall extend or be construed to annul, or in anywise affect, any special contract between such mail contractor, stage-coach proprietor, or common carrier, and any other parties, for the conveyance of goods and merchandise." The act contains eleven sections, but the other five are not very material to our present inquiry. We shall have occasion presently to notice some decisions upon the construction of this statute. In this country very few cases appear to have arisen upon notices of the kind that we are now speaking of. *Dicta* may be found, however, sustaining them in *Orange County Bank v. Brown*, 9 Wend. 116, and in *Bean v. Green*, 3 Fairf. 422, and they were very ably vindicated by Mr. Justice *Cowen*, in *Cole v. Goodwin*, 19 Wend. 251. Upon the whole, in the language of Mr. Justice *Redfield*, "we regard it as well settled, that the carrier may, by general notice, brought home to the owner of the things delivered for carriage, limit his responsibility for carrying certain commodities beyond the line of his general business, or he may make his responsibility dependent upon certain conditions, as having notice of the kind and quantity of the things deposited for carriage, and a certain reasonable rate of premium for the insurance, paid, beyond the mere expense of carriage." See *Farmers & Mechanics Bank v. Champlain Trans. Co.* 28 Vt. 186, 206. — It remains that we consider to what extent a carrier may exempt himself from his common-law liability, whether by

notice or by special contract. This question first arose in the cases concerning notices. Many of those cases we have already cited in this note. They will be found, upon examination, to exhibit a considerable degree of uncertainty and contrariety of opinion upon the question. Some of them inclined to hold, that a non-compliance by the haulor with the terms of the notice was a fraud on his part, and consequently that the carrier was liable for nothing short of direct *malfaisance*; other cases, and the greater number, held the carrier liable for *gross negligence*; and others still, held him liable for *ordinary negligence*. No certain rule could be deduced from the cases until *Wyld v. Pickford*, 8 M. & W. 448. In that case the whole subject was elaborately examined and the Court of Exchequer declared that the carrier, notwithstanding his notice, was bound to use ordinary care. *Parke*, B., said: "Upon reviewing the cases on this subject, the decisions and *dicta* will not be found altogether uniform, and some uncertainty still remains as to the true ground on which cases are taken out of the operation of these notices. In *Bodenham v. Bennett* (4 Price, 34), Mr. Baron *Wood* considers that these notices were introduced for the purpose of protecting carriers from extraordinary events, and not meant to exempt them from due and ordinary care. On the other hand, in some cases it has been said that the carrier is not, by his notice, protected from the consequences of *malfaisance*, — Lord *Ellenborough*, in *Beck v. Evans* (16 East, 247); and that the true construction of the words, 'lost or damaged,' in such a notice, is, that the carrier is protected from the consequences of negligence or misconduct in the carriage of goods, but not if he divests himself wholly of the charge committed to his care, and of the character of carrier. *Bayley and Holroyd*, JJ., in *Garnett v. Willan* (6 B. & Ald. 57, 60). In many other cases it is said, he is still responsible for 'gross negligence'; but in some of them that term has been defined in such a way as to mean ordinary negligence (Story on Bailm. § 11); that is, the want of such care as a prudent man would take of his own property. *Best*, J., in *Batson v. Donovan* (4 B. & Ald. 80), and *Dallas*, C. J., in *Duff v. Budd* (3 Br. & B. 182). The

(rr) *Hooper v. Wells*, 27 Cal. 11; *Earle v. Cadmus*, 2 Daly, 237; *Hopkins v. Westcott*, 6 Blatch. 64.

that, although the plaintiff took a receipt containing such notice,

weight of authority seems to be in favor of the doctrine, that in order to render a carrier liable after such a notice, it is not necessary to prove a total abandonment of that character, or an act of wilful misconduct, but that it is enough to prove an act of ordinary negligence,—gross negligence, in the sense in which it has been understood in the last-mentioned cases; and that the effect of a notice, in the form stated in the plea, is, that the carrier will not, unless he is paid a premium, be responsible for all events (other than the act of God and the Queen's enemies), by which loss or damage to the owner may arise, against which events he is, by common law, a sort of insurer; but still he undertakes to carry from one place to another, and for some reward in respect of the carriage, and is therefore bound to use ordinary care in the custody of the goods, and their conveyance to and delivery at their place of destination, and in providing proper vehicles for their carriage; and after such a notice, it may be that the burden of proof of damages or loss by the want of such care would lie on the plaintiff." We are not aware, however, that any of the English cases have expressly held that it was incompetent for a carrier to exempt himself by notice from the consequences of his own negligence, if he used terms which could receive no other reasonable construction. But however this may be, a series of English cases since the Carriers Act, and within the last two years, seem to have settled the point there that it is competent for a carrier by an express contract between himself and his bailor to exempt himself from liability for anything short of actual malfeasance. The first of these cases which it is necessary to cite is that of *Chippendale v. The L. & Y. Railway Co.* 7 E. L. & E. 396, in the Queen's Bench. There the plaintiff, who had some cattle conveyed by a railway company, received for them a ticket, which he signed, containing the terms on which the railway company carried the cattle. At the foot of the ticket there was a clause: "N. B.—This ticket is issued subject to the owner undertaking all risk of conveyance whatever; as the company will not be liable for any injury or damage, howsoever caused, and occurring to live stock of any description travelling upon the L. & Y. Railway, or in their vehicles." The plaintiff saw the cattle put into the truck. During the journey some of the cattle got alarmed and broke out of the truck, and were injured. The truck was so defectively constructed as to be unfit and unsafe for

the conveyance of cattle. Held, that there was no implied stipulation that the truck should be fit for the conveyance of cattle; and that the company were protected by the terms of the ticket from liability to the plaintiff for the damage to the cattle. It should be observed, however, that *Erie, J.*, places some stress upon the fact that the contract was for the carriage of *live stock*. He says: "I think that a limitation, however wide in its terms, being in respect of live stock, is reasonable; for though domestic animals might be carried safely, it might be almost impossible to carry wild ones without injury." See also *Morville v. The Great Northern Railway Co.* 10 E. L. & E. 368. Then followed the cases of *Austin v. The M. S. & L. Railway Co.* 11 E. L. & E. 506; s. c. 10 C. B. 464; and *Carr v. The L. & Y. Railway Co.* 14 E. L. & E. 840; s. c. 7 Exch. 707, both decided the same day. In the former case a railway company, letting trucks for hire, for the conveyance of horses, delivered to the owner of the horses a ticket, in which it was stated that the owners were to undertake all risks of injury by conveyance or other contingencies; and further stipulated, that the company would not be liable for any damages, however caused, to horses or cattle. The horses received damage through the breaking of an axle, which was attributable to the culpable negligence of the company's servants. A verdict having been found for the plaintiff, a rule *Nisi* was obtained for arresting the judgment. Upon the argument, the counsel in support of the rule insisting that the defendants were protected from all liability by their notice, *Jervis, C. J.*, said: "Must they not act as common carriers, except so far as they limit their liability by the ticket? It seems an alarming proposition to say that they can exempt themselves from all liability. If they are allowed to do so in respect of goods, why should they not be able to do it in the case of passengers? Supposing they were to be treated as gratuitous bailees, would they not be liable for gross negligence?" But after taking time to consider, the rule was made absolute, *Cresswell, J.*, delivering the judgment of the court in an elaborate opinion. In *Carr v. The L. & Y. Railway Co.*, the plaintiff, being the owner of a horse, delivered it to the defendants, a railway company, to be carried on the railway, subject to conditions which stated that the owners undertook all risks of conveyance whatsoever, as the company would

he may show that he never assented or accepted the paper as a contract. (rs)¹

not be responsible for any injury or damage, however caused, accruing to live stock of any description travelling on the railway. The horse having been injured by the horse-box being propelled against some trucks through the gross negligence of the company: *Held, Platt, B.*, hesitating, that the company, under the terms of the contract, were not responsible for the injury. But *quare, per Alderson, B.*, whether the company would have been responsible if the horse had been stolen. *Parke, B.*, said: "The question in this case turns upon the notice which was given by the defendants, and which forms the foundation of the contract between the parties. It is plain that, since the passing of the Carriers Act, it is competent for carriers to make a special contract. Such a contract was made in this case, and the only question is as to the meaning of that contract. According to the old cases, there was this limitation upon the construction of carriers' notices, that unless a carrier excluded his liability in express terms, according to the ordinary terms of the notice, he would be responsible for gross negligence. The practice of a carrier protecting himself by notice, was put an end to by the Carriers Act. . . . Prior to the establishment of railways, the court were in the habit of construing contracts between individuals and carriers, much to the disadvantage of the latter. Before railways were in use the articles conveyed were of a different description from what they are now. Sheep and other live animals are now carried upon railways, and horses which were used to draw vehicles are now themselves the objects of conveyance. Contracts, therefore, are now made with reference to the new state of things, and it is very reasonable that carriers should be allowed to make agreements for the purpose of protecting themselves against the new risks to which they are in modern times exposed. Horses are not conveyed on railways without much risk and danger; the

rapid motion, the noise of the engine, and various other matters are apt to alarm them and cause them to do injury to themselves. It is, therefore, very reasonable that carriers should protect themselves against loss, by making special contracts. The question is, whether they have done so here. The jury have found that the defendants have been guilty of gross negligence, and that must be taken as a fact. In my opinion, the owner of the horse has taken upon himself the risk of conveyance, the railway company being bound merely to find carriages and propelling power; the terms of the contract appear to me to show this. The company say they will not be responsible for any injury or damage (however caused) occurring to live stock of any description, travelling upon their railway. This, then, is a contract, by virtue of which the plaintiff is to stand the risk of accident or injury; and certainly, when we look at the nature of the things conveyed, there is nothing unreasonable in the arrangement. In the case of *Austin v. The Manchester, Sheffield, & Lincolnshire Railway Company*, 16 Q. B. 600, the language of the contract was different from the present, but not to any great extent. (His lordship stated the case.) In that case, the accident was occasioned by the wheels not being properly greased; in the present case, the carriage that contained the plaintiff's horse was driven against another carriage. We ought not to fritter away the meaning of contracts merely for the purpose of making men careful. That is a matter that we are not bound to correct. The legislature may, if they please, put a stop to contracts of this kind; but we have nothing to do with them, except to interpret them when they are made." *Alderson, B.*: "The defendants in this case undertook to carry the goods in question on certain terms. The question then is, What are those terms? It is clear that they are such as the defendants might lawfully make. It is plain to me that they undertook to

(rs) *Boorman v. Amer. Express Co.* 21 Wis. 152; *Strohn v. Detroit R. R. Co.* 21 Wis. 554. See also *Southern Exp. Co.*

v. Newby, 96 Ga. 685; *McMillan v. Michigan Southern R. R. Co.* 16 Mich. 79.

¹ In Massachusetts, acceptance by a consignor, without dissent, at the time of the delivery of property for transportation, of a shipping receipt containing a clause exempting the carrier from his common-law liability, authorizes an inference of assent. *Hoadly v. Northern Trans. Co.* 115 Mass. 304. *Contra, Erie, &c. Trans. Co. v. Dater*, 91 Ill. 193.

* 242 * It would follow then, that where the carrier interposes such general notice, as "all baggage at risk of owners," the

carry the horse at the risk of the plaintiff. The words are, 'the owners undertaking all risk of conveyance whatsoever.' Now, under those terms, a question might be raised, whether the injury contemplated was such as must issue in injury to the thing conveyed; so that a doubt might arise whether the case of the horse being stolen was contemplated, as under such circumstances the accident would not issue in damage to the horse. But that question would not arise here, as in this case the horse itself has been injured. The result is, that if there has been gross negligence on the part of the defendants, they are protected against liability by virtue of the words of the contract." *Platt, B.*: "The declaration states that the defendants were guilty of gross negligence, and that fact was proved. The germen of the charge is the gross negligence. Now, undoubtedly, since the establishment of railways, new subjects of conveyance have arisen. Formerly, horses were seldom carried, but now they are ordinarily conveyed by the trains. It is, therefore, said, that new stipulations are necessary to guard carriers from risks which are incidental to this new mode of conveyance. It is suggested that the animal may be alarmed by the noise of the engine, by the speed of the carriages, and by various other causes; and that unless we take upon ourselves the office of legislation, this ticket absolves the carriers from all responsibility. I own I am startled at such a proposition, and considering the high authority by which it is supported, I feel I ought to doubt and to distrust my own opinion. But I am bound to say that I am not satisfied that the language of this ticket absolves the railway company from all liability for damage. I cannot help thinking that the owner of the goods never dreamed of such a thing when he signed this contract. In truth, this accident had nothing to do with the conveyance of the horse. The accidents referred to are those which occur whilst the article is in a state of locomotion. The case of gross negligence, as it seems to me, is not pointed at by this contract." *Martin, B.*: "I agree in opinion with my brothers *Parke* and *Alderson*. This is the case of a special contract which the plaintiff has adopted and assented to. Without doubt, at common law, a carrier is entitled to make a special contract. If, indeed, he refuses to carry goods, except on the terms of a special

contract, he is liable to an action; but if he makes a special contract, it must be abided by. The Carriers Act says that a special contract may be made. It is, then, our duty to see what contract the parties have made. Insurers are answerable for gross negligence, and if goods may be insured, others may contract that they will not be answerable for their own gross negligence. In this case, the language used by the parties cannot be stronger than it is. I am unable to say what was passing in the mind of the owner of the horse. I am to look only at the terms of the notice, and if the carrier had been desirous of preparing a contract by which he would get rid of his liability in respect of gross negligence, he could not have used more apt words than those that are contained in this notice. With respect to the argument of inconvenience, the answer is, that we have nothing to do except to carry out this contract; the parties concerned, and not ourselves, are to judge of the inconvenience. If we hold the carriers in this case responsible for gross negligence, we shall place them in the situation of insurers and underwriters. There are, indeed, inconveniences attending either mode of constructing the contract, but, in my opinion, the defendants are not answerable under this contract for any risk arising from gross negligence." See also, as to reasonable notice, *White v. G. W. R. Co.* 2 C. B. (n. s.) 7; *Pianciani v. L. & S. W. R. Co.* 18 C. B. 226; and as to such notice, and the liability of carriers for animals, *McManus v. L. & Y. R. R. Co.* 2 Hurl. & N. 698. In this country, however, it would seem to be pretty nearly, if not quite settled, that it is incompetent for a carrier, either by notice or express contract, to exempt himself from liability for his own negligence. The strongest case that we have seen to this effect is the case of *Sager v. The Portsmouth R. R. Co.* 31 Me. 228. There the defendants had transported the plaintiff's horse from Boston to Portland. It was upon a cold day in November. The horse was carried in an open car, and suffered serious injury from the exposure to the cold. This action was brought to recover damages for that injury. The defendants introduced a paper signed by the plaintiff, whereby he agreed to exonerate the company from all damage that might happen to any horses, oxen, or other live stock, that he should send over the company's road;

sender * may disregard it, and the baggage will be at the * 243 risk of the carrier ; or he may expressly refuse to be bound

meaning thereby, that he took the risk upon himself of all and any damage that might happen to his horses, cattle, &c. ; and that he would not call upon said company or any of their agents for any damage whatever. At the trial, the learned judge instructed the jury that this contract would not exempt the company from liability for their own misfeasance, misfeasance, or negligence. And this instruction was held correct. *Shepley*, C. J., after speaking of the construction put upon notices by the English courts, said : "The notices were usually given in terms so general, that a literal construction of the contract thus arising out of them, would have exonerated the carriers from liability for their own misfeasance or negligence, and for that of their servants. Yet the well-established construction of them has been, that they were not thereby relieved from their liability to make compensation for losses thus occasioned." The learned judge then proceeded to an examination of the authorities ; and having stated that the court had formerly declared that the power of carriers to limit the liability imposed upon them by law should not be favored or extended, he continued : "If a literal construction of the agreement signed by the plaintiff would exonerate the defendants from losses occasioned by the negligence of their servants, it will be perceived that it could not be permitted to have that effect without a violation of established rules of construction, and without a disregard of the declared intention of this court not to extend the restriction of the liability of common carriers. The very great danger to be anticipated, by permitting them to enter into contracts to be exempt from losses occasioned by misconduct or negligence, can scarcely be overestimated. It would remove the principal safeguard for the preservation of life and property in such conveyances. It, however, requires no forced construction of that agreement, to regard it as effectual to place the defendants in the position of bailees for hire, and as not exonerating them from liability for losses occasioned by misfeasance or negligence. The latter clause, 'we will not call upon the railroad company or any of their agents for any damages whatsoever,' considered without reference to the preceding language, would be sufficiently broad to excuse them from making compensation for losses occasioned by wilful misconduct.

It is most obvious that such could not have been the intention ; and that the true meaning and intention was, that they would not call upon them for any damage whatsoever, 'that may happen to any horses, oxen, or any other live stock, that we send or may send over said company's railroad.' The intention of the parties, by the use of the language contained in this last clause, is then attempted to be explained as follows :— meaning by this, that we will take the risk upon ourselves of all and any damages that may happen to our horses, cattle, &c. The meaning of damage happening to live animals is to be sought. The word 'happen' is defined by the words, to come by chance, to fall out, to befall, to come unexpectedly. An accident, or that which happens or comes by chance, is an event which occurs from an unknown cause, or it is the unusual effect of a known cause. This will exclude an event produced by misconduct or negligence, for one so produced is ordinarily to be expected from a known cause. Misconduct or negligence under such circumstances would usually be productive of such an event. Lord *Ellenborough*, in the case of *Lyon v. Melis* (5 East, 428), speaking of what 'may or may not happen,' explains it as 'that which may arise from accident, and depends on chance.' An injury occasioned by negligence, is the effect ordinarily to be expected as the consequence of that negligence, without reference to any accident or chance. A correct construction of the agreement will not therefore relieve the defendants from their liability for losses occasioned by the misfeasance or negligence of their servants." So in *Reno v. Hogan*, 12 B. Mon. 68, the carriers received a box of glass, with a clause in the bill of lading, that they should not be "accountable for breakage." On its arrival at the place of destination, the glass was found broken into small fragments, which was proved to have been caused by the gross negligence of the defendant or his servants. The court, while admitting the validity of the special contract, held, that its provisions did not apply to injuries arising from gross negligence. Opinions and *dicta* to the same effect will be found in *Dorr v. N. J. Steam Navigation Co.* 4 Sandf. 136; *Stoddard v. Long Island Railroad Co.* 5 Sandf. 180; *Laing v. Colder*, 8 Penn. St. 479; *N. J. Steam Navigation Co. v. Merchants*

- * 244 by it, and insist * that his baggage shall be carried under the responsibility which the law creates ; and if the carrier
- * 245 refuses to take the goods, he * will render himself liable to an action. But if the notice be only a limited and
- * 246 qualified notice, and in itself reasonable, the * sender, having knowledge of it, is bound by it. Nor can he insist that the carrier shall receive and transport his goods without reference to it.
- * 247 * In a recent decision in New York, a rule of law of much importance is asserted ; it is that a railroad company
- * 248 is bound to * introduce improvements which are ascertained to be practicable and conducive to safety ; and are therefore liable for an injury caused by neglect in not introducing them. (s)

From what we have already said, and from the authorities we have cited, it may be inferred, that the right of a common carrier to limit his responsibility by a special contract cannot be considered as settled, or clearly defined. The common law makes a common carrier responsible for all damage, excepting only that which is caused by an act of God, or by a public enemy. If this responsibility rests only on usage, it disappears, of course, when the parties make an express contract, covering the same ground ; because usage binds parties only on the supposition that it entered into their intention and their contract. If this responsibility is matter of positive law,—whatever be its origin,—then, of course, it cannot be evaded or modified at the pleasure of the parties. And if either of these grounds were taken, no question would

- * 249 remain. But neither of them is taken. * For a time, some courts were disposed, as we have seen, to hold the responsibility of a common carrier to be determined by law, and to be beyond the reach of contract. But it is not so now. It is held, that his responsibility rests upon, and is preserved by, "public policy ;"

Bank, 6 How. 844; Slocum v. Fairchild, 7 Hill (N. Y.), 292; Swindler v. Hilliard, 2 Rich. L. 286; Parsons v. Monteath, 18 Barb. 353; Camden & Amboy Railroad Co. v. Baldauf, 18 Penn. St. 67; Pennsylvania R. R. Co. v. McCloskey's Admr. 23 Penn. St. 528. See also the notes of the learned American editors to Austin v. The M. S. & L. Railway Co. 11 E. L. & E. 506; s. c. 10 C. B. 454; and Carr v. The L. & Y. Railway Co. 14 id. 340, 7 Exch. 707. See also Shaw v. York & North Midland Rail-

way Co. 18 Q. B. 353; Morville v. Great Northern Railway Co. 10 E. L. & E. 306. — In England it has been held, after much consideration, that notices published in pursuance of the Carriers Act, if not complied with, exempt the carrier from liability for *gross* negligence. Hinton v. Dibbin. 2 Q. B. 646. See also Owen v. Burnett, 2 Cr. & M. 353.

(s) Smith v. New York & Hart. R. R. Co. 19 N. Y. 127.

and then the difficult questions come, What is this policy, what is its obligation, and to what extent does it admit of modification by the contract of the parties?

We apprehend that the difficulty of the question, as to the obligation of the common carrier, after notice and contract, arises from the extreme uncertainty of the principle thus brought to its determination. Anything more indistinct, undefined, and incapable of certainty or uniformity, than the requirement of "public policy," can hardly be imagined. Of late years this principle is invoked with increasing frequency; and sometimes, at least, seems to be made use of as authority for deciding in whatever way the court thinks would, on the whole, be most useful. It need not be said, that such use of such a principle must diminish greatly the certainty and uniformity of law.

The cases in which public policy conflicts with the contract of the common carrier, may be reduced to three classes.

In one, the carrier exempts himself from liability for all injuries which can in no way be attributed to his own negligence or wrongdoing.

In another, this exemption covers all liabilities whatever, including not only the negligence, but the wilful tort or default of the carrier or his servants.

In the third, the contract exempts the carrier from liability for any damage not actually caused by his own negligence, but leaves him liable for that.

We think the decisions and the reasons for them would now permit the carrier to exempt himself by contract, or by notice equivalent to contract, from any liability for damage not caused by his negligence or default.

Then we think that he cannot protect himself from a liability for the consequences of wilful default or tort, as, for example, embezzlement or wanton destruction of the property by himself or his servants. Upon the question whether he may exempt himself from all liability for the consequences of the mere negligence of *himself or his servants, we are inclined to * 250 think that the present weight of authority would not permit him to do so. This is indeed expressly prohibited by the recent English Railroad Traffic Act. It cannot, however, be denied that the law *does* permit, in some cases, contracts of this kind. Thus, insurance against fire, has been repeatedly held, as we show

in our chapter on that subject, to be intended and to operate as an insurance against damage caused by the negligence of the insured himself, his family or his servants.

In a late case in West Virginia it was held that a carrier might, by sufficiently definite terms, exonerate himself from liability for his own negligence, however gross, confining his liability to fraud or other wrong-doing. (*ss*)¹ At about the same time it was held in Kansas, in Mississippi, in Pennsylvania, Illinois, and Indiana, that the carrier could not so exempt himself from liability for loss caused by his negligence. (*st*)² The law of these last cases is in much better conformity with the weight of authority. Thus, it is held that "taken on owner's risk," (*su*) or "at owner's risk of fire," (*sv*) or with the stipulation, "valued under fifty dollars unless otherwise herein stated," (*sw*) did not exempt the company from liability for negligence. Indeed, the principle running through the cases seems to be, that any notice can affect the carrier only as insurer, leaving his liability for negligence wholly unaffected. On this ground, a notice that the goods would be carried in an uncovered car, would not discharge the carrier, if it was negligence so to carry them; (*sy*) and where horses were carried, with the strongest stipulation against the carrier's liability for negli-

(*ss*) *Baltimore, &c. R. R. Co. v. Rathbone*, 1 West. Va. 87.

(*st*) *Kallman v. United States Express Co.* 3 Kan. 205; *Southern Express Co. v. Moon*, 39 Miss. 822. The same doctrine is implied in *Rooth v. North Eastern R. R. Co.* Law Rep. 2 Ex. 178; *Lackawanna R. R. Co. v. Chenewith*, 52 Penn. 382; *Pennsylvania R. R. Co. v. Henderson*, 51 Penn. 315; *Illinois R. R. Co. v. Read*, 37 Ill. 484. In this last case it was a free ticket on which the notice was written. See also *American Express Co. v. Sands*, 55 Penn. St. 140; *Stedman v. Western*

Transportation Co. 48 Barb. 97; *Farnham v. Camden R. R. Co.* 55 Penn. St. 53; *Evansville R. R. Co. v. Young*, 28 Ind. 516.

(*su*) *Mobile, &c. R. R. Co. v. Jarboe*, 41 Ala. 644; *Penn. R. R. Co. v. Books*, 57 Penn. St. 839.

(*sv*) *Levering v. Union Transportation, &c. Co.* 42 Mo. 88.

(*sw*) *Orndorff v. Adams Ex. Co.* 3 Bush, 194.

(*sy*) *Montgomery, &c. R. R. Co. v. Edmonds*, 41 Ala. 667.

¹ So in the United States courts, *Railroad Company v. Lockwood*, 17 Wall. 857; in Maine, *Little v. Boston, &c. R. Co.* 66 Me. 239; in Ohio, *Union Ex. Co. v. Graham*, 26 Ohio St. 595; *U. S. Ex. Co. v. Backman*, 28 Ohio St. 144; and Michigan, *&c. R. Co. v. Heaton*, 37 Ind. 448; Ohio, *&c. R. Co. v. Selby*, 47 Ind. 471. In Illinois, railroads may, by contract, escape liability from their servants' negligence other than wilful or gross, *Arnold v. Ill. Cent. R. Co.* 83 Ill. 273; and in New York, a carrier may, by an express stipulation, exempt himself from liability for negligence, *Mynard v. Syracuse, &c. R. Co.* 71 N. Y. 180; *Magnin v. Dinsmore*, 56 N. Y. 168; but where the exemption was for "damage occasioned by delays from any cause or change of weather," the carrier was held liable for loss of goods through his negligent delay, *Nicholas v. N. Y., &c. R. Co.* 89 N. Y. 370. See *Holsapple v. Rome, &c. R. Co.* 86 N. Y. 275, that where general words, limiting a carrier's liability, may operate without including his negligence, such negligence will not be within the exemption.

² *Empire Trans. Co. v. Wamsutter Oil Co.* 63 Penn. St. 14.

gence, it was held that the company were still liable for not providing sufficient cars; (*sz*) where one having "a drover's pass," paying no fare, and the pass expressly stipulating against liability for negligence, was injured by negligence, it was held, that he was not a gratuitous passenger, and the company were liable. (*sa*)¹

A condition that the carrier should be liable for no loss unless a claim were made within thirty days from the date of the receipt, was held unreasonable and void. (*sb*)

When an owner of live freight contracted with a railroad company to release them from all claims but those arising from gross negligence, it was held that proof of collisions, &c., was not enough to maintain the action, without direct proof of gross negligence. (*sc*)

Recently, in England, one whose goods were injured by the negligence of the servants of a common carrier (where notice had been given), brought his action therefor. The judge who tried the case at *Nisi Prius* decided *against* the liability of the carrier; then a *majority* of the Queen's Bench, *in banco*, decided against the carrier; then a *majority* of the judges in the Exchequer Chamber, reversed the decision of the Queen's Bench; then it went to the House of Lords, and a *majority* of the judges, all of whose opinions were asked by the House of Lords, confirmed the decision of the Exchequer Chamber. And then a *majority* of the House of Lords, reversed the decision of the Exchequer Chamber, and held the carrier liable. (*t*) We * give an * 251

(*sz*) *Hawkins v. Great Western R. R.* Co. 17 Mich. 57; *Indianapolis, &c. R. R. Co. v. Allen*, 31 Ind. 394; *Michigan, &c. v. Heaton*, id. 897.

(*sa*) *Cleveland, &c. R. R. Co. v. Curran*, 19 Ohio, 21.

(*sb*) *Adams Express Co. v. Reagan*, 29 Ind. 21. See also *Harrison v. London, &c. R. R. Co.* 2 B. & S. 122.

(*sc*) *Bankard v. Baltimore & Ohio R. R. Co.* 34 Md. 197.

(*t*) *Peek v. North S. Railway Co.* 4 B. & S. 1005. The plaintiff sent three marble chimney-pieces to the station of the defendants, to be forwarded to London, and told the carter to ask what the insurance would be, the company having previously sent a printed notice to plaintiff's agent, that the company would receive and forward goods only subject to conditions, one of which was that they

would not be responsible for loss or injury to any marbles unless declared and insured according to their value. The company's clerk told the carter, they could not tell what the insurance would be unless the value of the marbles was stated, and afterwards told the plaintiff's agent that the rate, if uninsured, would be 5s.; but if insured it would be 10 per cent on the declared value in addition. Plaintiff's agent afterwards by letter directed the company to forward the marbles "not insured," and they were forwarded accordingly, and when delivered were injured by exposure to rain. The defendants pleaded that they carried the goods by a special contract under the Railway Traffic Act (17 & 18 Vict. c. 81, § 7). The case was first tried before *Erlé, J. (Q. B.)*, who held the company discharged from liability. The

¹ *Ohio, &c. R. Co. v. Selby*, 47 Iad. 471.

abstract of this case in a note, although little can be learned from it but the extreme difficulty of the question.

* 252 * The question has arisen, whether, where a reasonable and legal notice has been given to the sender, there still rests on the carrier the obligation of a special inquiry; so that without such inquiry the sender may transmit, or the passenger may take, his goods in silence, and have them covered by the same responsibility as if he had complied with the notice, and had stated the extra value of the goods, and paid the extra price. We cannot doubt that the weight of authority, as of reason and of justice, is, that such notice makes such inquiry unnecessary, and that the owner of the goods would, in such case, be considered either as taking the risk upon himself, or as endeavoring to cast it fraudulently upon the carrier. (u)

plaintiff's counsel obtained a rule on the defendants to show cause, — and the court of Queen's Bench (Lord *Campbell*, C. J., and *Crampton*, J., against *Eyle*, J., dissenting), made the rule absolute. On appeal to the Exchequer Chamber, the judges (*Williams*, J., dissenting) reversed the judgment of the Queen's Bench. The case was then appealed to the House of Lords. The Lords calling on the judges, *Blackburn*, J., and *Cockburn*, C. J., gave opinions in favor of the plaintiff; *Willes*, J., *Martin*, B., *Williams*, J., *Pollock*, C. B., for the defendants. Then the House of Lords reversed the judgment of the Exchequer Chamber. The case turned very much upon the construction of the statute above mentioned, which is as follows: "Every such (railroad) company as aforesaid shall be liable for the loss of, or for any injury done to any horses, &c., or to any articles, goods, or things in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, in any wise limiting such liability, every such notice being hereby declared null and void; provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivery of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable, provided always, that no greater damages shall be recovered for

the loss of, or for injury to, any such animals, beyond the sums hereinafter mentioned, &c.; provided, also, that the proof of the value of such animals, articles, goods, or things, and the amount of the injury done thereto, shall in all cases be upon the person claiming compensation for such loss or injury; provided also that no special contract between such company and any other parties respecting the receiving, forwarding, and delivery of any animals, articles, goods, or things, as aforesaid, shall be binding on, or affect any such party, unless the same be signed by him, or by the person delivering such animals, articles, goods, or things, respectively, for carriage; provided also that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company, under the said act (11 Geo. IV. & 1 Will. IV. c. 68), with respect to articles of the descriptions mentioned in the said act." In a later case, certain conditions of carriage were declared void, because unreasonable, although expressly agreed to. *Gregory v. West Midland R. R. Co.* 2 Hurl. & Colt. 944.

(u) It would be of no avail for a carrier to publish a notice if he was still bound to make a special inquiry; for this he may do without publishing a notice, and the bailor must inform him correctly, at his peril. That a notice brought to the knowledge of the bailor dispenses with any further inquiry, see *Batson v. Donovan*, 4 B. & Ald. 21; *Marsh v. Horne*, 5 B. & C. 322; *Duff v. Budd*, 3 Br. & B. 177; *Harris v. Packwood*, 3 Taunt. 284; *Bodenham v. Bennett*, 4 Prie, 31; *Garnett v. Willan*,

* There may be other special agreements between the * 253 carrier and his passengers ; and there seems to be some tendency to construe them precisely, if not strictly. Thus, one who buys a ticket entitling him to a through passage for a reduced price, cannot require the railroad (or other carrier) to take him up at an intermediate point, if he chooses to stop at one. (a)¹

Horse railroads have been recently introduced in our larger cities, and are now common. In the cases cited below, interesting questions are considered in reference to the authority of municipal governments to permit their use of highways, and the construction of acts exercising this authority. (b) They are undoubtedly

5 B. & Ald. 53; Sleat v. Fagg, id. 342. But see the remarks of Bronson, J., *contra*, in Hollister v. Nowlen, 19 Wend. 284. So under the Carriers Act, it is held to be the duty of the sender of goods therein enumerated, and exceeding £10 in value, to take the initiative by giving notice to the carrier of their value and nature, in order to charge the latter in respect to their loss ; and this whether the goods be delivered at the office of the carrier or not. Baxendale v. Hart, 9 E. L. & E. 508, 6 id. 468, 6 Exch. 769.—But the carrier will be held to very strict proof that the notice was brought to the knowledge of the bailor. Hollister v. Nowlen, 10 Wend. 284; Brooke v. Pickwick, 4 Bing. 218; Bean v. Green 8 Fairf. 422; Riley v. Horne, 5 Bing. 217; Clayton v. Hunt, 8 Camp. 27; Cobden v. Bolton, 2 id. 108; Butler v. Heane, id. 415; Kerr v. Willan, 2 Stark. 58; Davis v. Willan, id. 279. In Camden & Amboy Railroad Co. v. Baldauf, 16 Penn. St. 67, where the notice was in the English language, and the passenger was a German, who did not understand English, it was held incumbent on the carrier to prove that the passenger had actual knowledge of the limitation in the notice. But the strongest case to be found upon this point is that of Brown v. Eastern Railroad Co. 11 Cush. 97. This was an

action of assumpsit for lost luggage. There was a notice printed on the back of the passage-ticket given to the plaintiff, that the defendants would not be responsible beyond a specified sum ; but no other notice was given, nor was her attention called to this. Held, that if a common carrier can limit his responsibility in this way, it must be clearly shown that the other party is fully informed of the terms and effect of the notice ; and that the facts in this case did not furnish that certain notice which must be given to exonerate such carrier from his liability. This question is put an end to in England by the Carriers Act, the mere publication in pursuance of the statute being held to be constructive notice to all. Baxendale v. Hart, 9 E. L. & E. 508, 6 id. 468, 6 Exch. 769.—So the notice must be clear and explicit, and if ambiguous, will be construed against the carrier. Beckman v. Shouse, 5 Rawle, 179; Camden & Amboy Railroad Co. v. Baldauf, 16 Penn. St. 67; Barney v. Prentiss, 4 Har. & J. 817. So if there are two notices, he will be bound by the one least beneficial to him. Cobden v. Bolton, 2 Camp. 108; Munn v. Baker, 2 Stark. 255.

(a) Cheney v. B. & M. R. R. Co. 11 Met. 121.

(b) Musser v. Fairmount & Arch

¹ Dietrich v. Pennsylvania R. Co. 71 Penn. St. 432. Nor can one who has bought a ticket to ride in one direction, ride in a direction the reverse of that indicated by the ticket. Keeley v. Boston, &c. R. Co. 67 Me. 163. A carrier has a right to require a special check of passengers who stop over, or the payment of full fare from the stopping-over station to his destination ; and a passenger expelled for failure to comply with these regulations cannot insist on riding from the place where he was expelled until he has paid the sum previously demanded. Stone v. Chicago, &c. R. Co. 47 Ia. 82. One who purchases a ticket, and has his baggage checked, to a certain point, cannot be compelled to stop short of that place and go on in another train, at least in the absence of a regulation of the company. Hicks v. Hannibal, &c. R. Co. 68 Mo. 399. The words "good on passenger trains only," on a ticket, do not constitute an agreement that all passenger trains will stop at the stations designated on the ticket. Ohio, &c. R. Co. v. Swarthout, 67 Ind. 567.

common carriers of passengers, and their rights and obligations, as such, must be much the same with those of the ordinary railroad companies.

SECTION XVI.

OF FRAUD.

All fraud, or wilful misrepresentation, or intentional concealment, on the part of the sender of goods, or of the passenger, extinguishes the liability of the common carrier, so far as it is affected by such misconduct; and this must be equally true whether the fraud consists in the disregard of a notice, or, where there * 254 is no notice, in an intention to cast upon the carrier *a responsibility which he is not obliged to assume, which he does not know of, and against which he cannot therefore take the proper precautions. (c)¹

Indeed, the principle that the carrier is bound only by a responsibility which he knows and can provide for, seems to be the principal cause of a recent modification of his liability in respect to the baggage of a passenger, which appears now to be quite well settled. It may be stated thus: the common carrier of passengers is not liable as such for the loss of their baggage, beyond that amount which he might reasonably suppose such passenger would carry with him; nor for property such as is not usually included within the meaning of baggage. Thus, not for goods carried by way of merchandise; (d)² nor for a larger sum of

Street R. Co. 7 Am. Law Reg. 284; State of New York *v.* Mayor, &c. of New York, 8 Duer, 119.

(c) Gibbon *v.* Paynton, 4 Burr. 2298; Kenrig *v.* Eggleston, Aleyn, 98; Tylly *v.* Morrice, Carth 486; Anon. cited by Hale, C. J., in Morse *v.* Slue, 1 Vent. 288; Titchburne *v.* White, 1 Stra. 145. And see Batson *v.* Donovan, 4 B. & Ald. 22.

(d) Therefore the word "baggage" has been held not to include a trunk containing valuable merchandise and nothing else, although it did not appear that the plaintiff had any other trunk with him. Pardee *v.* Drew, 25 Wend. 459. So in Hawkins *v.* Hoffman, 6 Hill (N. Y.), 586, it was held, that the term "baggage" did not embrace samples of

¹ Where a common carrier, by his contract, limits his liability to a specified amount, if the value of the property is not stated by the shipper, and the goods are of greater value than the amount specified, silence alone on the part of the shipper as to the real value, although there be no inquiry by the carrier and no artifice to deceive, is fraud in law, which discharges the carrier from liability for ordinary negligence. Magnin *v.* Dinsmore, 62 N. Y. 35.

² Alling *v.* Boston, &c. R. Co. 126 Mass. 121; Blumantle *v.* Fitchburg R. Co. 127 Mass. 322. See Michigan, &c. R. Co. *v.* Carrow, 73 Ill. 348.

money than the passenger might reasonably take on such a journey for his expenses. (e)¹ But there may be * special articles, as fishing gear, or sporting apparatus, which one carries for his amusement; (f) and in these and other cases

merchandise carried by a passenger in a trunk, with a view of enabling him to make bargains for the sale of goods. But in *Porter v. Hildebrand*, 14 Penn. St. 129, where the plaintiff was a carpenter, moving to the State of Ohio, and his trunk contained carpenter's tools to the value of \$56, which the jury found to be the reasonable tools of a carpenter, it was held, that he was entitled to recover their value. See also *Dwight v. Brewster*, 1 Pick. 60; *Beckman v. Shouse*, 5 Rawle, 179; *Bomar v. Maxwell*, 9 Humph. 621; *Great Northern Railway Co. v. Shepherd*, 9 E. L. & E. 477, 14 id. 367, 8 Exch. 30; *Mad River and Lake Erie Railroad Co. v. Fulton*, 20 Ohio, 318; *Smith v. Boston, &c. R. R. Co.* 44 N. H. 325.

(e) Thus, in the case of *Orange County Bank v. Brown*, 9 Wend. 85, it was held, that the owner of a steamboat used for carrying passengers, was not liable for a trunk, containing upwards of \$11,000 in bank-bills, brought on board by a passenger as baggage, the object being the transportation of money. And in *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586, it was doubted by *Bronson*, J., whether money to pay travelling expenses could be included within the term baggage. "Men," says he, "usually carry money to pay their travelling expenses about their persons, and not in their trunks or boxes; and no contract can be implied beyond such things as are usually carried as baggage." It is, however, well settled that a traveller may carry, as a part of his baggage, a reasonable amount of money to pay his expenses. Thus, in *Jordan v. Fall River Railroad Co.* 5 Cush. 69, it was held, that common carriers of passengers are responsible for money *bond fide* included in the baggage of a passenger, for travelling expenses and personal use, to an amount not exceeding what a prudent person would deem proper and necessary for the purpose. And *Fletcher*, J., after a critical examination of the case, said: "Upon consideration of the whole subject, and referring to the cases, the court have come to the conclusion, that money, *bond fide* taken for travelling expenses

and personal use, may properly be regarded as forming a part of a traveller's baggage. The time has been, in our country, when the character and credit of our local currency were such, that it was expedient and needful, for persons travelling through different States, to provide themselves with an amount of specie, which could not conveniently be carried about the person, to defray travelling expenses. But even if bills are taken for this purpose, it may be convenient and suitable that they should be, to some amount, placed in a travelling trunk, with other necessary articles for personal use. This would seem but a reasonable accommodation to the traveller. It has been objected, that the carrier will not expect that there will be money with the baggage, and will not therefore be put upon his guard. But surely a carrier may very naturally understand and expect, that a passenger will place his money, for expenses, or some part of it, in his trunk, instead of carrying it all about his person; he certainly might as naturally expect this as that there would be jewels or a watch in a travelling trunk, for which articles a carrier has been held responsible. The passenger is not bound to give notice of the contents of his trunk, unless particular inquiry be made by the carrier. But it must be fully understood that money cannot be considered as baggage, except such as is *bond fide* taken for travelling expenses and personal use, and to such reasonable amount only as a prudent person would deem necessary and proper for such purpose. But money intended for trade, or business, or investment, or for transportation, or any other purpose than as above stated, cannot be regarded as baggage." See, to the same effect, *Weed v. S. & S. Railroad Co.* 19 Wend. 584; *Bomar v. Maxwell*, 9 Humph. 621; *Johnson v. Stone*, 11 Humph. 419; *The Ionic*, 5 Blatchf. C. C. 638. This case holds, that a gold watch and chain, gold ornaments for presents, and American coin, are not "luggage." See also *Dunlap v. International R. R. Co.* 98 Mass. 371.

(f) "If one has books for his instruc-

¹ An opera-glass is "baggage," *Toledo, &c. R. Co. v. Hammond*, 33 Ind. 879; but not an emigrant's feather-bed, not intended for use on the journey, *Connolly v. Warren*, 106 Mass. 146.

it may often be very difficult to draw the line between what would come within the liability of the carrier, and what would not. The question would not only be materially affected by circumstances, but is one of those upon which different individuals would be very likely to differ; and it is perhaps impossible to fix upon anything like a definite standard. But the principle is plain enough, and the reason and justice of it are undeniable. And the difficulty in the application of the principle, whether by the court

* 256 * or by the jury, is of a kind which must often occur in the administration of the law. It must always be a question of mixed law and fact, where the court state the principle, and illustrate its bearing upon the case at bar, as they see fit, and the jury apply the principle so stated as they best can.

A passenger in a railway train, may consider one who takes charge of the baggage, on arrival at a place, as the agent of the company, and notice to him concerning the baggage is notice to the company. (*ff*)

We have treated of steam railway companies; but in most of our large cities there are now horse-railroads. A few cases have arisen concerning their rights and liabilities. It seems that the iron rails laid by such a company in a public street are still their property, and another company authorized to lay a track in the same direction for a part of their route, have no right to pass over their rails. (*fg*)

A regulation by such a company that passengers shall not get

tion or amusement by the way, or carries his gun or fishing tackle, they would undoubtedly fall within the term baggage, because they are usually carried as such." Per *Bronson, J.*, in *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586. So in *Brooke v. Pickwick*, 4 Bing. 218, and *McGill v. Rowand*, 3 Penn. St. 461, carriers were held responsible for ladies' trunks containing apparel and jewels. So in *Woods v. Devin*, 18 Ill. 746, a common carrier of passengers was held liable for the loss of a pocket-pistol and a pair of duelling pistols, contained in a carpet-bag of a passenger, which was stolen out of the possession of the carrier. And in *Jones v. Voorhees*, 10 Ohio, 145, it was held, that a gold watch of the value of ninety-five dollars, was a part of a traveller's baggage, and his trunk a proper place to carry it in. But see *Bomar v. Maxwell*, 9 Humph. 621, where the plaintiff's trunk contained "a silver watch, worth about thirty-five dollars; also, medicines, handcuffs, locks,

&c., worth about twenty dollars," and the court said: "The watch alleged to have been in the trunk, clearly does not fall within the meaning of the term baggage; and much less the handcuffs, locks, &c.; these certainly do not usually constitute part of a gentleman's wardrobe, nor is it perceived how they are necessary to his personal comfort on a journey in a stage-coach." In *Parmelee v. Fischer*, 22 Ill. 212, it is laid down, that damages may be assessed for such articles of necessity and convenience as passengers usually carry for personal use, comfort, instruction, amusement, or protection, having regard to the length and object of their journeys; and in *Davis v. Mich. S. & N. Ind. R. R. Co.* id. 278, it was held, that a revolver is included in personal baggage.

(*ff*) *Ouimitt v. Henshaw*, 35 Vt. 605.

(*fg*) *Jersey City, &c. R. R. Co. v. Jersey City, &c. R. R. Co.* 20 N. J. Eq. 61.

off or on their cars by the front platform, is held to be reasonable; and one knowing the rule, and injured while violating it, cannot hold the company liable, even if permitted by the driver to get on in front. (*f*)

SECTION XVII.

OF THE EVIDENCE OF LOSS.

In regard to the proof of the contents of a passenger's trunk, lost by, or while in charge of, a common carrier, the prevailing American authority holds that the liability of the carrier for *some* amount having been established *aliunde*, the plaintiff is a competent witness *ex necessitate*, to prove the contents of his trunk, and their value. (*g*) From the same necessity, the wife of the owner has been admitted to prove the same facts. (*h*) But the rule for the admission of such evidence does not extend further than to the proof of such goods or baggage as being commonly carried in a traveller's trunk, may be expected to be there. (*i*) In Massachusetts, it was formerly held that the common-law rule prevailed, and neither the owner nor his wife could be a witness in an action brought by the owner. (*j*) Such was * the law in * 257 South Carolina. (*k*) But a statute of Massachusetts, passed since the decision above referred to, permits the plaintiff to put in evidence in the case a descriptive list, sworn to by him. (*l*)¹

(*f*) Baltimore, &c. R. R. Co. v. Wilkinson, 30 Md. 224.

(*g*) Sneider v. Geiss, 1 Yeates, 84; Clark v. Spence, 10 Watts, 335; Oppenheimer v. Edney, 9 Humph. 386; Johnson v. Stone, 11 id. 419; Whitesell v. Crane, 8 W. & S. 369; Mad River R. R. Co. v. Fulton, 20 Ohio, 318; Sparr v. Wellman, 11 Mo. 280.

(*h*) McGill v. Rowand, 8 Penn. St. 451; Mad River R. R. Co. v. Fulton, 20 Ohio, 318.

(*i*) Mad River R. R. Co. Fulton, 20 Ohio, 318. Therefore it has been *held* not to extend to "medical books, medicines, surgical instruments, and chemical apparatus." Pudor v. B. & M. Railroad Co. 26 Me. 458. And see Bingham v. Rogers, 6 W. & S. 495. The cases of Dibble v. Brown, 12 Ga. 217, and Doyle

v. Kiser, 6 Ind. 242, illustrate almost the whole law concerning the liability of the carrier for the baggage of a passenger. In Hopkins v. Westcott, 6 Blatchf. 64, it is *held* that manuscripts carried by a student, author, or professional man, for the purpose of study or business, are a part of "his baggage." See *ante*, p. * 199, n. (*kl*).

(*j*) Snow v. Eastern Railroad Co. 12 Met. 44. See further on this question, the editor's note to Great Northern Railway Co. v. Shepherd, 9 E. L. & E. 477; s. c. 8 Exch. 80, and 1 Greenl. Ev. 348.

(*k*) Dill v. Railroad Co. 7 Rich. L. 158.

(*l*) Supp. to R. S. c. 147, § 5 (1851). And a statute of 1856, allowing the parties to suits to testify, would seem to settle this definitely.

¹ See Pub. Sta. c. 169, § 18.

ON THE LAW OF TELEGRAPHIC COMMUNICATIONS.

SECT. I.—*Of Telegraphs in General.*

ALTHOUGH but a few years have elapsed since the invention of the electric telegraph, it is already in very general use. It joins provinces and nations separated by streams and seas, and now covers a large part of our country, and spans the ocean between the two great continents. And wherever it exists it is largely used as an instrument of communication for social, business, or political purposes. In Europe and in this country there are laws regulating the construction, establishment, and use of electric telegraphs. They embrace a wide extent and variety of topics. What we propose to do, as appropriate to the general purpose of this work, is to consider the Law of Communication by Telegraph in its relation to the Law of Contracts.¹

We shall treat, first, of the legal character of the company which owns and works a telegraph. Secondly, the contract between the telegraph company and the sender of a message. Thirdly, the breaches of this contract. Fourthly, the contract between the telegraph company and the receiver of a message. Fifthly, the breaches of this contract. Sixthly, contracts between the sender and receiver made by telegraph. Seventhly, the measure of damages.

¹ A contract between a railroad and telegraph company giving the latter the exclusive right to run its wires along the road of the former, is void as against public policy, in restraint of trade, and as tending to create monopolies, and is an interference with the State's right of eminent domain. *West. Un. Tel. Co. v. Am. U. Tel. Co.* 65 Ga. 160. And likewise a contract between a telephone company and the owner of telephone instruments, to the effect that, in the use of such instruments by the company, discriminations shall be made as between certain telegraph companies, is void as against public policy. *State v. Bell Telephone Co.* 36 Ohio St. 296.

* SECTION II.

* 257 b

THE LEGAL CHARACTER OF A COMPANY WORKING A TELEGRAPH.

The main question here is, Is such a company a common carrier? There are decisions in which the affirmative is quite distinctly asserted. And there are others in which it is asserted with more or less of qualification. (a)¹ When a new

(a) The only case in which telegraph companies have been expressly held to be common carriers is *Parks v. Alta Cal. Tel. Co.* 13 Cal. 422. In this case the court say: "The rules which govern the liability of telegraph companies are not new. They are old rules applied to new circumstances. Such companies hold themselves out to the public as engaged in a particular branch of business, in which the interests of the public are deeply concerned. They propose to do a certain service for a given price. There is no difference in the general nature of the legal obligation of the contract between carrying a message along a wire and carrying goods or a package along a route. The physical agency may be different, but the essential nature of the contract is the same. In both cases the contract is binding, and the responsibility of the parties is governed by the same general rules." — In *McAndrews v. Electric Tel. Co.* 33 Eng. L. & E. 180, telegraph companies are spoken of as being "in the position of carriers who would be liable at common law, but who may limit their liability by special notice," but the only question before the court was the reasonableness of the regulation relieving the company from liability for unpeated messages. A similar view seems to have been taken in *Bowen v. Lake Erie Tel. Co.* 1 Am. Law Reg. 685, where it was held that "telegraph companies holding themselves out to transmit despatches correctly are under obligation so to do unless prevented by causes over which they have no control." In *Baldwin v. United States Telegraph Co.*, these companies are regarded substantially as common carriers. On the other hand, in *Birney v. N. Y. & Wash. Printing Tel. Co.* 18 Md. 341, the court say: "While a

common carrier is an insurer and is protected from liability by the act of God, or the enemies of the State, he can avail himself only of such excuses. He sees what happens to his charge the moment it happens. But a telegraph company, owing to innumerable causes which may disturb the security of its lines, would be almost as often open to liability because of the providences of God unknown to it, as because of any other reason. This telegraph company is not a common carrier, but a bailee, performing through its agents a work for its employer, according to certain rules and regulations which under the law it has a right to make for its government." — And in *De Rutte v. N. Y., Alb. & Buf. Tel. Co.*, the court of Common Pleas say: "Common carriers are held to the responsibility of insurers for the safe delivery of property intrusted to their care, upon grounds of public policy, to prevent frauds or collusion with them, and because the owner, having surrendered up the possession of his property, is generally unable to show how it was lost or injured. These reasons, which are the ones usually assigned for the extraordinary responsibility of common carriers, cannot be regarded as applicable to the same extent to telegraph; nor are there any reasons in our judgment why they should be held in any extent to the responsibility of insurers for the correct transmission and delivery of intelligence." Similar views were expressed by the Supreme Court of the same State in *Breese v. U. S. Tel. Co.* 45 Barb. 274; affirmed in 48 N. Y. 132, and by the Court of Appeals in the recent case of *Leonard v. N. Y., &c. Tel. Co.*, and in the following cases: *N. Y. & Wash. Tel. Co. v. Dryburg*, 35 Pa. St. R. 298; *Shields v. Wash. & N. O. Tel.*

¹ In Georgia, a telegraph company is a bailee for hire, and not a common carrier. *West. Un. Tel. Co. v. Fontaine*, 58 Ga. 433.

* 257 c * kind or class of contracts come before the courts, it is both natural and reasonable to try to connect them with some one of the established and recognized classes, for so far as this may be done, new law is not wanted but only the application of old rules to new cases. It is obvious, however, that this effort may be carried too far. We have elsewhere intimated that the endeavor to make the law of partnership but a branch of that of co-tenancies or joint tenancy, and to bring transactions in negotiable paper under the common law of contracts, has not been without some mischievous influence. So we think may be, and perhaps has been, the effect to treat a telegraph company as a common carrier.

The private carrier makes his contracts under the general law; the common carrier under special rules of law. The essentials of these, as seen in the previous chapter, are, first, that he is considered as a *quasi* public officer, entering into definite relations with the public, and having on this ground some peculiar rights and some peculiar obligations. It may be admitted at once, that to this extent, telegraph corporations may be classed with common carriers. (b)

Co. 11 Am. L. Jour. 811; West. Un. Tel. Co. v. Carew, 15 Mich. 525; Playford v. United K. Tel. Co. L. R. 4 Q. B. 707; Ellis v. Am. Tel. Co. 18 Allen, 226. In this last case it was held that the provisions of the statutes of Massachusetts concerning telegraph companies apply to foreign companies doing business within that State. In Leonard v. New York, &c. Telegraph Co. 41 N. Y. 544, Mr. Justice Hunt states with great force the argument against the extension to telegraph companies of the common-law liability of a common carrier.

(b) While the clear weight of judicial opinion is that telegraph companies are not common carriers in the strict sense of the term, yet on account of the public nature of their employment they have been held in several cases to a very similar degree of responsibility. Thus in Baldwin v. U. S. Tel. Co. 1 Lansing, 125, the Supreme Court of New York say: "Although telegraph companies are not strictly speaking public carriers for the reason that they do not have tangible possession of goods which can be destroyed or stolen, yet from the public nature of their employment, the important matters confided wholly to their care, and the skill and fidelity required in the proper performance of their duties, their legal characteristics become so analogous to those of carriers that the law

must consider them as such, subject only to such modifications as the peculiar nature of their business renders absolutely necessary." And in De Rutte v. N. Y., Alb. & Buf. Tel. Co. 1 Daly, 547, it is said: "Like the business of common carriers, the interests of the public are so largely incorporated with it that it differs from ordinary bailments which parties are at liberty to enter into or not as they please." See also Parks v. Alta Cal. Tel. Co. 18 Cal. 422; West. Un. Tel. Co. v. Carew, 15 Mich. 525; N. Y. & Wash. Tel. Co. v. Dryburg, 35 Penn. St. R. 298; Graham v. West. Un. Tel. Co. 10 Am. Law Reg. (n. s.) 319; Sweatland v. Ill. & Miss. Tel. Co. 17 Ia. 438. — Two recent cases, however, deny that the obligations of telegraph companies rest upon the public nature of their employment, and assert that they have their foundation solely in the contract between the parties. In Leonard v. N. Y., Alb. & B. Tel. Co. 41 N. Y. 544, the Court of Appeals of New York held that "It must be assumed that the liability of telegraph companies in respect of the accurate transmission and faithful delivery of messages rests entirely upon contract, and that they are not in the situation of innkeepers, common carriers, and the like, upon whom legal duties rest, resulting from their occupation and profession, and who owe a duty to the

* Another of the obligations of common carriers, is, that * 257 d they are bound to treat all the public alike, and to carry all goods or passengers offered to them, unless they have a sufficient reason for making an exception. This is required by many of the statutes by which telegraph companies are regulated. If, however, they are common carriers where the statutes make no such requirement, or where the companies exist without any statutory regulation, they would be bound by the same obligation, and this would then rest on their relation to the public, as is the case with common carriers. This has been so held. (c) We are not able to see (independently of statute requirement) other reason for it than this: They publicly advertise that they will transmit messages; this may be regarded as an offer to the public and to all who compose it, and when any one to whom this offer is made accepts it by tendering a message, the offer and acceptance constitute a contract. This would certainly be analogous to the case of a common carrier, but it would not, we hold, justify the assertion that a telegraph company is a common carrier.

A third element of the law of common carriers is the most important and characteristic of all. It is that which makes them insurers of the goods they carry against any loss not caused by the act of God or of the public enemy, and insurers of passengers against any loss caused by an accident which could have been prevented by any care that was, rationally and practically speaking, possible. This rule, * which, we repeat, is the * 257 e most important and characteristic of all the rules which make up the law of common carriers, is, as we shall endeavor in a subsequent section to show, wholly wanting from the law of telegraphic communication.

Then, it must be remembered, that a common carrier carries either goods or passengers; the telegraph carries neither. The common carrier may carry a message, or communication, and may be paid for this. But in this transaction he could not be considered a common carrier, for he is neither bound to take

public irrespective of their engagements in particular instances." And in *Playford v. United Kingdom Tel. Co. L. R. 4 Q. B. 707*, the Court of Queen's Bench say: "The obligation of the company to use due care and skill in the transmission of the message is one arising entirely out of the contract. . . . We cannot agree with the judgments given in the American

courts in the cases cited in the argument that there is any analogy between a consignment of goods through a carrier, and the transmission of a telegram." In *Ellis v. Am. Tel. Co.* 18 Allen, 226, the public nature of their employment was said to rest upon the statute.

(c) *De Rutte v. N. Y., Alb. & Buf. Tel. Co.* 1 Daly, 547.

them, nor if he takes them does he insure them any farther than by his contract. There have been able and ingenious efforts to regard the message as a chattel; as property bailed for transmission. (d) But at most it may be said to have a savor of property, and to be in some respects like a chattel. But in many more respects it is unlike. It is indeed essentially different; and the message cannot be regarded as a chattel although the paper on which it is written — and which is never transmitted — may be. (e) To all these reasons against regarding telegraph companies as common carriers, may be added, what is distinctly asserted in one case, namely, that the mode of transmission makes it impossible for the company to see what happens to its charge, and to guard against threatened danger. (f)

THE OBLIGATIONS AND RIGHTS OF TELEGRAPH COMPANIES.

They are bound to have suitable instruments, and competent servants, and to see that the service rendered to applicants is rendered with the care and skill which its peculiar nature requires. (g)¹ This fitness and sufficiency of instruments and apparatus is required by some statutes, and obviously by the nature of their services; but we do not know that it has passed

(d) Scott & Jarnagan on Telegraphs, § 97.

(e) Those courts which hold telegraph companies to be common carriers must of course consider the message as a chattel, but we have seen that the number of these is very small. On the other hand, several cases distinguish their responsibilities from those of common carriers by the circumstance that they have nothing in the nature of a chattel intrusted to their keeping. Thus in *Leonard v. N. Y., A. & B. Tel. Co.* 41 N. Y. 544, the court say: "He has no property intrusted to his care; he has nothing which one can steal, or which can be taken from him. There is no subject of concealment or conspiracy. He has in his pos-

session nothing which in its nature of itself is valuable. It is an idea, a thought, a sentiment,—impalpable, invisible, not the subject of theft or sale, and as property quite destitute of value." So also *Baldwin v. U. S. Tel. Co.* 1 Lansing, 125; *Breese v. U. S. Tel. Co.* 46 Barb. 274; 48 N. Y. 182; *Ellis v. Am. Tel. Co.* 13 Allen, 226; *Playford v. Un. Kingdom Tel. Co.* Law Rep. 4 Q. B. 707; *Birney v. N. Y. & W. Pr. Tel. Co.* 18 Md. 341.

(f) *Birney v. N. Y. & W. P. Tel. Co.* 18 Md. 341.

(g) *Graham v. West. Un. Tel. Co.* 10 Am. Law Reg. (N. S.) 819; *West. Un. Tel. Co. v. Carew*, 15 Mich. 325.

¹ A telegraph company, contracting to deliver market reports, is responsible for a loss occasioned by its failure to furnish correct reports. *Turner v. Hawkeye Tel. Co.* 41 Ia. 458.

directly under adjudication, although it is referred to in some cases. (h) In reference to railroads, it has been held to be their duty to avail themselves of any proved and certain improvement. Whatever reasons there may be for this rule would seem to apply to telegraphs. It is obvious, however, that the rule itself would be applied to them only with much qualification. (i) They must receive and send all messages offered them. This is required by many of the statutes. Where not so required, we think they would come under the same obligation, as the effect of their offering themselves to the public, by advertising or otherwise, as undertaking to receive and send messages. The exceptions to this obligation are, that they need not receive messages of an illegal or immoral character; nor such as * subject * 257 g them, by their length or interference with their business, to unreasonable inconvenience; or such as cannot be read with reasonable care and certainty. Of course they are excused when the press of business makes it impossible to send all that offer. But in such case, and indeed in all cases, they are bound, generally by statute, and otherwise we think by the nature of their employment, to send them in the order in which they are received, with an exception in some of the statutes, giving priority to government messages; (j)¹ and to treat all who employ them impartially and alike. And they must send the messages with reasonable promptitude.

A most important obligation is to send them accurately, that is,

(h) In *Sweatland v. Ill. & Miss. Tel. Co.* 17 Ia. 433, the original message read: "Live hogs six, six quarter; dressed six three quarters, seven, firm." As received it read: "Live hogs six three quarters, seven firm." It appeared that after part of the dispatch had been received the instrument began to "splutter," and the remainder of the message was lost. The receiving operator telegraphed back to repeat from "six." The sending operator supposing the last "six" to be meant repeated only from that word, thus omitting the middle of the dispatch. The plaintiff claimed that the trouble was due to the defective character of the recording instrument; the defendants, that it

was the result of atmospheric causes which could not be guarded against. As to the former claim the court held that "on general principles the company was bound to employ skilful operators, to exercise due care, and to use good instruments. And on general principles, if it omitted this duty and damage ensued to a party in consequence of such omission, he would have his action therefor." See also *West. Un. Tel. Co. v. Carew*, 15 Mich. 525; *Leonard v. N. Y., &c. Tel. Co.* 41 N. Y. 544.

(i) *Hegeman v. West. R. R.* 16 Barb. 353; 3 Kern. 9.

(j) Scott & Jarnagan on Tel. §§ 128, 129, 130.

¹ *Behm v. West. Un. Tel. Co.* 8 Bissell, 131, was to the effect that a telegraph company is not bound to forward messages at once, but only in a reasonable time considering the force employed at the forwarding office, the amount of business transacted on the line, and the apparent necessity for haste shown in the message.

as they are written. It is certain that they have no right to change them in any respect or particular. If it be illegible the operator may refuse it; but if he receives it he must read it as well as he can and send it as he reads it. He must not alter it to extend abridged words, or to improve the grammar or the spelling or amend it in any way. (*k*)¹ It may be wholly unintelligible by him, and yet be understood by sender and receiver, and made unintelligible by anybody else on purpose.

Secrecy is another obligation, and it is imposed by many statutes, and would be by the confidential nature of the transaction. But it has been decided that telegrams are not privileged communications, and that even where the disclosure of the contents of dispatches by employés of the company were forbidden * 257 h by statute, such employés might * be summoned as witnesses in courts of justice, and compelled to produce the dispatches or testify as to their contents. (*l*)

The delivery of the message must be prompt, and to the right person. They are certainly bound to send it beyond their own lines, if this be obviously implied and required by the address of the message, and thus receive it. Whether they are liable for a failure of duty by lines which take the message from them, must depend, as a matter of principle, upon the question, whether these other lines are associated with theirs, in such wise as to make them to this extent copartners. Otherwise they are bound only to deliver it at a proper time and in a proper way to the succeeding line. This question always resolves itself into this: Has

(*k*) N. Y. & Wash. Pr. Tel. Co. v. Dryburg, 35 Penn. St. 298. The message delivered for transmission in this case was, "Send me for Wednesday evening two hand-bouquets, very handsome, one of five and one of ten dollars." The operator read the word *hand* as *hund*, and, assuming that hundred was intended, added the letters *red*, so that the dispatch transmitted read "two hundred bouquets." Before the mistake was discovered, the plaintiff had cut a large number of valuable flowers, which were rendered entirely valueless, and for the loss thus occasioned it was held that he might recover. The court say: "The wrong of

which the plaintiff complains consists in sending him a different message from that which they had contracted with Le Roy to send. That it was a wrong, is as certain as that it was their duty to transmit the message for which they were paid. . . . One of the plainest of their obligations is to transmit the very message prescribed. To follow copy, an imperative law of the printing office, is equally applicable to the telegraph office."

(*l*) Henisler v. Freedman, 2 Parsons, Sel. Cas. 274; State v. Litchfield, 10 Am. Law Reg. (n. s.) 878; *In re Waddell*, 8 Jur. (n. s.) 181; *In re Ince*, 20 Law Times (n. s.) 421.

¹ Where a message received by an agent is an unintelligible jargon, and the agent wrongly interprets it, the telegraph company is not liable for the ensuing loss, though it has not delivered the exact words received from his principal. Hart v. Direct, &c. Cable Co. 86 N. Y. 633.

the receiving line, by actual connection with other lines, by an appearance of connection sanctioned by the receiving line, by custom, or advertisement or otherwise, led their customer to believe or justified him in believing, that they will send the message over the whole distance as over their own lines? Receiving pay for the whole distance might be *prima facie* evidence of such a contract, but it would be open to explanation or rebutter. (m) Many companies now guard against this class of liabilities, by a provision printed upon the * message blank, that they will not be responsible for errors or delay on connecting lines, and making the company which receives the message, only the agent of the sender, to send the message on other lines when necessary. (mm)

In the message blanks now commonly used, the conditions are printed upon the face of the paper in such a manner as to make them a part of the contract for transmission. (nn)¹

(m) So held in *De Rutte v. N. Y., Alb. & Buf. Tel. Co.* 1 Daly, 547; and in *Baldwin v. U. S. Tel. Co.* 1 Lansing, 125; and see *Thurn v. Alta Cal. Tel. Co.* 15 Cal. 472. On the other hand, in *Stevenson v. Montreal Tel. Co.* 16 Upper Canada R. 580, it was held, by a divided court, that although the defendants advertised their line as connecting with all the principal cities and towns in Canada and the United States, and had received the charge for transmission to a point beyond their own line, this imposed on them no obligation beyond that of delivering the message safely to the connecting line, and paying for its transmission thereon, and that there was no implied contract to deliver the message safely at the termination of the connecting line. And see *West. Un. Tel. Co. v. Carew*, 16 Mich. 525; and *Baldwin v. U. S. Tel. Co.* 54 Barb. 506. And in *Leonard v. N. Y., Alb. & Buf. Tel. Co.* 41 N. Y. 544, it is said that "each carrier, by the receipt of the goods and the consequent promise to forward them, enters into an agreement with the owner at New York, although he does not meet him or correspond with him personally, that he will carry and deliver the goods, and is liable to the original owner in New York if he fails in his undertaking. The rule and the rea-

son for it are the same in regard to the transmission of telegraphic messages." The principles on which this question depends appear to be precisely the same as those governing the liability of connecting lines of railroad and other carriers. We have seen already that the decisions in this latter class of cases are exceedingly conflicting, and it is to be expected that there will be the same diversity upon this point. See *ante*, p. *212 *et seq.*

(mm) In an action against a connecting line for negligence in transmitting a message sent under the above conditions, it was held that the terms and conditions applied only to the company to which the message was first given, and that there was no special contract between the sender and the line which subsequently completed the transmission. *Squire v. West. Un. Tel. Co.* 98 Mass. 282.

(nn) In *Breese v. U. S. Tel. Co.* 45 Barb. 274; 48 N. Y. 132, where the message was written upon such a blank, the court say: "Before the message was written under the printed heading, and signed and delivered to the defendant, it was a general proposition to all persons desiring to send messages by the defendant's peculiar means of transmission or conveyance, of the terms and conditions upon which such messages would be sent,

¹ A delivery to a telegraph company of a message on a blank containing the terms of transmission is an acceptance of the terms, and forms a contract between the parties. *Young v. West. Un. Tel. Co.* 65 N. Y. 163. A condition in a night message to be sent at half the usual rates, "it is agreed between the senders of the following message and this company that the company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any message, beyond the amount received

They may, undoubtedly, make all reasonable rules for the conduct of their affairs. (*n*) This reasonableness we consider, on principle, as a matter of law; but practically, it is usually given to the jury under the direction of the court.

By these rules they may require prepayment. They may protect themselves from liability for accidental injury. They may limit their liability in some respects and exclude some grounds of liability. But we should hold decidedly that they could not protect themselves from liability for the gross negligence or incompetence of their servants, or an imperfection or inadequacy of their instruments which could easily and certainly be, and therefore certainly

should be, remedied. (*o*) On this point, as well as on the

* 257*j* further question * how far a knowledge of the rules brought home to the sender, constitutes or implies a contract

and the defendant become liable in case of error or accident in the transmission or conveyance. By writing the message under it, and signing and delivering the same for transmission, the party accepted the proposition, and it became an agreement binding upon the defendant only according to the terms and conditions specified in its proposition." It was held also that the plaintiff could not control the effect of the contract by showing that he had neglected to read the printed conditions. See also *West. Un. Tel. Co. v. Carew*, 15 Mich. 525, and *post*, note (*p*).

(*n*) *McAndrew v. Elect. Tel. Co.* 88 L. & Eq. R. 180; *Camp v. West. Un. Tel. Co.* 1 Met. (Ky.) 164; *Wann v. West. Un. Tel. Co.* 37 Mo. 472; *Gildersleeve v. U. S. Tel. Co.* 29 Md. 232; *Ellis v. Am. Tel. Co.* 18 Allen, 226. A rule that the company would not be answerable for damages unless the claim was presented within sixty days after the message was sent, was held reasonable, and obligatory on the sender who had notice of it, in *Wolf v. Western Union Tel. Co.* 62 Penn. St. 88. This power is expressly conferred by statute in England, Canada, and many of the States of this Union.

(*o*) *Sweatland v. Ill. & Miss. Tel. Co.* 27 Ia. 438. In this case *Dillon*, C. J., says: "The arguments suggested furnish no reason why a company should be allowed to make general printed conditions which should have the effect to relieve it from liability for the improper or negligent conduct of its servants. Telegraph companies, like railroad companies, owe important duties to the public. Generally there are no competing lines, and if so the business is necessarily in the hands of a few. These companies must act in good faith toward the public, and cannot by general conditions demand unreasonable concessions from those proposing to send messages. It is not necessary to discuss what might lawfully be done by a special contract; but I deny that companies can adopt general printed rules exactly as a condition for sending messages that the sender shall exonerate or release the company from damages caused by defective instruments, or by want of proper skill in the operators, or by their failure to use due care." *Gildersleeve v. U. S. Tel. Co.* 29 Md. 232; *Ellis v. Am. Tel. Co.* 18 Allen, 226; *Birney v. N. Y. & Pr. Wash. Tel. Co.* 18 Md. 341.

by said company for sending the same," has been held not to be reasonable, and not to exonerate the company from liability beyond such a sum paid for transmission, *True v. International Tel. Co.* 60 Me. 9; as for an unaccounted-for mistake in the message delivered, *Bartlett v. West. Un. Tel. Co.* 62 Me. 209; or an unaccounted-for failure to deliver, *West. Un. Tel. Co. v. Fontaine*, 58 Ga. 433. See *West. Un. Tel. Co. v. Fenton*, 52 Ind. 1. But a regulation in a telegraph blank used in sending night dispatches at half price, exempting from liability for errors in transmission or delivery, "from whatever cause occurring," was held unreasonable, so far as it was attempted to exempt for negligence or fraud. *Hibbard v. West. Un. Tel. Co.* 33 Wis. 558.—In *West. Un. Tel. Co. v. Buchanan*, 35 Ind. 429, it was decided that a person, with knowledge of the rules and regulations, who writes a message on paper other than a blank containing them, is as much bound as if he had written the message on a blank

between him and the company, we think principles would be applied analogous to those already considered in reference to rules and notices of railway corporations. (p)¹

There is, however, one rule, which is very generally adopted, and has no analogue elsewhere. It is, that if a sender wishes his message repeated and returned to him, it shall be done for half the first price; and if a sender does not have his message thus returned to him, the company will not be responsible for any inaccuracy. This rule is certainly very reasonable. (q)² It is a

(p) See ante, p. *233. As to the effect of notices limiting the liability of the company, it was held in *Baldwin v. U. S. Tel. Co.* 1 Lansing, 125, that the same rule applied to them as to common carriers, and that their liability would not be limited by the notice, even if brought to the knowledge of the sender. In this case the conditions were printed upon the blank on which the message was written, but did not purport to constitute any agreement between the company and the sender. The same general rule is laid down in *Breese v. U. S. Tel. Co.* 45 Barb. 274; 48 N. Y. 182, though in that case the conditions were held to have been adopted by the sender as part of the contract. See also *Sweatland v. Ill. & Miss. Tel. Co. supra*; and *Wolf v. Western Union Tel. Co.* 62 Penn. St. 83. But in Maryland, where the statute provides that "dispatches are to be received and transmitted under such rules and regulations as may be established by the companies," a different rule has been adopted. In *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 232, it is said: "The appellant having adopted rules and regulations as authorized by law, the appellee was bound to know that the engagements of the company were controlled by them, and did himself in law engraft them in his contract, and is bound by them. This would

be the case whether the dispatch offered for transmission be expressly declared to be subject to the terms and conditions prescribed or not. Those dealing with the company must be supposed to know its rules and regulations, and their contract must be taken to have reference to them unless otherwise provided by special contract. To the same effect in *Birney v. N. Y. & Wash. Tel. Co.* 18 Md. 341. In *Camp v. West. Un. Tel. Co.* 1 Met. (Ky.) 104, and *MacAndrew v. Electric Tel. Co.* 17 C. B. 8, the sender of the message was held bound by a reasonable regulation of the company of which he had notice. But the company cannot relieve themselves from liability for the negligence or default of their operators or servants, by any rule or notice. *Sweatland v. Illinois, &c. Tel. Co.* 27 Ia. 482.

(q) The reasonableness of this regulation has been repeatedly sustained. In the early case of *MacAndrew v. Electric Tel. Co.* 17 C. B. 8, the plaintiff had sent a dispatch by the defendants' line ordering one of his vessels to sail to Hull, but the message received directed her to sail to Southampton. It appeared that the error arose from a similarity in the telegraphic symbols for the two places. The regulations of the company relieved it from liability for unrepeat-

¹ *Tyler v. West. Un. Tel. Co.* 60 Ill. 421.

² In *Redpath v. West. Un. Tel. Co.* 112 Mass. 71, *Chapman*, C. J., in speaking of the regulation respecting the repetition of a message, said: "It seems to us that one who elects to save the small sum charged for a more extended liability cannot reasonably claim the benefit of it in a business where careful operators are so liable to make mistakes; and that this principle applies to every stage of dealing with the message." *Grinnell v. West. Un. Tel. Co.* 113 Mass. 299, decided that where a message is sent under such a regulation, it is immaterial that repetition would not disclose the error. But in *Tyler v. West. Un. Tel. Co.* 60 Ill. 421, *Breese*, J., said that "such a contract, forced, as we have shown it is, upon the sender, is, in our opinion, unjust, unconscionable, without consideration, and utterly void." "Modern telegraphy is not now an infant art. . . . In its infancy, it scarcely ever failed to perform its office. Thirty years have witnessed vast improvements in the art,—a higher knowledge of the subtle agent called into use, more finished instruments, and almost perfect skill in those that use them,—so that, setting aside atmospheric causes which have not yet been provided against, it may be asserted as an in-

* 257 k wise precaution on the part of the * company ; they show their good sense thus to secure accuracy by giving up half of the price of the message ; and it would be a wise precaution, by the sender of an important message, to secure accuracy or guard against the effect of inaccuracy in this way. Nevertheless, the sender is not bound to use these means ; and then the question occurs, How far does his neglect or refusal to do so protect the company from the effect of inaccuracy ? Our notes will show the adjudication on this subject. A reasonable conclusion, not unsupported by authority, would seem to be, that the company does not thereby protect itself against the gross negligence or ignorance of its operators. (r)¹ They may refuse to send a message at all unless

messages. Chief Justice *Jervis* said : "All that we are called on to say is whether this part which is the subject matter of defence is or is not reasonable, that is to say, that the company will not be responsible for unpeated messages. So far from that being, as has been contended, an unreasonable, qualification it seems to me that it is highly just and reasonable that the company should require a message to be checked and corrected in order to ascertain whether they are correctly representing what is intrusted to them by repeating the message so that the person who sends it may see whether they are correct in the message they have sent. It seems to be perfectly reasonable that it should be so." So in *Camp v. West. Un. Tel. Co.* 1 Met. (Ky.) 164, the court say : "There is nothing unreasonable in this condition. It gives the party sending the message the option to send it in such a manner as to hold the company responsible, or to send it for a less price at his own risk. If the message be unimportant he may be willing to risk it without paying the additional charge. But if it be important, and he wishes to have it sent correctly, he ought to be willing to pay the cost of

repeating the message. This regulation, considering the accidents to which the business is liable, is obviously just and reasonable. It does not exempt the company from responsibility, but only fixes the price of that responsibility, and allows the person who sends the message either to transmit it at his own risk at the usual price, or by paying in addition thereto half the usual price to have it repeated, and thus render the company liable for any mistake that may occur." See also *Ellis v. Am. Tel. Co.* 18 Allen, 226; *Sweatland v. Ill. & Miss. Tel. Co.* 27 Iowa, 488; *Wann v. West. Un. Tel. Co.* 37 Mo. 472; *Gildersleeve v. U. S. Tel. Co.* 29 Md. 232; *West. Un. Tel. Co. v. Carew*, 15 Mich. 525.

(r) In *Birney v. N. Y. & Wash. Pr. Tel. Co.* 18 Md. 341, the company were held liable notwithstanding this regulation, it appearing that the message had been mislaid by the operator without any attempt being made to transmit it. — So in *Bryant v. Am. Tel. Co.* 1 Daly, 575; and *Graham v. West. Un. Tel. Co.* 10 Am. Law Reg. n.s. 319, where the damage complained of resulted from negligent delay in the delivery of messages after their transmission to the receiving office. — So in

contestable truth, that given a line of wire properly established, the most perfect instruments, and skilled operators who exercise their skill with proper care, a message started at Chicago for New York is as sure to reach its destination exactly in the words and figures in which it was started as the lightning is sure to strike the object which attracts it. Intelligent and skilful operators all admit this. There is no reason, the atmosphere being right, and all else right, why a message correctly started should not be correctly transmitted along the line to the end of the line, no matter how many hundred miles asunder may be the point of its departure and the point of its reception. If this be so, then the efforts made by the courts to excuse those who undertake this business should not be imitated or encouraged." See *Candee v. West. Un. Tel. Co.* 34 Wis. 471; *Passmore v. West. Un. Tel. Co.* 78 Penn. St. 238.

¹ As in *West. Un. Tel. Co. v. Buchanan*, 35 Ind. 429, where an operator was ignorant of the name of the shire town of a neighboring county, one of the stations on the line of the company.

it be repeated ; but if they send it without repetition, they undertake at least to use ordinary care and * skill. It * 257 *l* might be that the sender by his refusal takes upon himself the responsibility for injuries caused by common accidents or mistakes, or such as occur from time to time in the best conducted offices. But that he still leaves with the company their responsibility for gross non-observance of duty. (*rr*)¹

The company stands as to all its officers and all whom it employs, in the relation of master and servant ; and their responsibility for the acts or omissions of those in their employment, must be determined by the rules and principles already considered in treating of master and servant.

It may be asked, To whom do the company give credit for the price of sending the message ? Certainly to the sender in the first place. He may send the message or not as he pleases ; but if he sends it he is liable for the payment. But the receiver may take it or not as he pleases. If he refuses he cannot be liable for the pay. If he takes an unpaid message, he must pay for it. And after he has received and opened the envelope in which it is usual to deliver the message, or if he has read a message delivered to him without covering, it is too late for him to refuse to receive it and pay for it.

SECTION IV.

OF THE BREACHES OF THIS CONTRACT.

We must look to the obligations of the parties to learn what constitutes a breach. So far as the sender is concerned it would seem to be practically confined to his non-payment of the price of his message ; and of this nothing need be said.

Dryburg v. N. Y. & Wash. Pr. Tel. Co. 35 Penn. St. Rep. 208, where the operator altered the dispatch for the purpose of supplying what he supposed to be an omission.

(*rr*) This regulation has generally been held to relieve the company from liability for errors arising in the course of transmission, as may be seen in the cases cited in the last note. But the

general principle, that this regulation will not relieve the company from liability for the negligence or unskillfulness of its servants, is laid down also in the same cases. It was held, that the company were still liable for damages caused by want of proper skill and care in their servants, or from defective instruments ; also, in *Sweatland v. Ill. & Miss. Tel. Co.* 27 Iowa, 433.

¹ *Tyler v. West. Un. Tel. Co.* 60 Ill. 421.

If injury is sustained by reason of imperfection of posts, * 257 m * wires, or of instruments, or of want of care or skill in the use of them, we are not aided by direct adjudication in determining the liability of the companies. We believe it would rest upon the common law of contract, and not on any supposed analogy to the stringent liability of common carriers. Hence we should say that the company would be liable if the mischief was caused by their negligence, either as to instruments or servants, or by the negligence or default of their servants while acting in their service ; and not otherwise. (s) ¹ If such unfitness of instruments or incompetency or default of their servants were shown, the burden of proof would rest on the companies, to show an absence of negligence on their part, or of liability for the acts or defaults of their servants.

They must receive all messages, and send them in the order received. The statutes make some exceptions, and the common principles of law make others, as stated in the previous section. But a company which disregards this requirement, must bring itself under some of these exceptions, or be liable for the consequences. It hardly needs be said, that if the company, induced

(s) In the absence of any stipulations restricting their liability, telegraph companies have been repeatedly held liable for the negligence of their servants. Thus, in U. S. Tel. Co. v. Wenger, 55 Penn. St. R. 262, a message sent by the plaintiff's line to New York was transmitted only to Philadelphia. The court say : " No such reason as the law would recognize, and indeed no reason at all, was given for the failure to transmit the message to its destination. Thus was presented a clear case of gross negligence against the company, in performing its undertaking, and a consequent liability to the plaintiff for such damage as he had sustained in consequence thereof." So in Landsberger v. Magnetic Tel. Co. 32 Barb. 590, where, by the negligence of the operator, the address of the person to whom the message was sent being incorrectly transmitted, the company was held responsible. — In Leonard v. N. Y., &c. Tel. Co. 41 N. Y. 544, where an order for five thousand sacks of salt was changed to five thousand casks, the court say : "No excuse is given for this error, and

no explanation, unless it be that the characters by which these words are designated nearly resemble each other. No doubt this would furnish a reason why a person ignorant of telegraphic characters, or unskilled in their reading, should misunderstand them. Such are not the persons the defendants are permitted to employ in their business. Those engaged in it profess to understand the hieroglyphics. They are bound also to use the machinery which will in the best and safest manner deliver to them the expected messages. Careless reading, or ignorant management of the machinery, is no excuse; it is simply an aggravation of the offence. The negligence was quite enough to sustain the action." See Bowen v. Lake Erie Tel. Co. 1 Am. Law Reg. 685; De Rutte v. N. Y., Alb. & Buf. Tel. Co. 1 Daly, 547; Dryburg v. N. Y. & W. P. Tel. Co. 35 Penn. St. R. 298; Rittenhouse v. Ind. Line of Tel. 1 Daly, 474; Lane v. Montreal Tel. Co. 7 Upper Canada (C. P.), 23; Wash. & N. O. Tel. Co. v. Hobson, 15 Grat. 122.

¹ Where a servant in the sole employ of the defendant's agent, a telegraph operator, was allowed in the agent's absence to transmit and receive messages, and sent a fraudulent order for money in the name of the cashier of a bank to a distant bank, and himself collected the money by personating the payee, the defendant was held responsible to the defrauded bank. Bank of California v. West Un. Tel. Co. 52 Cal. 280.

by a higher price, which would in part be a bribe, gave to one applicant an advantage * over another, the injured applicant would hold the company liable. (t) So it would be if preference was given from personal favoritism, and not for money. As the statutes regulating telegraph companies generally require emphatically this equality and impartiality in the treatment of their customers by the companies, it may be that a breach of this obligation would be thought to justify exemplary damages, as an offence against the public.

If an operator sees fit to alter a message for the purpose of correcting it or amending it, we cannot doubt that the company should be liable for all injury caused by the change. (u)

We have seen that secrecy is another obligation of the company; and this obligation must give them the power, and make it their duty, to exclude or remove not only from their employment, but from their office, spies, or listeners, and to confine the knowledge of the contents or character of the message, to the operators employed in sending it, and to hold them to strict secrecy. We believe the company would be responsible for the breach of any part of this duty.

Some difficulty exists as to the obligation of delivery. But it is a difficulty of fact rather than law. There can be no doubt that the company are bound to deliver the message, accurately, promptly, and to the right person;¹ and as little doubt, that this obligation includes the duty of using all reasonable efforts to be accurate, and prompt, and to be certain as to the person entitled to receive the message. We should hold it equally a breach of duty to be negligent in the use of knowledge which they possess,

(t) In the case of Reuter v. Electric Tel. Co. 6 El. & Bl. 341, it was held that a provision in the charter of the company that its lines should be open for the sending and receiving of messages by all persons alike, without favor or preference, was not violated by an agreement with the plaintiff to transfer, half-price his dispatches containing public intelligence, the court saying that this allowance "seemed rather a remuneration to him for his services in collecting public intelligence, and bringing custom

to the company, than any preference or partiality to him in the use of the telegraph." In U. S. Tel. Co. v. Western Union Tel. Co. 56 Barb. 46, the defendant company put upon their blanks for moneys a provision that the company would not be liable to any other telegraph company for error or neglect. The action was for refusal to send a message, and was brought under the New York statute; and judgment was rendered for the plaintiff.

(u) See note (k), *ante*.

¹ Where a telegraphic money-order is sent in answer to a request by telegraph, the company is not bound to ascertain that the sender of the request is an impostor, and payment to him will relieve the company from liability. West. Un. Tel. Co. v. Meyer, 61 Ala. 158.

or in the use of means * and efforts to obtain the knowledge necessary for the proper performance of the service they undertake. But what would be reasonable, and therefore requisite, care and effort in any case, must depend upon the circumstances of the case, and be a question for the jury under the instruction of the court. We do not hold them to be insurers, as common carriers are. There is however one point in which their duty of delivery is analogous to that of carriers. If the nature or character of the message, and still more if its express words, make it a case in which the utmost promptitude of delivery is requisite, by undertaking the transmission of such a message, they promise that promptitude of delivery. (v)¹

We have already said that they certainly may make reasonable rules for the transaction of their business, and require a reasonable regard for these rules on the part of their customers. Questions of this kind have often been before the courts, as our notes will show. And there is still some uncertainty as to the whole of the legal effect of the rule requiring that messages be repeated, or rather returned to the sender, under the penalty of relieving the companies from responsibility for inaccuracy.

It is held not only that the company is governed by the common relation of master and servant, as to their liability for the defaults of their servants, but also as to their liability to their servants. (w)

(v) In *Bryant v. Am. Tel. Co.* 1 Daly, 575, an order was sent by telegraph from New York, to an attorney in Providence, directing the attachment of a house in the latter city. It was explained to the operator that, unless the dispatch was received before the arrival of the train then on its way between the two cities, the attachment could not be made; and he was informed that any extra charges necessary to insure accuracy and dispatch would be paid. There was a delay of two hours in sending the dispatch from the receiving office, and when delivered it was too late. As the company was fully informed of the nature of the message, and the reasons for haste, they

were held liable for the full amount of the debt which the plaintiff would have recovered had the dispatch been promptly delivered. See also *Parks v. Alta Cal. Tel. Co.* 13 Cal. 422. In *U. S. Tel. Co. v. Wenger*, 55 Penn. St. R. 262, an order for the purchase of stock was delayed, and by a rise in the market the plaintiff suffered loss. The court say: "The dispatch was such as to disclose the nature of the business to which it related, and that the loss might be very likely to occur if there was any want of promptitude in transmitting it."

(w) *Byron v. N. Y. State Printing Tel. Co.* 26 Barb. 39.

¹ See *Tyler v. West. Un. Tel. Co.* 60 Ill. 421.

* SECTION V.

* 257 p

OF THE CONTRACT BETWEEN THE COMPANY AND THE PERSONS TO WHOM MESSAGES ARE SENT.

The first question might seem to be, Is there any contract whatever between the company and the receiver; are they under any obligation whatever to him; or what basis can there be for any such contract, or what consideration does the company receive from him?

We believe it to be generally the case, that the company contract only with the sender, and are under no obligation to any one else. It may well be that the receiver is injured by the default of the company. Because they carelessly mistook the message, or did not deliver it to the right person, or delayed its delivery, or let its contents become known to others, he to whom the message was sent may have lost an opportunity of important advantage, or indeed, may sustain direct loss. But the mere fact of such loss, so caused, would not give him a remedy against the company. This he can have only when malice or other circumstances give him an action of tort, or where the sender is in fact the agent of the receiver, and the company do in fact make their contract with the receiver as a principal, through the sender as his agent.

Where this relation is known to the company at the time, and they act with that knowledge, there can be no question of their contract with the receiver. It is a different question, when, although such agency exists, it is not stated to the company in any way, and there was nothing in the message or in the transaction to lead the company to suppose any such agency existed. Is the company now liable to the actual although unknown principal? So far as adjudications aid us in answering this question, they would seem to favor the conclusion that this agency might be inferred from, or proved by, evidence that the transaction was for the benefit of the receiver, and that it was he who was mainly, if not

* 257 q *only, interested therein. (x)¹ Then, if the price paid for the message be paid by the sender, it is so far to be re-

(x) *De Rutte v. N. Y., Alb. & Buf. Tel. Co.* 1 Daly, 547. Plaintiff was a commission merchant in California. His brother Theophilus was his agent and correspondent in France, but had no other interest in his business. The latter procured from parties in Bordeaux an order for plaintiff to purchase for them a cargo of wheat, at a price not to exceed twenty-two francs per hectolitre. This order was sent to New York, and thence transmitted by defendant's line to San Francisco. The message received read twenty-five francs instead of twenty-two, and plaintiff, having purchased at that price according to the order, was put to serious loss. On the question of the plaintiff's right to sue, the court say: "The next objection taken by the defendants is, that they entered into no contract with the plaintiff; that they made their contract with Theophilus De Rutte, who sent the message acting as the agent of Callarden & Labourdette. It does not necessarily follow that the contract is made with the person by whom or in whose name a message is sent. He may have no interest in the subject-matter of the message, but the party to whom it is addressed may be the only one interested in its correct or diligent transmission; and, where that is the case, he is the one with whom the contract is made. The business of transmitting messages by means of the electric telegraph is like that of common carriers, in the nature of a public employment; for those who engage in it do not undertake to transmit messages only for particular persons, but for the public generally. They hold out to the public that they are ready and willing to transmit intelligence for any one, upon the payment of their charges; and, when paid for sending it, it forms no part of their business to inquire who is interested in, or who is to be benefited by, the intelligence conveyed." "But if we leave out of view altogether the question with whom the contract was made, the defendants would still be liable to the plaintiff for putting him to loss and

damage through their negligence in transmitting to him an erroneous message." In *Bowen v. Lake Erie Tel. Co.* 1 Am. Law Reg. 685, the action was brought by the receiver, but it appears to have been in tort. In *N. Y. & W. Pr. Tel. Co. v. Dryburg*, 86 Penn. St. R. 298, the court say: "It is said that, upon the general principles of agency, the company can be held answerable to the sender only. That the relation of principal and agent existed between him and the company, there can be no doubt; but I do not think it equally clear that that relation was not established between Dryburg and the company. Telegraph companies are in some sort public institutions, open alike to all, and largely used in conducting the commerce of the country; and, when a man receives a message at the hands of the agent of such a company, and acts upon it, it seems reasonable that, for all purposes of liability, the telegraph company shall be considered as much the agent of him who receives as of him who sends the message. In point of fact, the fee is often paid on delivery; and I am inclined to think the company ought to be regarded as the common agent of the parties at either end of the wire. But, however this may be regarding the company only as the agent of the sender of the message, is it to be doubted that an agent is liable for misfeasance even to third parties?" The court further held that the rule as to unrepeat messages would not protect the company, as the plaintiff had no means of knowing whether the message had been repeated or not. In *Ellis v. Am. Tel. Co.* 18 Allen, 226, the action was in tort by the receiver of the message. It was held that the company was protected by the clause as to unrepeat messages, which, it appears, was inserted also in the paper on which the message was delivered to the plaintiff. The court say: "It may be a sufficient answer to such a claim that, according to the reasonable rules by which they were governed in the performance of their undertaking towards the plaintiff, and of

¹ That no action will lie against a telegraph company, at the suit of the receiver, for the misdelivery of a telegram, unless there be either a contract between him and the company, or (possibly) fraud on their part in the transmission of it, see *Dickson v. Reuter's Telegraph Co.* 2 C. P. D. 62; affirmed in *Dickson v. Reuter's Telegram Co.* 3 C. P. D. 1, on the ground that the plaintiff could not maintain any action based upon the defendant's negligence, or of an implied representation of authority from the sender. But in Texas, damages are recoverable for the disappointment to a son caused by the neglect of a telegraph company to deliver a telegram announcing his mother's death, and requesting his attendance at the funeral. *Relle v. W. U. Tel. Co.* 55 Tex. 308.

garded as * paid by the receiver,—whether charged to * 257 r him or not as between him and the sender,—as to afford a sufficient consideration for the implied contract between him and the company. And for any breach he might have his action; and the sender could not sue unless he too sustained an injury, and then only for that injury.

SECTION VI

OF CONTRACTS BETWEEN SENDER AND RECEIVER BY TELEGRAPH.

These are now common. It is certainly desirable that the law in respect to them should be definitely determined; but it is not so as yet.

If one party makes an offer and the party to whom it is made accepts it, there is a contract. But some years ago, the question came before the English courts, and afterwards before our own, whether, when the acceptance was made by letter, the acceptance was complete when the letter was mailed, or not until that letter was received. The full presentation of the law on that subject made in a former chapter, (y) shows the difficulty, uncertainty and fluctuation of the adjudication on this subject. It was not for a long time settled, if indeed it is fully so even now, that the

which he had notice, they have committed no breach of duty for which they can be held liable to him. Besides, it is difficult to see how the plaintiff, who claims through the contract entered into by the sender of the message with the defendants, which created the duty and obligation resting on the defendants, can claim any higher or different degree of diligence than that which was stipulated for by the parties to the contract. Certainly, a derivative or incidental right cannot be greater or more extensive than that which attached to the principal or source whence such right accrued or was derived. The court say of Dryburg's case: "It differs from this in the essential particular that it was not proved that the defendant in error had any notice or knowledge of the regulations of the company, by which their liability was restricted." — In a recent English case, Playford v. United

Kingdom Tel. Co. Law Rep. 4 Q. B. 707, an action was brought by the receiver upon a case stated without pleadings, and it was held that he could not recover. The court say: "The obligation of the company to use due care and skill in the transmission of the message is one arising entirely out of the contract. The plaintiff who is a stranger to the contract with the company, cannot maintain an action against them for the breach of it." — In Rose v. U. S. Tel. Co. 6 Rob. 306, the plaintiff was a broker, who received a message, and was led by a mistake to sell 5,000 barrels of oil instead of 500. But he disclosed the name of his principal; and it was held that he was not liable on the contract of sale, and therefore could not maintain the action; implying, that otherwise, though only a receiver of the message, he might.

(y) *Ante*, vol. i. p. 483.

* 257 * contract * was complete when the letter of acceptance was mailed, the acceptor having then no knowledge of any withdrawal of the offer.

Is this now the law in respect to contracts by telegraph? It certainly is not so settled. There is some adjudication on the subject, but it is contradictory, and leaves the question undetermined. (z)¹ It may be that a custom will grow up, or a course of adjudication take place, which will place the telegraph on precisely the same footing as the mail; and certainly some adjudication, and opinions of much weight look in this direction. Such is not our own opinion at present. There may be reasons why this should become a part of the law-merchant; but we cannot think it is so now.

The reasons for not holding it may easily be stated.

* 257 t They, * in fact, resolve themselves into two. One is, that the mail is a governmental institution. It is the agent of

(z) The only case in which this question appears to have been directly passed upon is that of *Trevor v. Wood*, 41 Barb. 265, 86 N. Y. 307. The plaintiffs and defendants were all brokers; the former doing business in New York, the latter in New Orleans. There was an arrangement between them that negotiations for sales should be conducted by telegraph. On the 30th of January, plaintiffs sent a telegram to defendants, inquiring the price for which they would sell a certain quantity of bullion. Defendants replied on the following day, naming the sum. Plaintiffs immediately replied accepting the offer, and renewed their acceptance on the following day. Owing to some derangement of the line, the two last-mentioned messages were delayed, and were not received until February 4th. On the 3d, the defendants, having received no reply to their offer, sold the bullion, and notified plaintiffs of the sale. On this state of facts, the Supreme Court of New York held that the plaintiffs could not recover, as there was no completed contract between the parties at the time the bullion was sold; that the plaintiffs must be regarded as having undertaken to bring home to the defendants their acceptance of the offer made; and that the agreement to negotiate by telegraph was a warranty, by each party, that his communication should be re-

ceived by the other. They further held that a communication is only initiated when delivered to the operator, and becomes complete only when it comes to the possession of the party to whom it is addressed; and that the rule which prevails as to acceptances made by mail does not apply to telegraphic communications, giving the reasons stated in the text. This decision was overruled by the Court of Appeals, 86 N. Y. (9 Tiff.) 307, where it was held that contracts made by telegraph are subject to the same rules as those made by letter; that the rule laid down in *Mactier v. Frith*, 6 Wend. 108, as to acceptance of an offer by letter, governed the present case; and that the contract became binding from the time the plaintiff's offer of acceptance was delivered to the operator. The court say: "It was agreed between the parties that their business should be transacted through the medium of the telegraph. The object of this agreement was to substitute the telegraph for other methods of communication, and to give to their transactions by it the same force and validity they would derive if they had been performed through other agencies. Under these circumstances, the sending of the dispatch must be regarded as an acceptance of the respondent's offer, and thereupon the contract became complete."

¹ A contract by telegraph, like one by mail, is completed when the acceptance is deposited for transmission in the telegraph office. *Minnesota Oil Co. v. Collier Lead Co* 4 Dillon, 431.

all the people and of every one of them, and may be considered as, if not guaranteed to a certain extent by the government, still guarded as well as regulated by the power of the government. It is not so with the telegraph. Efforts are now making to place telegraphing in the hands of the government and put it on the same footing as the post-office. It may become so, but it is not so yet. State statutes do not require nor institute a telegraph, nor hold it as public property; they only permit it, and confer upon it certain rights, and lay upon it certain duties.

Another reason is, that when a letter is delivered, it is perfectly certain that the assent of the accepting party, in precisely his own words, is, so far as the writer can do it, made known to the offerer. This can never be certain where the message is sent by telegraph. The operator or copyist, at either end, may make a mistake. Accuracy may be made extremely probable by returning the message; but never certain while it is possible that the mistake in sending is corrected, perhaps by another mistake, in returning the message. We are of opinion therefore, that, at present, the contract is not complete, until the message of acceptance is received, or, at least, that the law is not settled otherwise. And so far as the State statutes touch this question, they would seem to require delivery to the receiver, or to make the delivery of the message to the operator alone insufficient.

Still another but a connected question may arise; and, indeed, has arisen. There are frequent occasions when a party is bound to give information as soon as possible. This may be by positive and express contract, or by a plain inference from the nature of the transaction, or from the relation and duty of one party to the other. Is the party thus bound, obliged to use a telegraph if the same be within his reach?

Here, also, we must wait for adjudication before we know certainly what the law is. But there are strong reasons for requiring the use of these means, and they grow stronger * every day. And the adjudication which looks in this direction favors this conclusion. (a)

(a) *Proudfoot v. Montefiore, L. R. 2 Q. B. 511*, action on a policy of insurance. Defence, concealment of material information by the assured. Plaintiff's agent shipped a cargo of madder from Smyrna, on the 21st of January, having previously informed plaintiff of the intended shipment, and its amount. News of the vessel's stranding reached the agent on the 24th. On the 26th, the next post day, he notified plaintiff of the disaster, but purposely refrained from telegraphing, in order that plaintiff might insure, which he did before the receipt of the

One exception however must still be made. Notices of non-payment or non-acceptance of negotiable paper, remain, as yet, in our opinion, on their old footing. That is, if notice be sent seasonably by telegraph and seasonably received, we have no doubt it would be valid. But one bound to send such notice has a right to send it by mail, and if he mails it in season he discharges his duty and secures his rights, whether the letter be received or not. It is not so, if the notice be sent by telegraph, and be not delivered in season. And even in states where by statute legal notices and processes and instruments may be effectually sent or served, by telegraph, we hold delivery essential to complete the work, which is only inchoate when the instrument or paper is delivered to the telegraph company.

In our chapter on the Statute of Frauds (*b*) it will be seen that one of the provisions of the English statute—that permitting actions to be maintained upon certain contracts only when they are in writing signed by the party to be charged—is generally in force in our country. The same chapter will show what is the prevailing construction as to this requirement of writing and signing. We think the principles already well established when applied to contracts made by telegraph, will lead to the conclusion that they satisfy this requirement. This is the effect of some of the state legislation concerning telegraphs. The question has not yet been directly decided; but it has been considered by the courts, and especially in reference to guaranty. Our notes will

* 257 v * show the adjudication on the subject. (*c*)¹ Orders for

last letter. The court say: "We think if clear, looking at the position of Rees as agent to purchase and ship the cargo for the plaintiff, that it was his duty to communicate to his principal the disaster which had happened to the cargo; and, looking to the now general use of the electric telegraph in matters of mercantile interest, between agents and their employers, we think it was the duty of the agent to communicate with his employer by this speedier means of communication." See also *The Convoy's Wheat*, 3 Wall. 225.

(*b*) Vol. III. p. * 3.

(*c*) In *Howley v. Whipple*, 48 N. H. 487, the court say: "When a contract

is made by telegraph, which must be in writing by the statute of frauds, if the parties authorize their agents either in writing or by parol to make a proposition on one side, and the other party accept it through the telegraph, that constitutes a writing under the statute of frauds; because each party authorizes his agents, the company, or the company's operator, to write for him; and it makes no difference whether that operator writes the offer or the acceptance in the presence of his principal, or by his express direction, with a steel pen an inch long, attached to an ordinary penholder, or whether his pen be a copper wire a thousand miles long." So in *Dun-*

¹ A message received by telegraph is not admissible to charge the sender, without proof of the loss of the original, and of its authorization by the sender. *Smith v. Easton*, 54 Md. 138. But in *Saveland v. Green*, 40 Wis. 431, the message received was held original evidence, on the ground that the telegraph company was the agent of the sender.

goods are constantly made by telegraph, and they may be accepted by telegraph, by letter, or by act. And neither party will be responsible to the other for the mistake of the telegraph. (cc)

SECTION VII.

OF THE MEASURE OF DAMAGES.

In some of our states, the owners of stock or shares in telegraph companies are made personally liable for the debts of the company. More frequently they are left to the common law of corporations, which would hold only the company as a corporate body.

In regard to the measure of damages, the principal question has been, as in so many other cases, that arising from the rule, "causa proxima non remota spectatur." We have repeated occasion to consider this rule, and the adjudication respecting it, in other chapters, (d) and do not know * that we * 257 w need now add to these general considerations anything belonging especially to telegraphic communication. If the telegraph company is in default, but their default is made mischievous to a party only by the operation of some other intervening cause, then the rule above mentioned would prevent the liability of the company; because their default would be only the *remota*, the remote or removed cause of the injury, and not the *proxima*, or nearest cause.¹

ning v. Roberts, 35 Barb. 463, where it was proved that the defendant was in the office when the dispatch was sent, and agreed to the message as forwarded, the court say: "It is urged that the telegram was not subscribed by the defendant, nor by his authority. But it has been determined, that, under the circumstances of this case, the act of the operator in forwarding the telegram was the act of the defendant. In law, therefore, the manipulations of the operator by which the defendant's name became appended to the dispatch were his own, and were equivalent to an actual personal signing of his name with pen and ink." See also Trevor v. Woods, 38 N. Y. (9 Tiff.)

811. Where the telegram is sent from a written dispatch signed by the sender, it is held that the original writing is the proper evidence of the contract, and not the telegram as received. Kinghorn v. Montreal Tel. Co. 18 Up. Can. (Q. B.) 60; Durkee v. Vt. Central R. R. 29 Vt. 127.

(cc) Thus, in an English case, where one sent to plaintiffs for a sample rifle, saying he might want fifty, and afterwards sent a message to send him three rifles, and the operator telegraphed "the" instead of "three," and fifty rifles were sent, it was held that there was no contract, and no liability for more than three. Henkel v. Pape, L. R. 6 Ex. 7.

(d) See *post*, vol. iii. p. 178.

¹ See Barnesville Bank v. West. Un. Tel. Co. 30 Ohio St. 555.

So when the question takes the form, How far shall the claim for mischief or damage be pursued, and for what consequences of their default shall the company be liable? The answer is, only for proximate or immediate, and not for distant consequences. And the meaning of this is, only for those consequences which follow naturally and directly from the failure of the company to perform their contract duly, and therefore may be supposed to have been in contemplation of the parties when they made their contract. (*dd*) Our notes will show that this question has arisen in many forms; and they will also show the adjudication upon it. (*e*)¹

(*dd*) *Baldwin v. U. S. Tel. Co.* 1 *Lans.* 125; 54 *Barb.* 506; 6 *Abb. Pr. n. s.* 406.

(*e*) The rule of damages is thus laid down by *Earl*, C. J., in *Leonard v. N. Y., &c. Tel. Co.* 41 *N. Y.* 544: "The measure of damages to be applied to cases as they arise has been a fruitful subject of discussion in the courts. The difficulty is not so much in laying down general rules, as in applying them. The cardinal rule undoubtedly is that the one party shall recover all the damages which have been occasioned by the breach of contract by the other party. But this rule is modified in its application by two others. The damages must flow directly and naturally from the breach of contract, and they must be certain both in their nature and in respect to the cause from which they proceed. Under this latter rule, speculative, contingent, and remote damages, which cannot be directly traced to the breach complained of, are excluded. Under the former rule, such damages are only allowed as may fairly be supposed to have entered into the contemplation of the parties, when they made the contract as might naturally be expected to follow its violation. It is not required *must* have contemplated the actual damages which are to be allowed. But the damages must be such as the parties may be fairly *supposed* to have contemplated when they made the contract. A more

precise statement of the rule is, that a party is liable for all the direct damages which both parties would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts." In this case, plaintiff's agents at Chicago had telegraphed to his agents at Oswego to forward 6,000 sacks of salt. In the course of transmission the word *sacks* was changed to *casks*. It appeared that the latter term in the salt trade referred to packages of coarse salt containing over three hundred pounds, the former to packages of fine salt containing fourteen pounds. Before the mistake was rectified, the requisite quantity of coarse salt was sent; and, there being no demand for it at Chicago, it was sold at a heavy loss. The measure of damages was held to be the difference in the market prices of the salt at Chicago and at Oswego on the day of shipment, together with the charges of transportation. In *Squire v. West. Un. Tel. Co.* 98 *Mass.* 232, plaintiffs had accepted by telegraph an offer for the sale of a number of hogs in Buffalo. The dispatch was not promptly delivered, and, in consequence, the hogs were sold to another party. The court say: "The sum which would compensate the plaintiffs for the loss and injury sustained by them would be the difference, if any, in the price

¹ *Manville v. West. Un. Tel. Co.* 37 *Ia.* 214, was to the effect that the measure of damages for a failure to deliver, for four days, a message "to ship hogs at once," was the difference between the market value of the same on the day the receiver got them to market after the receipt of the dispatch, and on the day he could have got them there but for the delay. In *Tyler v. West. Un. Tel. Co.* 60 *Ill.* 421, it was held that where, through the negligence of the defendant, a sale of a thousand shares of stock was made on the sender's account instead of one hundred shares, the sender being obliged to purchase nine hundred shares to make the sale good, if in the interval between the sale and the purchase of the extra shares there was an advance, such advance would be the measure of damages.

which they agreed to pay for the merchandise by the message which the defendants undertook to transmit, if it had been duly and seasonably delivered, in fulfilment of their contract, and the sum which the plaintiffs would have been compelled to pay at the same place in order, by the use of due diligence, to have purchased the like quantity and quality of the same species of merchandise." Where the dispatch directed the immediate attachment of property on a suit in plaintiff's favor, and, by reason of delay in transmission, the opportunity for making the attachment was lost, the company has been held liable to pay the whole sum which would have been secured had the attachment been seasonably made. *Parks v. Alta Cal. Tel. Co.* 13 Cal. 422; *Bryant v. Amer. Tel. Co.* 1 Daly, 575. It has been held that, even when the loss is the direct result of the error or delay, the company are not liable, unless either the terms of the message itself show that such a loss would naturally follow a failure to transmit promptly and correctly, or the circumstances of the case were explained to the company. Thus, in *Landsberger v. Magnetic Tel. Co.* 32 Barb. 580, plaintiffs made a contract with parties in San Francisco to buy for them in New York a quantity of pistols, on which they were to receive a commission, agreeing also to forfeit \$600 in case of failure to fulfil their agreement. Plaintiffs transmitted \$10,000 to their agents in New York, to enable them to fulfil the contract, sending at the same time the following telegram, "Get \$10,000 of the Mail Co." Through the negligence of the company, the dispatch did not arrive in season to fulfil the contract. In an action against the company, it was held that plaintiff could recover neither his expected com-

missions nor the \$600 paid as forfeit, but was limited to the amount paid for the transmission of the message, and interest on the \$10,000 during the time it was delayed in the hands of the Mail Co.; the court saying that there was nothing in the dispatch to intimate that any other loss would be suffered by the plaintiff from the delay. Similar views are expressed in *Gildersleeve v. U. S. Tel. Co.* 29 Md. 232; *Stevenson v. Montreal Tel. Co.* 16 Up. Can. (Q. B.) 630; *Kinghorn v. Montreal Tel. Co.* 18 Up. Can. (Q. B.) 60. It was held in *Shields v. W. & N. O. Tel. Co.* 4 Am. Law J. (N. S.) 811, that, where the message is unintelligible to the operator, its value is inappreciable, and the company has no means of knowing the extent of the responsibility involved in its transmission. The dispatch in this case read, "Oats fifty-six; bran one ten; corn seventy-three; hay twenty-five." Plaintiff was allowed to recover only the cost of transmission. On the other hand, in *Rittenhouse v. Indep. Line of Tel.* 1 Daly, 474, it was held that, so long as the words were plain, the fact that the meaning was unintelligible to the operator would not discharge the company. So *Bowen v. Lake Erie Tel. Co.* 1 Am. Law Reg. 686. Where an order is sent by telegraph for the purchase of an article, and by mistake the name of another article is substituted, and the receiver purchases this last-named article, the company are liable for the damage resulting from the failure to purchase the article actually ordered, but not for a loss on the resale of that purchased by mistake, unless they have had fair notice of such sale. *Rittenhouse v. Ind. Line of Tel.* 1 Daly, 474; 44 N. Y. 268; *W. & N. O. Tel. Co. v. Hobson*, 15 Grat. 122.

OF PATENTS.

THE law of Patents is but a little more than two centuries old, in England ; and on the continent of Europe it began still later. In this country a statute authorizing and regulating patents was enacted in 1790, and upon this and subsequent amendatory statutes the law of patents rests. In itself it is utterly unknown to the common law ; but the rules and principles of the common law, as to contract, construction, evidence and remedy, are applied to the law of patents. The last statute, which covers the whole ground and replaces the earliest enactments, was approved July 8, 1870. (a)

We propose to consider the law of patents only in its relation to the law of contracts. We would say, however, that as to the methods and processes of obtaining patents, any applicant at the patent-office in Washington is furnished not only with a copy of the statute, but with a carefully-prepared pamphlet, in which full directions are given for the transaction of any business with the office. And the experience of the author of this work justifies his saying that any person having or wishing to have dealings with the patent-office, as counsel or otherwise, may be sure of receiving from the officers employed therein all the guidance and assistance compatible with the discharge of their duties.

(a) The English legislation upon this subject rests upon a clause in the Statute 21 Jac. 1, c. 3, § 6, commonly called the Statute of Monopolies, exempting from the operation of that act "letters-patent and grants of privilege, for the term of fourteen years or under, of the sole working or making of any manner of new manufactures within this realm, to the

true and first inventor and inventors of such manufactures, which others, at the time of making such letters-patent and grants, shall not use, so as also they be not contrary to law, nor mischievous to the state by raising prices of commodities at home, or hurt of trade, or generally inconvenient."

* SECTION II.

* 257 z

OF THE FOUNDATION OF A PATENT-RIGHT.

Whatever may have been the theory in former years, it must now be admitted, that a patent-right now rests altogether on the statute, and not at all upon any inherent or natural right of an inventor to the exclusive use of his invention. (b)

The statute in fact makes, or constitutes, a contract between the inventor and the public, resting on sound and actual considerations on both sides. The public engages to protect him in the exclusive use of his invention for a certain time. This he gains. On the other hand he agrees to put on a record open to the public, a description of his invention which shall enable any person of competent skill to make use of it, after his exclusive use is terminated. This the public gains; but their greater gain is in the stimulus to invention given by this protection of the inventor.

It is plain, therefore, that the owner of a patent-right should not be treated as a monopolist, as he once was, who ought to be limited and restrained in every way, whenever an ingenious construction of language or rigorous application of a principle, could turn a decision against him. He is a party to a fair and equal contract, and should be dealt with by the law rationally and impartially. And so of late years, he has been. (c)

* SECTION III.

* 257 aa

WHO MAY OBTAIN A PATENT.

The Statute of 1870 enacts, that "any person who has invented or discovered any new and useful art, machine, manufacture or

(b) *Morton v. N. Y. Eye and Ear Infirmary*, 2 Fish. 320. patentee must be the first, as well as the original, inventor, to be entitled to the

(c) *Grant v. Raymond*, 6 Peters, 241; *Ames v. Howard*, 1 Sumn. 486. The protection of the statute. His title rests entirely on the priority of his invention.

composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned," may obtain a patent therefor. The patentee must be the first as well as an original inventor, to be entitled to the protection of the statute. His title rests entirely on the priority of his invention. (*d*) But he need not

have been the first to conceive the idea embodied in the invention. (*dd*) And it is held that * a prior invention, to avoid a subsequent patent must have been a working machine, which either has done work or was certainly capable of doing it, and not a mere machine got up for purposes of experiment. (*de*)

(*d*) *Woodcock v. Parker*, 1 Gall. 439; *Bedford v. Hunt*, 1 Mass. 804; *Parker v. Stiles*, 5 McLean, 61; *Allen v. Blunt*, 2 Wood. & M. 140.

(*dd*) *Story*, J., said: "The law is that whoever first perfects a machine is entitled to a patent, and is the real inventor, although others may previously have had the idea, and made some experiments toward putting it in practice." *Washburn v. Gould*, 3 Story, 122. So in *Parkhurst v. Kinsman*, 1 Blatchf. 488, *Nelson*, J., says: "It is not enough, to defeat a patent already issued, that another conceived the possibility of effecting what the patented accomplished. To constitute a prior invention, the party alleged to have produced it must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form. It must have been carried into practical operation; for he is entitled to a patent, who, being an original inventor, has first perfected the invention and adapted it to practical use. Crude and imperfect experiments, equivocal in their results, and then given up for years, cannot be permitted to prevail against an original inventor who has perfected his improvement and obtained his patent." And in *Goodyear v. Day*, 2 Wall. Jr. 283, *Grier*, J., says: "The invention when perfected may truly be said to be the culminating point of many experiments, not only by the inventor, but by many others. He may have profited indirectly by the unsuccessful experiments and failures of others; but it gives them no right to claim a share of the honor or profit of the successful inventor. It is when speculation has been reduced

to practice, when experiment has resulted in discovery, and when that discovery has been perfected by patient and continued experiments, — when some new compound, art, manufacture, or machine has been produced, which is useful to the public, that the party making it becomes a public benefactor, and entitled to a patent." See also *Whiteley v. Swayne*, 7 Wall. 686; *Agawam Co. v. Jordan*, *ibid.* 588; *Foote v. Silsby*, 1 Blatchf. 445; *Reed v. Cutter*, 1 Story, 595; *Howe v. Underwood*, 1 Fish. 160; *Singer v. Walmsley*, *ibid.* 558; *Un. Man. Co. v. Lutinsbury*, 2 Fish. 389; *White v. Allen*, *ibid.* 440.

(*de*) *Woodman v. Stimpson*, 8 Fish. 98; *Swift v. Whesen*, *id.* 343; *Cahoon v. Ring*, 1 Clif. 592. But it need not have been put into actual use, if it can be already proved that it would practically answer the purpose for which it was designed. *Coffin v. Ogden*, 3 Fish. 640. See *Parker v. Hulme*, 1 Fish. 44. "Desertion of a prior invention consisting of a machine never patented, may be proved by showing that the inventor after he had constructed it, and before he had reduced it to practice, broke it up as something requiring more thought and experiment, and laid the parts aside as incomplete, provided it appears that these acts were done without any definite intention of resuming his experiments, and of restoring the machine with a view of applying for letters-patent." *Seymour v. Osborne*, 11 Wall. 562; *Johnson v. Root*, 2 Clif. 123; *Cahoon v. Ring*, 1 Clif. 612. In *Gayler v. Wilder*, 10 How. 477, which was a suit upon a patent for a fire-proof safe, it was proved that long before the

And the inventor may employ mechanics to embody his ideas, and may avail himself of their suggestions as to form and details, if the plan of the invention be his own. (*df*)

The statute further provides, that its having been first patented in a foreign country shall not prevent or avoid a patent in this country, unless it shall have been introduced into public use in the United States for more than two years prior to the application. But the patent granted here shall expire at the same time with the foreign patent. (*e*)

By an "abandonment" of the invention, is meant a public use of it with the knowledge and assent of the inventor. If he had knowledge of such use, his assent is implied from his silence, or the absence of all effort to prevent its use. And both his knowledge and acquiescence may be shown by circumstances leading to that conclusion. (*f*)

plaintiff's invention a safe had been made on the same principle; but it appeared that no test of its capacity for resisting heat was ever made, that the inventor never made a second one, and after using this one for some years, laid it aside for one of different construction. The jury were instructed that if, on the evidence, they found that the first safe had been finally forgotten or abandoned before the plaintiff's invention, and if he was an original inventor, he was entitled to a verdict. This direction was supported by a majority of the Supreme Court, who regarded the second inventor as standing upon the same ground with the discoverer of a lost art, or an unpatented and unpublished foreign invention. See also *Hall v. Bird*, 6 Blatchf. 438; *Walton v. Potter*, 4 Scott, N. R. 91, *Webst. Pat. Caa.* 585. On the question how far the suggestions of others to the patentee will affect his title, *Nelson*, J., says: "In order to invalidate a patent on the ground that the patentee did not conceive the idea embodied in the improvement, it must appear that the suggestions, if any, made to him by others, would furnish *all* the information necessary to enable him to construct the improvement. In other words, the suggestions must have been sufficient to enable him to construct a complete and perfect machine. If they simply aided him in arriving at the useful result, and if, after all the suggestions, there was something left for him to devise and work out by his own skill and ingenuity, then he is in contemplation of law to be regarded as the first and original discov-

erer." *Pitts v. Hall*, 2 Blatchf. 229; *Alden v. Dewey*, 1 Story, 338; *Thomas v. Weeks*, 2 Paine, 102; *O'Reilly v. Morse*, 15 How. 111.

(*df*) *Sparkman v. Higgins*, 1 Blatchf. 200; *Watson v. Bladen*, 4 Wash. 582; *Allen v. Rawson*, 1 M. G. & Scott, 551.

(*e*) Stat. 1870, § 25. *Bartholemew v. Sawyer*, 1 Fish. 516.

(*f*) *Pennock v. Dialogue*, 2 Pet. 16; *Shaw v. Cooper*, 7 Pet. 320; *Kendall v. Winsor*, 21 How. 329; *Mellus v. Silsbee*, 4 Mass. 111; *Sargent v. Seagrave*, 2 Curt. 555; *Sanders v. Logan*, 2 Fish. 167. Prior to the act of 1889, any sale or public use of the invention prior to the application for letters-patent, with the consent or acquiescence of the inventor, was sufficient to defeat his claim. Since the passage of that act a patentee may make, and vend, or use his invention within two entire years before he applies for a patent, without necessarily abandoning his right. But any person who may have purchased of the inventor, or, with his knowledge and consent, constructed, sold, or used the article invented, prior to the application for a patent, shall have the right to use, and vend to others to be used, the specific thing so made or purchased. Act 1870, §§ 24, 27. *McClurg v. Kingland*, 1 How. 202; *McCormick v. Seymour*, 2 Blatchf. 254. An abandonment may still be made within the two years, but it would seem to require strong proof to establish it. Thus, in *Pitts v. Hall*, 2 Blatchf. 247, it was held that a mere expression of intention not to take out a patent is not of itself equivalent to an actual dedication. The public use of

The longer the period of its public use and of his silence, the stronger the presumption of abandonment. But no particular time is necessary to constitute abandonment.

A similar statement may be made concerning the extent of the use, as whether by one person, a few, or many.

If an inventor is not yet ready to take out his patent, he may protect himself against subsequent inventors by filing a caveat in the secret archives of the patent-office. If any person applies for a patent for the same invention within one year, the caveat will have notice; and he may renew his caveat from year to year. The description of the invention in the caveat, need not be so technically precise as in a specification, but it must enable the examiners to judge whether there be an interference, if a subsequent application is filed.

WHAT MAY BE SUBJECT OF A PATENT.

The language of the statute in the passage above quoted, in which it describes the things for which a patent may be granted, is much the same as in the older statutes. And every word of it has passed repeatedly under adjudication.

The invention must be "new." But it is obviously impossible here, as indeed in most of the questions arising under our patent laws, to find precise and technical rules which always answer the question. Our notes will show the adjudication on this question. (*g*)¹

the invention by the patentee himself, is said that an invention may be abandoned even after it has been patented. Adams v. Edwards, 1 Fish. 1; Bell v. purpose of trial and experiment, will not avoid the patent. Wyeth v. Stone, 1 Story, 273; Ryan v. Goodwin, 8 Sumn. 518; Whitney v. Emmett, Bald. 309; Shaw v. Cooper, 7 Pet. 320. See *in re Newall v. Elliott*, 4 C. B. (n. s.) 269. It is said that an invention may be abandoned even after it has been patented. Adams v. Edwards, 1 Fish. 1; Bell v. Daniels, id. 872.

(*g*) A machine is said to be new in the sense of the patent law when its principles or mode of operation are different from any previously known. And "by the principles of a machine," says Judge

¹ A patent is *prima facie* evidence of novelty and utility as against an infringer. Lehnbeuter v. Holthaus, 105 U. S. 94. Where an inventor presented, with no obligation of secrecy, a pair of corset-steels to a lady friend, who used them for eleven years, it was held (Miller, J., dissenting), that he could claim no patent, as there had been a public use of the article. Egbert v. Lippman, 104 U. S. 333.

It must not be merely the application of an old invention * or means or method of operation to a new use. (h) * 257 ee

Story, "is not meant the original elementary principles of motion which philosophy and science have discovered, but the *modus operandi*, the peculiar manner or device for producing any given effect. If the same effects are produced by two machines by the same mode of operation, the principles of each are the same. If the same effects are produced, but by combinations of machinery operating substantially in a different manner, the principles are different." *Whittemore v. Cutter*, 1 Gall. 478; *Barrett v. Hall*, 1 Mass. 470; *Foote v. Silsby*, 1 Blatchf. 459; *Roberts v. Ward*, 4 McLean, 566; *Pitts v. Wemble*, 2 Fish. 26; *Latta v. Shawk*, 1 Fish. 465. "What constitutes form, and what principle," says *Washington*, J., "is often a nice question to decide. The safest guide to accuracy in making the distinction is, to ascertain what is the result to be obtained by the discovery; and whatever is essential to that object, independent of the mere form, proportions, or material of an existing machine, will not constitute a new invention, unless a new effect is thereby produced. *Winans v. Denmead*, 15 How. 341; *Lowell v. Lewis*, 1 Mass. 190. *Many v. Jagger*, 1 Blatchf. 306; *Dixon v. Moyer*, 4 Wash. 71; *Davis v. Palmer*, 2 Brock. 310. *Hotchkiss v. Greenwood*, 11 How. 248. Nor does the substitution of a mechanical equivalent constitute an invention. See note (x), *infra*.

When, however, the invention consists in a new combination of parts in the same machine, or for a combination of machines to produce a certain effect, in either case it is immaterial whether the elements of the combination are new or old. *Buck v. Hermance*, 1 Blatchf. 404; *Barrett v. Hall*, 1 Mass. 474; *Le Roy v. Tatham*, 22 How. 132; *Hovey v. Stevens*, 1 Wood. & M. 302; *Many v. Sizer*, 1 Fish. 327; *Potter v. Holland*, 1 Fish. 327. But where an old machine is improved by the addition of new elements, a patent is valid only for the improvements, and the claim must not cover the whole machine. *Whitney v. Emmett*, Bald. 314; *Evans v. Eaton*, 7 Wheat. 480; *Whittemore v. Cutter*, 1 Gall. 480; *Moody v. Fiske*, 2 Mass. 118. So, in a patent for a composition of matter, it is not necessary that every ingredient, or even

that any one ingredient, should have been unused before, for the purpose specified, provided the combination be substantially new. *Ryan v. Goodwin*, 8 Sunn. 514.

(h) Thus, in *Losh v. Hague*, 1 Webet. Pat. Cas. 206, it was held, that the application to railway carriages of a kind of wheel previously in use on common carriages, would not support a patent. So in *Howe v. Abbott*, 2 Story, 190, where the patentee claimed as his invention a process of curling palm-leaf for mattresses, &c., and it appeared that horse-hair had long been prepared for the same purpose by the same process. *Story*, J., said: "The application of an old process to manufacture an article to which it had never before been applied, is not a patentable invention. There must be some new process, or some new machinery, used to produce the result. If the old spinning machine to spin flax were now first applied to spin cotton, no man could hold a patent to spin cotton in that mode; much less the right to spin cotton in all modes, although he had invented none. As, therefore, Smith has invented no new process or machinery, but has only applied to palm-leaf the old process and the old machinery used to curl hair, it does not strike me that the patent is maintainable. He who produces an old result by a new mode or process, is entitled to a patent for that mode or process. But he cannot have a patent for a result merely without using some new mode or process to produce it." "In order to escape the objection of a double use," says Mr. Curtis, "it is necessary that the new occasion or purpose, to which the use of a known thing is applied, should not merely be analogous to the former occasions or purposes to which the same thing has been applied. When, therefore, the principle is well known, or the application consists in the use of a known thing to produce a particular effect, the question will arise, whether the effect is of itself entirely new, or whether the occasion only upon which the particular effect is produced is new. If the occasion only is new, then the use to which the thing is applied is simply analogous to what it had been before. But if the effect itself is new, then there are no known analogous uses of the same thing, and the process may constitute such an art as will be the subject of a patent." See also, *Ames v. Howard*, 1 Sunn. 487; *Bean v. Smallwood*, 2 Story, 411; *Hotchkiss v.*

That may enlarge the use of a thing, but does not make it a new thing. If a part of what is claimed is not new, and that part is severable from the residue which is new, the statute provides for a disclaimer by the patentee of that part of his claim, leaving the patent valid as to so much as was new. The cases have determined many interesting questions concerning the important subject of disclaimer, as our notes will show. (i)

* 257 *ff* A reissue is granted to the original patentee, * his heirs, or the assignees of the entire interest, on a surrender of the original patent, when, by reason of an insufficient or defective specification, the original patent is invalid, if the error has not arisen from any fraudulent intention. But only what is so described or shown in the original patent, can be the subject of a reissue.¹ The patentee may, however, have a separate patent for each distinct and separable part of the invention comprehended in the original application.

Greenwood, 11 How. 286; Phillips *v.* Page, 24 How. 164; Bray *v.* Hartshorn, 1 Clif. 538; Brooks *v.* Aston, 8 El. & Bl. 478; Steiner *v.* Heald, 8 Exch. 807; Horton *v.* Mabon, 12 C. B. (n. s.) 437; App. 16 id. 141; Harwood *v.* G. N. R. 11 H. L. C. 654. Nor can a patent be taken for a particular use of a known machine, although the plaintiff be the first to discover the benefit of such use. Tetley *v.* Easton, 2 C. B. (n. s.) 706; Ralston *v.* Smith, 11 H. L. C. 223.

(i) Statute 1870, § 54. "Whenever through inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, a patentee has claimed more than that of which he was the original or first inventor or discoverer, his patent shall be valid for all that part which is truly and justly his own, provided the same is a material or substantial part of the thing patented; and any such patentee, his heirs or assigns, whether of the whole or any sectional interest therein, may, on payment of the duty required by law, make disclaimer of such parts of the thing patented as he shall not choose to claim or to hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent; said disclaimer shall be in writing, attested by one or more witnesses, and recorded in the Patent-Office; and it shall thereafter be considered as part of the original specification to the extent of the interest possessed by the claimant, and by those claiming under him, after the record thereof. But no such disclaimer shall affect any action pending at the

time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing it." By section 60 it is further provided, that without entering a disclaimer, the patentee may sue either at law or in equity for the infringement of such parts of his patent as are *bona fide* his own. But if a disclaimer is not filed before the commencement of the suit, he shall recover no costs; and if he unreasonably neglect or delay to file a disclaimer, he shall not be entitled to the benefits of this section. See Hall *v.* Wiles, 2 Blatchf. 198; Singer *v.* Walmsley, 1 Fish. 574; Carhart *v.* Austin, 2 Fish. 529; M'Cormick *v.* Seymour, 3 Blatchf. 209, 19 How. 106. But a disclaimer is necessary only where the thing claimed without right is a substantial and material part of the thing patented. Hall *v.* Wiles, 2 Blatchf. 198. Unreasonable delay in filing a disclaimer, when one is necessary, is a good defence to an action or suit upon the patent. What delay is reasonable is usually a mixed question of law and fact, to be decided by the jury under the instructions of the court, but is sometimes a question of law for the court alone. Reed *v.* Cutler, 1 Story, 600; Brooks *v.* Bicknell, 3 McLean, 449; O'Reilly *v.* Morse, 16 How. 122; Silaby *v.* Foote, 20 How. 387; Singer *v.* Walmsley, 1 Fish. 575; Parker *v.* Stiles, 5 McLean, 56. A disclaimer affects only the interest of the party who makes it. Wyeth *v.* Stone, 1 Story, 204; Potter *v.* Holland, 1 Fish. 327; Smith *v.* Mercer, 1 Penn. L. J. 541.

¹ See Manufacturing Co. *v.* Corbin, 103 U. S. 786, and cases cited.

It must be "useful." This means that it must not be harmful and opposed to the public welfare. (*j*) Then, that it promises some positive advantage; (*k*) and included in this is the implied requirement, that the means employed do actually produce the result attributed to them; for, if they fail, the invention would be of no use, or certainly not useful in the manner the applicant has asserted. (*l*)

* The words "art, machine, manufacture or composition of matter" have been repeatedly under consideration by the courts. But the result is only that, as they were intended to embrace almost, if not quite, every possible mode of accomplishing a useful result by physical means, so they have about this extent in law. (*m*)

It has been recently held in England that the use of a new material to produce a known article is not the subject of a patent. (*mm*)¹

One rule is of great importance and is always regarded; although it is not easy to define it, and is often of very difficult application. It is, that a patent cannot be granted, or is void if granted, for a mere property or function of matter, a motive power of the elements, or a physical law or force. But any of these being discovered, or a new use of any of them, the discoverer or inventor may have a patent for his mode or method of applying it to use.

Hence, it is now settled, that a patent may be taken out for "a process." What the limits are to the application of this rule, it

(*j*) Lowell *v.* Lewis, 1 Mass. 186; Kneass *v.* Schuylkill Bank, 4 Wash. 12; Langdon *v.* De Groot, 1 Paine, 204; Whitney *v.* Emmett, Bald 309; Dickenson *v.* Hall, 14 Pick. 220; Roberts *v.* Ward, 4 McLean, 566; Page *v.* Ferry, 1 Fish. 298; Poppenhausen *v.* N. Y. G. P. C. Co. 2 Fish. 62.

(*k*) Many *v.* Jagger, 1 Blatchf. 881; Wilbur *v.* Beecher, 2 id. 137; Bedford *v.* Hunt, 1 Mass. 308; Dunbar *v.* Marden, 13 N. H. 319.

(*l*) Manton *v.* Parker, Dav. Pat. Cas. 827; Roberts *v.* Ward, 4 McLean, 565; Curtis on Patents, § 248; O'Reilly *v.* Morse, 15 How. 119. The superior utility of a machine, though not of itself ground for a patent, is often evidence of the in-

troduction of some new principle or mode of operation. Many *v.* Sizer, 1 Fish. 17; Judson *v.* Cope, id. 616; Johnson *v.* Root, id. 851; 2 Clif. 108. If the defendant has used the patented improvement, he is estopped from denying its utility. Vance *v.* Campbell, 1 Fish. 488; Hayes *v.* Sulzor, id. 532.

(*m*) A construction equally broad has been given by the English courts to the word "manufacture" in the Statute of Monopolies, on which the patent law of England rests. See Crane *v.* Price, 4 McN. & G. 580; Hill *v.* Thompson, 3 Meriv. 626; Boulton *v.* Bull, 2 H. Bl. 463.

(*mm*) Rushton *v.* Crawley, L. R. 10 Eq. 522.

¹ Thus the substitution of a known equivalent for one of the elements of a former structure, as a rigid for a flexible leather cross-bar on shawl-straps, is not patentable. Crouch *v.* Roemer, 103 U. S. 797.

would be difficult to determine in the present state of the * 257 *hh* authorities, which we exhibit in our notes. (*n*)¹ * This

(a) The leading English case upon this point is *Neilson v. Harford*, 1 Webst. Pat. Cas. 273. Prior to the plaintiff's invention, furnaces for the manufacture of iron had been worked by a blast of cold air. He discovered that, by using hot air instead of cold, a great improvement in the quality of the iron would be effected. In his specification he merely directed heating the air on its passage from the blowing apparatus to the furnace, by passing it through a vessel artificially heated; but gave no direction as to temperature, and even declared that the form or shape of the vessel was immaterial to the effect, and might be adapted to the local circumstances or situation. On the trial it was strenuously urged that the claim was for the general principle of using hot air in the blast, independent of any mode of making the application, and therefore void as an attempt to patent a principle. It was held otherwise. Baron Parke, delivering the opinion of the court, said: "It is very difficult to distinguish this specification from that of a patent for a principle; but after full consideration, we think that the plaintiff does not merely claim a principle, but a machine embodying a principle, and a very valuable one. We think the case must be considered as if, the principle being well known, the plaintiff had first invented a mode of applying it by a mechanical apparatus to furnaces; and his invention then consists in this,—by interposing a receptacle for heated air between the blowing apparatus and the furnace. In this receptacle he directs the air to be heated by the application of heat externally to the receptacle, and thus he accomplishes the object of applying the blast, which was before of cold air, in a heated state to the furnace." And in another suit upon the same patent, *Houseshill Co. v. Neilson*, 1 Webst. Pat. Cas. 683, Lord Justice Clerk Hope, in his charge to the jury, said: "It is quite true that a patent cannot be taken out solely for an abstract philosophical principle, — for instance, for any law of nature, or any property of matter, apart from any mode of turning it to account in the practical operations of manufacture, or the business, and arts, and utilities of life. The mere discovery of such a principle is not an invention, in the pat-

ent-law sense of the term. But a patent will be good, though the subject of the patent consists in the discovery of a great, general, and most comprehensive principle in science or law of nature, if that principle is by the specification applied to any special purpose, so as thereby to effectuate a practical result and benefit not previously attained." And again he says: "I state to you the law to be, that you may obtain a patent for a mode of carrying a principle into effect; and if you suggest and discover, not only the principle, but suggest and invent how it may be applied to a practical result by mechanical contrivance and apparatus, and show that you are aware that no particular sort, or modification, or form of the apparatus, is essential, in order to obtain benefit from the principle, then you may take your patent for the mode of carrying it into effect, and are not under the necessity of confining yourself to one form of apparatus." This ruling was afterwards sustained by the House of Lords, though the case was reversed upon another point. To the same effect are the observations of Baron Alderson in *Jupe r. Pratt*, 1 Webst. Pat. Cas. 146: "You cannot take out a patent for a principle; you may take out a patent for a principle, coupled with the mode of carrying the principle into effect, provided you have not only discovered the principle, but invented some mode of carrying it into effect. But then you must start with some mode of carrying it into effect; if you have done that, then you are entitled to protect yourself from all other modes of carrying the same principle into effect, that being treated by the jury as piracy of your original invention." And this is at this day the law of England on this point. See *Bovill r. Keyworth*, 7 El. & Bl. 724; *Booth v. Kennard*, 1 Hurl. & N. 527; *Seed v. Higgins*, 8 El. & Bl. 771, 8 H. L. C. 550; *Curtis on Patents*, § 141. In this country the inventor would seem to be confined within much narrower limits. Thus, in *O'Reilly v. Morse*, 15 How. 62, it was conceded by the court that the defendant in error was the first to apply electro-magnetism to practical use for telegraphic purposes, and that he was justly entitled to a patent for the particular process he had discovered; but his claim was declared void as being for a principle. The claim

¹ See *Tilghman v. Proctor*, 102 U. S. 707, for a discussion of this question, and comments on *O'Reilly v. Morse*, ante.

process is the method of reaching a certain result. It differs from a "machine;" for a patent for a machine covers * nothing but that very machine. But the "process" * 257 ii

on which this decision was rendered was as follows: "I do not propose to limit myself to the specific machinery or parts of machinery described in the foregoing specification and claims; the essence of my invention being the use of the motive power of the electric or galvanic current, which I call electro-magnetism, however developed, for marking or printing intelligible characters, signs, or letters, at any distances, being a new application of that power of which I claim to be the first inventor, or discoverer." A majority of the court held this to be a claim for the use of electro-magnetism for the purpose specified, without regard to the means, or manner, of making the application, and as such to be unwarranted by law. Nor did they consider that the case of *Neilson v. Harford*, if properly understood, afforded any support to such a claim. Speaking of Neilson's apparatus they say: "Undoubtedly the principle that hot air will promote the ignition of fuel better than cold, was embodied in this machine. But the patent was not supported because this principle was embodied in it. He would have been equally entitled to a patent, if he had invented an improvement in the mechanical arrangements of the blowing apparatus, or in the furnace, while a cold current of air was still used. But his patent was supported, because he had invented a mechanical apparatus by which a current of hot air, instead of cold, could be thrown in. And this new method was protected by his patent. The interposition of a heated receptacle in any form, was the novelty he invented." *Taney*, C. J., thus sums up the provisions of the acts of Congress relating to patents: "Whoever discovers that a certain useful result will be produced in any art, machine, manufacture, or composition of matter, by the use of certain means, is entitled to a patent for it; provided he specifies the means he uses in a manner so full and exact, that any one skilled in the science to which it appertains can, by using the means he specifies, without any addition to, or subtraction from them, produce precisely the result he describes. If this cannot be done by the means he describes, the patent is void. If it can be done, then the patent confers on him the exclusive right to use the means he specifies to produce the result or effect he describes, and nothing more. And it

makes no difference in this respect, whether the effect is produced by chemical agency or combination; or by the application of discoveries or principles in natural philosophy, known or unknown, before his invention; or by machinery acting altogether upon mechanical principles. In either case, he must describe the manner and process as above mentioned, and the end it accomplishes. And any one may lawfully accomplish the same end without infringing the patent, if he uses means substantially different from those described." So in *Le Roy v. Tatham*, 14 How. 156. The patentee had discovered that lead recently set would, under heat and pressure in a close vessel, reunite perfectly after a separation of its parts, and had applied his discovery to the manufacture of lead pipe. It was held that he was not entitled to a patent for this newly-discovered property of lead, but that he was entitled to a patent for the process of making lead pipe by means of this principle, and that he was bound to describe his process fully in his specification. The language of the court would indicate that in this case also the inventor would be limited to the process described. It was held, however, that the patentee had claimed the machinery employed, and the decision rested on the question of its novelty. See same case, 22 How. 132. Both these cases were decided by a bare majority of the court, Judges *Nelson*, *Wayne*, and *Grier* dissenting, and Judge *Curtis* not sitting, he having been of counsel. See *Wyeth v. Stone*, 1 Story, 278; *Blanchard v. Sprague*, 2 Story, 164; *Stone v. Blanchard*, 3 Sumn. 535; *Earle v. Sawyer*, 4 Mass. 6; *Sickles v. Borden*, 3 Blatchf. 535; *Foote v. Silsby*, 2 Blatchf. 265; *Burr v. Duryea*, 1 Wall. 631; *Evans v. Eaton*, Peters, C. C. 341; *Smith v. Ely*, 5 McLean, 91; *Parker v. Hulme*, 1 Fish. 44; *Smith v. Downing*, 1 Fish. 64; *Detmold v. Reeves*, 1 Fish. 127; *Wintermute v. Redington*, 1 Fish. 239; *Morton v. N. Y. Eye and Ear Infirmary*, 5 Blatchf. 116, 2 Fish. 320. Nor is a patent valid for a mere effect or result, apart from the means by which it is produced. *Whittemore v. Cutter*, 1 Gal. 480; *Carver v. Hyde*, 16 Pet. 519; *Corning v. Burden*, 15 How. 268; *Burr v. Cowperthwait*, 4 Blatchf. 163; *Sickles v. The Falls Co.* 4 Blatchf. 508.

may be one which may be carried out by a variety of machines. And if the "process" be effectually covered by the patent, it will prevent this use of any of those machines; but not any

other use of them. (o) And it would seem that one * 257 jj * patent may embrace both the new process and the new

product, when the result of a new process is a new manufacture or composition of matter. (oo) It is also held that two patents may be issued to the same person, one for the process, and the other for the result of the process. (op)

(o) The distinction between a process and a machine is thus set forth by *Grier, J.*, in *Corning v. Burden*, 15 How. 252. "A process ~~as nomine~~ is not made the subject of a patent in our act of Congress. It is included under the term 'useful art.' An art may require one or more processes or machines in order to produce a result, or manufacture. The term machine includes every mechanical device, or combination of mechanical powers and devices, to perform some function, and produce a certain effect or result. But when the result is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called processes. A new process is usually the result of discovery; a machine, of invention. The arts of tanning, dyeing, making water-proof cloth, vulcanizing india-rubber, melting ores, and numerous others, are usually carried on by processes as distinguished from machines. One may discover a new and useful improvement in the process of tanning, dyeing, &c., irrespective of any particular form of machinery, or mechanical device; and another may invent a labor-saving machine, by which the operation or process may be performed; and each may be entitled to his patent. As, for instance, A has discovered that, by exposing india-rubber to a certain degree of heat, in mixture or connection with certain metallic salts, he can produce a valuable product or manufacture; he is entitled to a patent for his discovery as a process or improvement in the art, irrespective of any machine or mechanical device. B, on the contrary, may invent a new furnace, or stove, or steam apparatus, by which the process may be carried on with much saving of labor and expense of

fuel; and he will be entitled to his patent for his machine, as an improvement in the art. Yet A could not have a patent for a machine, or B for a process; but each would have a patent for the means and method of producing a certain result or effect, and not for the result or effect produced. It is for the discovery or invention of some practicable method or means of producing a beneficial result or effect that a patent is granted, and not for the result or effect itself. It is when the term process is used to represent the means or method of producing a result, that it is patentable; and it will include all methods or means which are not effected by mechanism or mechanical combinations." See *Whitney v. Emmett*, Baldwin, 312; *Howe v. Abbott*, 2 Story, 194; *Goodyear v. Railroads*, 2 Wall. Jr. 380; *French v. Rogers*, 1 Fish. 133; *Smith v. Downing*, 1 Fish. 64; *Crane v. Price*, Webst. Pat. Cas. 411. When the process is one which requires the use of old mechanism, care must be taken not to claim the mechanism itself as the subject of the patent. Thus, in *Kay v. Marshall*, 1 My. & Cr. 878, the plaintiff had discovered, that by macerating flax before spinning, the spinning-rollers could be placed much nearer together than when dry flax was used, and thereby a much stronger and finer thread be produced. The real invention was the new process of spinning with wet flax instead of dry; but the inventor took out a patent for a new machine, and there being no novelty in the mechanism employed, his patent was declared void. See also *Le Roy v. Tatham*, 14 How. 156.

(oo) *Goodyear v. Railroads*, 2 Wall. Jr. 380; *Goodyear v. Wait*, 8 Fish. 242.

(op) *Rubber Company v. Goodyear*, 9 Wall. 788.

SECTION V.

OF INTERFERENCE.

When each of two or more persons claims to be the first inventor of the same thing, an "interference" is declared to exist between them. Then a trial is had before the examiner, as to which of them was actually the first inventor. And there may be an interference although one of the parties * has * 257 *kk* already obtained a patent; because, although the commissioner cannot cancel a patent which has been issued, he may give a patent to him whom he finds to be the first inventor, and thus place them in an even position before the public and the courts. But two inventors or patents do not interfere unless they claim, wholly or partially, the same invention. (*oq*)

SECTION VI.

OF INFRINGEMENT.

The patent gives to the patentee the exclusive use of the thing patented, for seventeen years. If any other person, within that period, makes an adverse use of it, (and any use of it without the patentee's consent is adverse,) this is an infringement of the patentee's exclusive right, for which he has an adequate remedy. (*p*)

The question, What is an infringement of a patent right? is the great question of patent law; and often one of great difficulty, for many reasons. It is not easy to separate what is matter of law in the question from what is matter of fact. To decide the question of fact aright, often requires a thorough acquaintance with the laws of mechanics, and with various branches of natural

(*oq*) Gold-Separating Co. r. U. S. Dis-integrating-Ore Co. 6 Blatchf. 307.

(*p*) It is said, however, that the making of a machine merely for philosophical experiment, or for the purpose of ascertaining its sufficiency to produce its described effects, is not an infringement.

ment. Whittemore v. Cutter, 1 Gall. 432; Poppenhausen v. Falke, 2 Fish. 181;

Jones v. Pearce, Webst. Pat. Cas. 125.—But see Watson v. Bladen, 4 Wash. 588. With these exceptions the question of infringement is one irrespective of motive. Parker v. Hulme, 1 Fish. 54.

science. And judges and experts, to say nothing of juries, often encounter questions in patent cases, both sides of which are so strongly supported, that either seems impregnable, were it not that the other is as much so. What better instance of this can be given, than a case in England, involving very large pecuniary interests, and turning entirely upon the question of infringement,

* 257 ll *held* *that there was no infringement; then, of six judges in the Exchequer Chamber, four held that there was an infringement; then, when the House of Lords asked the judges of England for their opinion, seven held that there was an infringement, and four that there was not; and finally the House of Lords decided that there was no infringement? (q)

We shall endeavor to give some general rules, or principles, which may be of use to those who have to consider this difficult question; placing in our notes the cases which illustrate or which qualify these rules or principles.

There must be, to constitute an infringement, a *copy* of the patented article; and it must agree with that article in principle and in action and effect. (r) No device of language, and no avoid-

(q) *Unwin v. Heath*, 13 M. & W. 583; 12 C. B. 522; 5 H. L. C. 505. The patent was for the use of carburet of manganese in the manufacture of steel. Defendant made use of oxide of manganese and coal-tar, the materials of which the carburet of manganese is made; and it was contended that in this process these ingredients became converted into the carburet before the iron was changed to steel, but the scientific evidence on this point was very conflicting. The final decision of the House of Lords rested on the ground, that at the date of the patent the ingredients of the carburet of manganese were not known to be an equivalent for the carburet itself.

(r) *Winans v. Denmead*, 15 How. 390; *Odiorne v. Winkley*, 2 Gall. 53; *How v. Abbott*, 2 Story, 190; *Parker v. Haworth*, 4 McLean, 370; *Brooks v. Bicknell*, 3 McLean, 250; *Rich v. Lippincott*, 1 Fish. 1. But in order to constitute an infringement, it is not necessary that the device complained of should imitate the patented machine in every respect, or even that it should resemble it in form or external appearance, provided it be substantially the same in principle and mode of operation. *Smith v. Higgins*, 1 Fish. 597; *Judson v. Cope*, id. 615; *Union Sugar-Refinery v. Mathieson*, 2 Fish. 600;

Cahoon v. Ring, 1 Clif. 592; *Blanchard v. Beers*, 2 Blatchf. 415; *Barrett v. Hall*, 1 Mass. 447; *Wyeth v. Stone*, 1 Story, 278; *Dixon v. Moyer*, 4 Wash. 68; *Root v. Ball*, 4 McLean, 177. But if by the change of form or proportion a new effect is produced, there is no infringement, as the change is not merely of form, but of principle also. *Winans v. Denmead*, 15 How. 390; *Many v. Jagger*, 1 Blatchf. 386; *Davis v. Palmer*, 2 Brock. 810; *Aiken v. Dolan*, 8 Fish. 187. And where several distinct improvements are claimed in one patent, the use of one of them alone will constitute an infringement. *Moody v. Fiske*, 2 Mass. 112; *Emerson v. Hogg*, 2 Blatchf. 1. Nor can the defendant embody in his machine the patented inventions of the plaintiff, nor entitle himself to use them, by adding improvements, or new inventions of his own or of others, thereto. *Carr v. Rice*, 1 Fish. 198; *Colt v. Mass. Arms Co.* id. 108; *Howe v. Morton*, id. 588; *McCormick v. Talcott*, 20 How. 405; *Foster v. Moore*, 1 Curt. 279; *Woodworth v. Rogers*, 3 Wood. & M. 155. To constitute an infringement of a combination, all the elements of the combination must be employed, or at least substantial equivalents for them. If one or more be omitted there is no infringement.

ance of what may seem to be a direct * contradiction to * 257 mm the description and claim of the patent, will necessarily prevent the interference complained of from being an infringement. The statute requires that the patentee shall give in his specification a description of his invention "in full, clear, concise and exact terms"; and it is plain that this means that the patentee shall be limited by his own specification; for his description cannot comply with this requirement, if he may go beyond it to find something which the defendant infringes. (s) And it is equally plain, that nothing must be judged an infringement which is not clearly so; for the public have an undoubted right to the whole ground not certainly occupied by the specification, for any ambiguity or omission by the patentee is his own fault, and he must bear the consequences. It would be very difficult to call that an * in- * 257 nn

Prouty v. Ruggles, 16 Pet. 336; *Stimpeon v. B. & S. R. R. Co.* 10 How. 329; *Eames v. Godfrey*, 1 Wall. 78; *Seymour v. Osborne*, 11 Wall. 516; *Dodge v. Card*, 2 Fish. 116; *McCormick v. Manny*, 6 McLean, 539. And where an element is omitted in the defendant's device, the plaintiff will not be permitted to show that such element is useless. *Vance v. Campbell*, 1 Black, 427.

(s) Act 1870, § 26. See *Sickles v. Gloucester Man. Co.* 1 Fish. 222; *Johnson v. Root*, id. 351; *Rich v. Lippincott*, 2 Fish. 1; *Dixon v. Moyer*, 4 Wash. 73. "The specification," says Story, J., "has two objects; one to make known the manner of constructing the invention so as to enable artisans to make and use it, and thus give the public the full benefit of the discovery after the expiration of the patent. The other object is, to put the public in possession of what the party claims as his own invention, so as to ascertain if he claim anything that is in common use, or already known, and to guard against prejudice or injury from the use of an invention which the party may otherwise innocently suppose not to be patented. *Evans v. Eaton*, 7 Wheat. 434. Accordingly, if the description fails to distinguish clearly between what is new in the alleged invention and what is old, or if the terms of the patent are so obscure or doubtful that the court cannot determine what is the particular improvement claimed, the patent will be void for uncertainty. *Lowell v. Lewis*, 1 Mass. 188; *Barrett v. Hall*, id. 188; *Ames v. Howard*, 1 Sumn. 485; *Hovey v. Stevens*, 3 Wood. & M. 80; *Seymour v. Osborne*, 11 Wall. 541; *Winternute v. Redington*, 1 Fish. 289; *Langdon v. De*

Groot, 1 Paine, 207. And the description must be sufficiently clear and specific to enable one skilled in the art to which the invention relates, to put it in practice without further instruction, and without the exercise of any inventive power of his own. *Singer v. Walmsley*, 1 Fish. 558; *Wayne v. Holmes*, 2 Fish. 20; *Gray v. James*, Pet. C. C. 401; *Brooks v. Bicknell*, 8 McLean, 260; *Davoll v. Brown*, 1 Wood. & M. 56. But old and well-known machinery with which the patented device is to be connected, need not be specifically described. *Page v. Ferry*, 1 Fish. 298; *Emerson v. Hogg*, 2 Blatchf. 9; *Kneass v. Schuylkill Bank*, 4 Wash. 14. On the other hand, it is well settled that patents are to be construed liberally, and not to be rigidly interpreted. It is enough if the court can see what is the nature and extent of the claim by a reasonable interpretation of the language used, however imperfectly or inartificially the patentee may have expressed himself. *Hogg v. Emerson*, 6 How. 479; *Grant v. Raymond*, 6 Pet. 218; *Turrill v. Mich.*, &c. R. R. 1 Wall. 491; *Inlay v. N. & W. R. R.* 1 Fish. 340; *Potter v. Holland*, 1 Fish. 382; *Ryan v. Goodwin*, 8 Sumn. 320. And "in determining the sufficiency of the patent, the whole instrument—that is the patent, embracing the specification and drawings—is to be taken together, and, if from these the nature and extent of the claim can be perceived, the court is bound to adopt that interpretation and give it full effect." *Parker v. Stiles*, 5 McLean, 54; *Earle v. Sawyer*, 4 Mass. 1; *Carver v. Braintree Man. Co* 2 Story, 482; *Judson v. Cope*, 1 Fish. 615; *Ransom v. Mayor of N. Y.* 4 Blatchf. 157; *Pitts v. Wemple*, 2 Fish. 10.

fringement, which did not certainly include some essential thing which the patent certainly included because it is expressly mentioned therein.

The patent gives to the patentee the exclusive right "of making, using, and vending" the invention. It is therefore an infringement of this right, to make, or use, or vend that invention.

If the article be a machine, it is the whole machine. He only is an infringer who completes the article, and not a mechanic or laborer who makes parts of it. (u) So a sale of the materials of the machine, or of the parts, severally, is no infringement, unless it be a sale of the parts, severed from each other, and in succession, with intent that the purchaser shall put them together and so procure the whole machine. (v) And if a sheriff sells the materials of a machine, as materials, and a purchaser buys them and puts them together to make the machine, it is he and not the officer who is responsible. And it has been held, that, when the patent is for both process and product, both being new, a sale or use of the manufactured article is itself an infringement. (w)

Generally, if the article patented is a thing produced in a particular and specified way, the patent will cover both the article and the process by which it is made, and either may be infringed.

It must always be remembered that the question whether a certain article, or product, or process, is an infringement upon another certain article, or product, or process, is the question, Are they the same or are they different? Again, it is not easy to say whether this means substantially, or essentially, the same, or precisely the same. For although a mere verbal or apparent resemblance would not suffice to constitute an infringement, yet, if the article complained of distinctly interfered with the exclusive property of the patentee as described by him, it would not be of much use to the defendant to descant upon the similarity or difference

of the articles in essence or in substance. If now we

* 257 oo remember * the extreme difficulty of all questions involving identity or difference, and suppose them complicated, as they often are in practice, with the metaphysical questions above suggested, we may see how impossible it must be to subject such questions to determination by a system of positive rules.

(u) *Delano v. Scott, Gilpin*, 498; *Sargent v. Larned*, 2 Curt. 340. 356; *Goodyear v. N. J. Cent. R. R. 1 Fish*. 628; *Goodyear v. Providence Rubber Co.* 2 Clif. 851.

(v) *Sawin v. Guild*, 1 Gall. 484.

(w) *Goodyear v. Railroads*, 2 Wall. Jr.

As an illustration of this, we may refer to the rule, that no one can protect his imitation of a patented article by showing that he had introduced a new mechanical principle, if this were only *equivalent* to those employed by the patentee. (x) But our notes will show that he would be a very acute man who could certainly discern, or a very bold man who would certainly assert, what is meant by "a mechanical equivalent."

A purchaser of a patented article may repair it as long as it will last; but must not make a new one under the pretence of repair, nor infringe on another's patent. (xx)

* SECTION VII.

* 257 pp

OF THE RIGHTS OF A PURCHASER OF AN INTEREST IN A PATENT.

The owner of a patent, whether he be the original inventor and patentee, or an assignee, may himself assign and transfer his right, in whole or in part. (y) Conditions or limitations, which

(x) A mechanical equivalent has been defined as "such an equivalent as a mechanic of ordinary skill in the construction of similar machinery, and having the plaintiff's specification and machine before him, could substitute in the place of the mechanism described, without expensive experiments, and without the exercise of his inventive faculties." *Hall*, J., in *Burden v. Corning*, 2 Fish. 492, and in *Johnson v. Root*, 1 Fish. 168. *Sprague*, J., says: "The term 'equivalent' has two meanings, as used in this class of cases. The one relates to the results that are produced, and the other to the mechanism by which those results are produced. Two things may be equivalent, that is, the one equivalent to the other, as producing the same result, when they are not the same mechanical means. Mechanical equivalents are spoken of as different from equivalents that merely produce the same result. A mechanical equivalent, I suppose, as generally understood, is where the one may be adopted instead of the other, by a person skilled in the art, from his knowledge of the art." In *Foster v. Moore*, 1 Curt. 291, *Curtis*, J., says: "I do not think the doctrine respecting the use of mechanical equivalents is confined by the patent law to those elements which are strictly known

as such in the science of mechanics. In the present advanced state of that science there are different well-known devices, any one of which may be adopted to effect a given result, according to the judgment of the constructor. And the mere substitution of one of these for another cannot be treated as an invention. It does not belong to the subject of invention, but of construction." See also *Smith v. Downing*, 1 Fish. 64; *Cahoon v. Ring*, 1 Clif. 592; *Tatham v. Le Roy*, 2 Blatchf. 486. As to the application of the doctrine of mechanical equivalents where the invention is only an improvement on a known machine, see *McCormick v. Talcott*, 20 How. 402; *Singer v. Walmley*, 1 Fish. 568; *Seymour v. Osborne*, 11 Wall. 555. The same principle applies to the use of "chemical equivalents" in patents for a process or a composition of matter, but it is held that the substituted article must have been known as an equivalent for the other at the date of the original invention. *Byam v. Farr*, 1 Curt. 263; *Allen v. Hunter*, 6 McLean, 303; *Unwin v. Heath*, 5 H. L. C. 505.

(xx) *Aiken v. Manchester Print Works*, 2 Clif. 486.

(y) Act 1870, § 36: "Every patent, or any interest therein, shall be assignable in law, by an instrument in writing,

form a part of the contract of sale or transfer, are obligatory on both parties, and may be such as the parties agree upon. But questions have arisen as to the rights of a purchaser where they are not limited or restrained by specific agreement.

One of these is as to the right of the purchaser to profit * 257 qq by * the renewal or extension of the patent. The weight of authority leads to the conclusion, that he who holds the whole interest in the patent, by assignment, before the extension, will not hold it after the extension, unless something in the instrument of assignment, or in the special act granting the extension, gives to the purchaser this right. (z)

and the patentee, or his assigns or legal representatives, may, in like manner, grant and convey an exclusive right under his patent to the whole or any specified part of the United States; and said assignment, grant, or conveyance, shall be void as against any subsequent purchaser or mortgagee for a valuable consideration without notice, unless it is recorded in the Patent-Office within three months from the date thereof. There are three classes of persons in whom the patentee can vest an interest of some kind in the patent. They are an assignee, a grantee of an exclusive sectional right, and a licensee. An assignee is one who has transferred to him in writing the whole interest of the original patent, or an undivided part of such whole interest in every portion of the United States. And no one, unless he has such interest transferred to him, is an assignee. A grantee is one who has transferred to him in writing the exclusive right under the patent, to make and use, and to grant to others to make and use, the thing patented, within and throughout some specified part or portion of the United States. Such right must be an exclusive sectional right, excluding the patentee therefrom. A licensee is one who has transferred to him in writing, or orally, a less or different interest than either the interest in the whole patent, or an undivided part of such whole interest, or an exclusive sectional interest." Per *Ingersoll*, J., in *Potter v. Holland*, 1 Fish. 383. So *Brooks v. Byam*, 2 Story, 525; *Suydam v. Day*, 2 Blatchf. 20; *Blanchard v. Eldridge*, 1 Wall. Jr. 839. An assignment may be made before the issuing of the patent. *Gayler v. Wilder*, 10 How. 493; *Rathbone v. Orr*, 5 McLean, 191; and may cover future improvements. *Nesmith v. Calvert*, 1 Wood. & M. 41. The provision as to recording a transfer does not

apply to a mere license. *Brooks v. Byam*, 2 Story, 542; *Stevens v. Head*, 9 Vt. 177. As to the rights of joint owners of a patent, it is settled that such joint owners are not *ipso facto* partners. *Kinsman v. Parkhurst*, 18 How. 289; affirming s. c. 1 Blatchf. 72. And it has been held that each has the right to make and use, and to license others to make and use, the thing patented, without accountability to the other. *Cleem v. Brewer*, 2 Curt. 234. And such appears to be the law at this day, notwithstanding the case of *Ritts v. Hall*, 3 Blatchf. 201, where it was held that one joint owner might sue another for infringement in respect of the former's undivided interest in the patent for the articles sold by the latter. See an able criticism of this case in *Curtis on Patents*, § 188.

(z) The Act of 1836, § 18, re-enacted in Act of 1870, § 67, provides that "the benefit of the extension of a patent shall extend to the assignees and grantees of the right to use the thing patented to the extent of their interest therein." The constructions given to this clause have been very conflicting; and perhaps the true meaning cannot be deemed fully settled even now. In the Circuit Court it was held by Story, J., that this clause did not enlarge the rights of the grantee or assignee to use the thing patented, beyond the interest originally granted; that if that interest was by its nature, or by a just interpretation of the terms of the assignment, limited to the original term, the assignee could have no interest in the renewed term; but that if, by the original assignment or grant, any interest in the renewed term had been conveyed to the assignee or grantee, the statute carried into effect the intent of the parties, and turned the equitable right of the assignee to an interest in the renewed patent into a legal title. *Woodworth v. Sherman*,

Another question is, how far the exclusive right to use or sell to be used the article within a specified territory extends. On this point it is held, that an assignee holding may sell the articles within the territory, to persons who buy to sell it * abroad. Under this ruling, a limitation of the territory * 257 rr would seem to be of less effect than it was intended to have. If a man in a county in New York bought the right to make and sell a patented hay-cutter in that county, he could not himself sell them elsewhere. But he might establish his manufactory, and make them in any quantities, and sell them to any persons who bought to sell them again in any part of the country. It would, however, undoubtedly, be within the power of the parties to restrain or suppress this right as they chose, by specific agreements to that end. (a)¹

If a note be given for a patent, proof that the patent was void or the invention wholly ineffectual is a good defence. But if it can be used and effectually applied to useful purposes, it is no

3 Story, 171. A similar view was expressed by *McLean*, J., in *Brooke v. Bicknell*, 4 *McLean*, 66. But in *Wilson v. Rousseau*, 4 How. 682, a majority of the Supreme Court held that the benefits of the renewal were extended by this section to such assignees or grantees of the right to use the patented machine as were in the use thereof at the date of the renewal, and that such persons had the right to continue the use of such patented machine during the renewed term to the extent of their interest, whether one machine or more; but that the right thus conferred was only the right to use, not to make or sell, or license others to make or sell; and that such right was not exclusive, no matter how broad or how exclusive the assignment had been under the original term. See also *Bloomer v. McQuewan*, 14 How. 550; *Chaffee v. Boston Belting Co.* 22 How. 217; *Bloomer v. Millingen*, 1 Wall. 840. In *R. R. Co. v. Trimble*, the assignment was, "for all alterations and improvements on the same from time to time." And it ran, "to the full end of the term for which letters-patent are or may be granted." Held, by the Supreme Court of the United States (*Bradley*, J., dissenting), that the legal title of a patent the patentee obtained for an improvement, which was extended, passed to the

assignee, with the extension. In *Wilson v. Rousseau*, the patent in question was for a machine; but in *Day v. Union Rubber Co.* 3 Blatchf. 497, it was held, that the terms of this section permitted the assignee to continue the use of "the thing patented," whether the patent were for a machine alone, or for a process, or a machine to be used in such process, or for a process alone, and whether the identical machinery used by such assignee was in existence before the renewal of the patent or not. But see *Wood v. Mich. South. R. R.* 3 Fish. 464; *Jenkins v. Nicholson Pavement Co.* 1 Abb. U. S. 567; *Chase v. Walker*, 3 Fish. Pat. Cas. 120; *Hodge v. Hudson River R. R. Co.* 6 Blatchf. 85. That a general assignment of an interest in a patent gives the assignee no interest in the renewal beyond the right to use the thing patented, unless the terms of the assignment embrace the renewed patent, see *Phelps v. Comstock*, 4 *McLean*, 365; *Gibson v. Cook*, 2 Blatchf. 146; *Clum v. Brewer*, 2 Curt. 520. By § 63 of the Act of 1870, extensions are to be granted hereafter only on patents issued prior to March 2, 1861.

(a) See *post*, next section and cases there cited, especially in notes (d) and (f):

¹ Where the owner of a patent-right in a machine assigned it for a royalty on each machine sold by the assignee, the latter was held compelled to pay the royalty on all machines covered by the patent the use of which was allowed by him, though such machines were not sold by him. *Rodgers v. Torrant*, 43 Mich. 113.

defence that the use is not profitable from the excessive consumption of power by the machine. (*aa*)¹

SECTION VIII.

OF THE RIGHTS OF A PURCHASER OF A PATENTED ARTICLE.

Such a purchaser has the right to use the article as he pleases, or neglect to use it. But he cannot copy it and make another; not even if he loses the one he bought, by accident, as by fire. (*b*) He may certainly repair it; but to what extent? The answer

must be, so long and so far as he *only* repairs it. (*c*) In * 257 ss this way, he may keep it in being and in * use long after it would, if unrepaired, become useless, or fall in pieces.

We should say, that, if by honest repair, or replacement of parts worn out, he went on step by step, until every part of the original machine had gone, and all the parts and pieces of the existing machine were new, he might raise the metaphysical question whether the present machine were the same that he bought; but he would own the present machine, provided that every new part had been added as it was called for by way of repair, and only so. The line may be an obscure one, but it must be drawn somewhere; and only where the purchaser passed beyond it, and, under pretence of repair, made for himself a new machine, would he be in the wrong.

This question also has arisen. A party buys and sells the product of a patented machine, knowing that the maker from whom he purchases, infringes upon the patent of the patentee.

(*aa*) *Nash v. Lull*, 102 Mass. 60.

(*b*) *Wilson v. Simpson*, 9 How. 123.

(*c*) *Chaffee v. Boston Belting Co.* 22 How. 223; *Bicknell v. Todd*, 5 McLean, 288; *Wilson v. Simpson*, 9 How. 128. In this respect there is a marked difference between the rights conferred by a grant to make and use a machine, and those arising from a sale of the machine itself. In the former case, the purchaser buys a portion of the franchise, and is therefore not confined to the use of a particular machine, but may build another if the first is worn out or destroyed. Wood-

worth *v. Curtis*, 2 Wood. & M. 526; *Wilson v. Stolley*, 4 McLean, 227. In the latter case, he has purchased only the right to use the specific machine, and when that is destroyed his right is gone with it. But where a knitting machine and the needles used in it were covered by separate patents, it was held, that when the needles were worn out the purchaser had no right to manufacture others to replace them, although the needles were essential to the operation of the machine. *Aikin v. Manchester Print Works*, 2 Clif. 435.

¹ See also *Harlow v. Putnam*, 124 Mass. 553.

Is he himself an infringer? The statute gives the patentee an exclusive right "to make, use, and vend the said invention." It is, however, held that this is limited to the machine itself, and does not extend to the product of the machine. (*d*) Hence one who knows that a patent for a machine is infringed, may buy of one who makes and uses the infringing machine, the products of that machine, and may use what he buys, or sell it to be used, without being himself an infringer. It is obvious that this might open the door to fraud. An irresponsible party might be set up as the actual maker and user of the machine, and so as the only infringer; while others, actually intended, only bought and sold what he made. But this would be an interest in the making and using of the infringing machine, which would undoubtedly make the party holding the interest himself an infringer. (*e*)

When the * purchaser of a patented article buys it without * 257 *tt* restriction, the article or product is no longer under the protection of the statute; and he may use or sell it in another territory for which another person has taken an assignment of or a right under the same patent. (*f*) The statute provides that one who purchases an article of the inventor, or makes it with his consent before the inventor applies for a patent, may use, or sell to others to be used, the article so made, without liability therefor. (*g*)

A license to use an invention only at the licensee's "own establishment" does not extend to one owned by himself and others (*gi*)

(*d*) *Boyd v. Brown*, 3 McLean, 206; *Boyd v. McAlpine*, *id.* 429; *Simpson v. Wilson*, 4 How. 711; *Booth v. Garely*, 1 Blatchf. 250; *Blanchard Gun Stock Turning Co. v. Jacobs*, 2 Blatchf. 70.

(*e*) Thus, where A and B agreed with C to purchase of the latter all the lead pipe he should make, A and B to furnish the lead and to pay C a certain price for manufacturing, and C used a machine which infringed the plaintiff's patent, it was held, that "if the agreement was only colorable, and entered into for the purpose of securing the profits of the business without assuming the responsibility for the use of the invention, and for the purpose of throwing the responsibility upon C, who was insolvent, then they would be as responsible as he was. *Tatham v. Le Roy*, C. C. U. S. Dist. of N. Y. *Nelson*, J., cited and approved in case on appeal. *Le Roy v. Tatham*, 14 How. 161. See also *Keplinger v. De Young*, 10 Wheat. 804.

(*f*) See cases cited in note (*d*), *supra*. Also, *Adams v. Burks*, C. C. U. S. *Shepley*, J., Mass. Dist. 1871. *Bloomer v. Millinger*, 1 Wall. 357; *Aikin v. Manchester Print Works*, 2 Clif. 435; *Chaffee v. Boston Belt Co.* 22 How. 217. And the purchaser from a licensee may apply the article to any purpose he pleases, notwithstanding any agreements between the licensee and the patentee. See *Metropolitan Wash. Mach. Co. v. Earle*, 2 Fish. 208.

(*g*) Act 1870, § 87. See *McClurg v. Kingland*, 1 How. 208. But a purchaser from a wrong-doer without the inventor's knowledge or consent, or one who has surreptitiously acquired and used the invention, has no right to use the invention after the patent has been obtained. *Kendall v. Winsor*, 21 How. 380; *Pierson v. Eagle Screw Co.* 3 Story, 406; *Hovey v. Stevens*, 1 Wood. & M. 301.

(*gi*) *Rubber Co. v. Goodyear*, 9 Wall. 788.

SECTION IX.

OF REMEDIES AT LAW.

The statute provides that damages for an infringement may be recovered in an action on the case in any circuit court of the United States, or district court exercising the jurisdiction of a circuit court, or in the Supreme Court of the District of Columbia, in the name of the party interested, either as patentee, assignee, or grantee. (*h*)

The statute also provides, in a section which we give in a note, for certain defences which may be proved in trial under the * 257 *uu* general issue. (*i*) If any of these defences are made, * thirty days' notice must be given. But other defences may be made without this notice. As, that there is no infringement; or,

(*h*) Act 1870, § 59.

(*i*) Act 1870, § 61. "In any action for infringement, the defendant may plead the general issue; and having given notice in writing to the plaintiff or his attorney, thirty days before, may prove on trial any one or more of the following special matters: 1st. That, for the purpose of deceiving the public, the description and specification filed by the patentee in the Patent-Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect; or, 2d. That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; or, 3d. That it had been patented or described in some printed publication prior to his supposed invention or discovery thereof; or, 4th. That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented; or, 5th. That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public. And in notices as to proof of previous invention, knowledge, or use of the thing patented, the defendant shall state the names of patentees and the dates of their patents, and when granted, and the names and

residences of the persons alleged to have invented or to have had the prior knowledge of the thing patented, and where and by whom it had been used; and if any one or more of the special matters alleged shall be found for the defendant, judgment shall be rendered for him with costs. And the like defences may be pleaded in any suit in equity for relief against an alleged infringement; and proofs of the same may be given upon like notice in the answer of the defendant, and with like effect." The defences specified in this section may also be pleaded specially. *Grant v. Raymond*, 6 Pet. 246; *Evans v. Eaton*, 3 Wheat. 503. Where reference is made to a prior printed publication, it should be to the part of the work intended to be relied on. A mere reference to the title is not sufficient. *Silsby v. Foote*, 14 How. 22, affirming s. c. 1 Blatchf. 454. And it has been held, that a book of plates without letter-press is not a "printed publication" admissible in evidence under this section. *Judson v. Cope*, 1 Fish. 615. The notice need specify only the names of the persons having the prior knowledge, but not the names of the witnesses by whom such knowledge is to be proved. *Many v. Jagger*, 1 Blatchf. 376; *Wilton v. Railroads*, 1 Wall. Jr. 195. Otherwise held in the seventh circuit, *Judson v. Cope*, 1 Fish. 615.

that the patent is invalid, because the patentee is a person to whom the patent cannot be granted; or because the invention is wanting in the qualities made requisite by statute; or because the patent is deficient or erroneous in some of the formalities essential to its validity. (*j*)

SECTION X.

OF REMEDIES IN EQUITY.

The statute gives the court power "upon bill in equity filed by any party aggrieved, to grant injunctions according to the course and principles of courts of equity." (*k*). This remedy of injunction is that which is usually sought by a * party * 257 *vv* desiring to prevent a violation of his right under a patent. It is a common remedy in equity, and the rules of proceeding and the principles which determine the granting of an injunction, generally, are applied in patent cases; and they cover the matters of pleading, evidence, notice, and the like.

The injunction can issue only to a party who has a legal interest in, or title to, a valid patent. And the question has been much discussed, When will a court grant an injunction without requiring that the plaintiff should first establish this legal right? This question is always addressed to the discretion of the court. But while this discretion is always exercised with a careful regard to the especial facts, circumstances, and merits of the case before the court, it is always guided by such principles as have been established by the practice of the court. What these are we can best show in the words used by courts in leading cases presenting this question; and these we give in our notes. (*l*)

(*j*) *Whittemore v. Cutter*, 1 Gall. 429; *Kneass v. Schuylkill Bank*, 4 Wash. 9.

(*k*) Act 1870, § 55.

(*l*) "The rule as to granting or continuing injunctions in patent-right causes," says *Leavitt*, J., "is now well settled by the modern usages of the courts of the United States. They are now granted without a previous trial at law, in cases where the owner of the patent shows a clear case of infringement, and has been in the possession and enjoyment of the exclusive right for a term of years without any successful impeachment of its va-

lidity. Such possession and enjoyment, aided by the presumption arising from the patent itself, are usually regarded as sufficient to warrant an injunction to restrain an infringement. And there is no fixed rule as to the length of time the possession and enjoyment of the right under a patent shall have continued. It must be sufficient to justify a presumption in favor of its validity. But the presumptions in favor of a patent, arising from the length of time which has elapsed since its issue, are greatly strengthened by the fact, that its validity has been af-

* 257 *vv* * It may be added that laches on the part of the plaintiff, consisting in his long neglect of his right, and so permitting another party to go on spending time and money on what may afterwards be declared an infringement, is always a strong reason against a temporary injunction. (m) And whenever bonds to keep an account of manufacture, sale, profits, &c., will answer the purposes of justice as well, or, perhaps, nearly as well, as a temporary injunction, they are preferred. (n)

firmed and sustained by prior judicial decisions, either at law or in equity." *Potter v. Muller*, 2 Fish. 465. And in *Ogle v. Ege*, 4 Wash. 584, *Washington*, J., says: "I take the rule to be in cases of injunction in patent cases that, when the bill states a clear right to the thing patented, which, together with the alleged infringement is verified by affidavit, if the patented has been in possession of it by having used or sold it, in part, or in the whole, the court will grant an injunction, and continue it until the hearing, or until further order, without sending the plaintiff to law to try his right. But if there appears to be a reasonable doubt as to the plaintiff's right, or the validity of the patent, the court will require the plaintiff to try his title at law. And says *Grier*, J., "No interlocutory injunction should issue unless the complainant's title and the defendant's infringement are admitted, or are so palpable and clear that the court can entertain no doubt upon the subject." *Parker v. Sears*, 1 Fish. 93. See also *Goodyear v. N. J. Cent. R. R.* 1 Fish. 626; *Muscan Hair Man. Co. v. Amer. H. M. Co.* 1 Fish. 320; *Tappan v. Nat. Bank-note Co.* 2 Fish. 195; *Doughty v. West*, 2 Fish. 533; *Hussey v. Whitley*, 2 Fish. 120; *Foster v. Moore*, 1 Curt. 286; *Orr v. Littlefield*, Wood. & M. 18; *Washburn v. Gould*, 3 Story, 170; *Brooks v. Bicknell*, 4 McLean, 72; *North v. Kershaw*, 4 Blatchf. 70; *Hill v. Thompson*, 8 Meriv. 622; *Caldwell v. Van Vleessingen*, 9 Hare, 415; *Neilson v. Thompson*, Webst. Pat. Cas. 277. But where a sufficient exclusive possession is established it has been held, that a doubt concerning the validity of a patent will not necessarily prevent an injunction. *Sargent v. Seagrave*, 2 Curt. 655; *Isaacs v. Cooper*, 4 Wash. 260. The principle that exclusive possession for a time strengthens the title of the patentee is founded on the idea that, as it is a claim of right adverse to the public, and the public acquiesce in that claim, such acquiescence raises a presumption that the claim is good. It was held, therefore, that where the invention was

one which few persons would use, and which had not been used in a public manner, no such presumption would arise. *Tappan v. Nat. Bank-note Co.* 2 Fish. 195. And, on the same principle, where the plaintiff's machines were made under several distinct patents, one of which had been repeatedly sustained, it was held that exclusive possession raised no presumption of the validity of the other patents, especially as it appeared that a prejudice had existed against the plaintiff's machine, which it required long time and expense to overcome. *Grover & Baker S. M. Co. v. Williams*, 2 Fish. 133. Nor in an application for an injunction is the court bound by the result of a previous trial at law, but will examine the whole case, and grant the injunction or not according to its own judgment. *Sickles v. Younga*, 3 Blatchf. 288; *Many v. Sizer*, 1 Fish. 81. See on this subject of injunction, *Hodge v. Hudson River R. R. Co.* 6 Blatchf. 165; *Morris v. Lowell Manuf. Co.* 3 Fish. Pat. Cas. 67; *Potter v. Whitney*, id. 77; *Brammer v. Jones*, id. 340; *Goodyear v. Mullee*, id. 420; *Goodyear v. Houninger*, 3 Fish. Pat. Cas. 147.

(m) *Wyeth v. Stone*, 1 Story, 282; *Union Man. Co. v. Lounsbury*, 2 Fish. 389; *Cooper v. Matthews*, 8 Law Rep. 415.

(n) "In acting on applications for temporary injunctions to restrain the infringement of letters-patent," says Judge *Curtis*, "there is much latitude for discretion. The application may be granted or refused unconditionally, or terms may be imposed on either of the parties as conditions for making or refusing the order. And the state of litigation where the plaintiff's title is denied, the nature of the improvement, the character and extent of the infringement complained of, and the comparative inconvenience which will be occasioned to the respective parties by allowing or denying the motion, must all be considered in determining whether it should be allowed or refused; and, if at all, whether abso-

* The injunction sought for as a permanent and effectual remedy, is a perpetual injunction. This will be granted only on a final hearing. It may be sought for on purely legal grounds. But if sought on grounds of fact, and the fact be denied, as if for an infringement and this be denied, then the facts at issue must, generally at least, be tried by a jury. (o) But, as in other cases, the jury will be instructed by the court; and, if the verdict be manifestly erroneous, it will be set aside. It may be, however, that the question of infringement may rest upon the construction of documents, or otherwise on merely legal grounds, and is wholly within the province of the court.

The question whether an injunction can be issued in one country for a violation there of a right under a patent issued there, when the violation is by a foreigner bringing with him what was

lately, or upon some and what conditions." In this case an account was directed to be kept. In *Tatham v. Lowber*, 4 Blatchf. 86, *Nelson*, J., says: "It is common in the case of a bill filed for an infringement, and a motion made for a preliminary injunction, where the question of infringement is not manifest, and enjoining the defendant would produce serious hardship or derangement of his business, to withhold the injunction on defendant's keeping an account or giving security for damages accruing." And this is done especially where the defendant is merely using a patented machine, and the plaintiff has been in the habit of licensing parties to make such use of it, as the amount of the license fee is then the measure of the plaintiff's damages. In such a case Judge *Grier* says: "A chancellor who would issue an injunction to stop a mill or manufactory, locomotive or steam engine, because in their construction some patented device or machine has been used, would act with more than doubtful discretion. Stopping the mill or steam engine might inflict irreparable injury, but could not benefit the inventor. The compensation to him for this trespass on his rights is the price of a license. The wrong done him is not the use of his invention, but the non-payment of a given sum of money. To issue an injunction in such a case, where neither prevention nor protection is sought or required, would be an abuse of power. An injunction is not to be used as an execution, or for extortion." *Sanders v. Logan*, 3 Wall Jr. 2 Fish. 167. See also *Livingston v. Jones*, 2 Fish. 207; *Foster v. Moore*, 1 Curt. 279;

Orr v. Littlefield, 1 Wood. & M. 18; *Day v. Candee*, 3 Fish. 9.

But where the infringement is clear, and the right to an injunction manifest, the injunction will not be stayed on the defendant's offer to keep an account, although it may occasion irreparable injury to the defendant, and though the latter be well able to respond in damages. *Sickles v. Mitchell*, 8 Blatchf. 548; *Tracy v. Torry*, 2 Blatchf. 279; *Gibson v. Van Dresar*, 1 Blatchf. 536; *Forbush v. Bradford*, 21 Law Rep. 471.

(o) This, though the usual course, is not invariably so. Thus in *Goodyear v. Day*, 2 Wall. Jr. 283, *Grier*, J., says: "It is true that in England the chancellor will generally not grant a final and perpetual injunction in patent cases, when the answer denies the validity of the patent, without sending the parties to law to have that question decided. But even there the rule is not absolute or universal. It always rests on the sound discretion of the court. A trial at law is ordered by a chancellor to inform his conscience; not because either party may demand it as a right, or that a Court of Equity is incompetent to judge of questions of fact, or of legal titles. In the courts of the United States, the practice is by no means so general as in England, or as it would be here if the trouble of trying issues at law devolved upon a different court." See *Sickles v. Gloucester Man. Co.* 1 Fish. 222; *Woodworth v. Rogers*, 3 Wood. & M. 149; *Van Hook v. Pendleton*, 1 Blatchf. 194; *Buchanan v. Howland*, 5 Blatchf. 161; *Bacon v. Jones*, 4 My. & Cr. 433.

lawfully made and used and sold in the country of the foreigner, has been answered in England in the affirmative ; (r) * 257 yy * and in this country quite as positively, and we think for better reasons, in the negative. (s)

SECTION XI.

OF DAMAGES.

The statute provides that " whenever in any such action (action on the case) a verdict shall be rendered for the plaintiff, the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs." (r) And another section gives the same power to courts of equity. (s)

It must be noticed that this power applies only to "actual damages;" if therefore vindictive or exemplary damages were given, and they might be in a case calling for them, especially if

(p) *Caldwell v. Van Vliessingen*, 9 Hare, 415. In this case an injunction was granted against the owners of a Dutch vessel, forbidding the use, within English waters, of a certain screw-propeller for which the plaintiff held an English patent. Vice-Chancellor *Turner's* decision rests on the principle, which lays down broadly at the outset, that "the rule is universal that foreigners are in all cases subject to the laws of the country in which they may happen to be." The Statute 15 & 16 Vict. ch. 83, § 28, passed since this decision was given, provides that no letters-patent granted after the passage of that act, shall extend to prevent the use of any such invention in any foreign ship which may be in any waters within Her Majesty's dominions.

(q) *Brown v. Duchesne*, 2 Curt. 371, affirmed, 19 How. 183. The facts in this case were substantially the same as in *Caldwell v. Van Vliessingen, supra*. A French vessel was rigged in France with gaffs similar to those for which the plaintiff held an American patent. On her arrival in Boston, the master was sued for infringement. Says *Curtis, J.*, in the opinion given in the Circuit Court: "It cannot be doubted that, in the ap-

prehension especially of all commercial States, the particulars in which vessels of one country shall be controlled or affected by the municipal laws of another country, while lying in its ports, is a distinct subject of legislation, quite aside from its internal affairs, and to be influenced by considerations very different from those which would determine the grant of a monopoly affecting the domestic trade of the country. To say that when Congress legislated respecting patents, it had in view this matter, and intended to enable private citizens to interfere with the structure or equipment of foreign vessels, seems to me not admissible. Such an intention may be manifested by express enactment extending its terms to some or all foreign vessels; it may even be deduced from a law broad enough in its general terms to embrace such vessels, and which, from its subject-matter and the mischiefs to be remedied, may fairly be considered to have been designed to include such an exercise of power. But in making the laws concerning patents, Congress was legislating *alio intuitu*."

(r) Act 1870, § 59.
(s) Act 1870, § 55.

the suit be a second one against the same defendant, (t) this power of the court would not extend to them. (u) Nor * would the court listen with favor to an application to * 257 zz treble the damages given by the verdict, unless malice, insufficiency of the verdict, or other special reasons were shown. (uu)

By a prevailing rule, the damages in a case of infringement of a patented machine, are the profits actually received from the infringement, by the debtor. (v) But it is not easy to see why the principle of indemnity should not be applied here also, as it is almost universally, to measure the damages. And, on this ground, we think there should be a due regard to the damage actually sustained by the plaintiff from the infringement. This is disputed, however; and in one case bearing upon this subject, Mr. Justice Story said: "Struck with similar difficulties in establishing any general rule to govern cases upon patents, some learned judges have refused to lay down any particular rule of damages, and have left the jury at large to estimate the actual damages according to the circumstances of each particular case. I rather incline to believe this to be the true course." (w) At

(t) Alden v. Dewey, 1 Story, 896.

(u) Stimpson v. The Railroads, 1 Wall. Jr. 169. In spite of the *dictum* of Judge Story, cited in the last note, it may be doubted whether the jury were ever justified in returning a verdict for anything but the actual damages. Thus in Seymour v. McCormick, 16 How. 488, Grier, J., says, that "the act confines the jury to the assessment of actual damages. The power to inflict vindictive or punitive damages is committed to the discretion of the court within the limit of trebling the actual damages found by the jury." See also, Stephens v. Felt, 1 Blatchf. 38; Buck v. Hermance, id. 406; Hall v. Wiles, 2 Blatchf. 201; Pitts v. Hall, id. 288.

(uu) Schwartzel v. Holenshall, 3 Fish. Pat. Cas. 116.

(v) Lovell v. Lewis, 1 Mass. 185; Wilbur v. Beecher, 2 Blatchf. 132; Parker v. Bamber, 6 McLean, 631; Buck v. Hermance, 1 Blatchf. 398; Bell v. Daniels, 1 Fish. 878; Page v. Ferry, id. 298; Wayne v. Holmes, 2 Fish. 20; Case v. Brown, id. 268.

(w) Earle v. Sawyer, 4 Mass. 1; and see Pierson v. Eagle Screw Co. 3 Story, 402; Kneass v. Schuylkill Bank, 4 Wash. 14; Hays v. Sulzor, 1 Fish. 532; Ransom v. Mayor of New York, 1 Fish. 253. So in Seymour v. McCormick, 16 How. 480, Grier, J., says: "It must be apparent to

the most superficial observer of the immense variety of patents issued every day, that there cannot, in the nature of things, be any one rule of damages which will equally apply to all cases. The mode of ascertaining actual damages must necessarily depend on the peculiar nature of the monopoly granted." And, again: "It is only where, from the peculiar circumstances of the case, no other rule can be found, that the defendant's profits become the criterion of the plaintiff's loss." And in Parker v. Hulme, 1 Fish. 44, Kane, J., in charging the jury, said: "The damage assessed should be compensatory. The criterion is indemnity. You may take into consideration the loss sustained by the plaintiff, as you may likewise the profit made by the defendant. . . . You are to give compensatory damages, such as may indemnify the plaintiff for the injuries he has sustained."

In Goodyear v. Bishop, 2 Fish. 154, where it appeared that the profits made by the defendant were very trifling in proportion to those which the plaintiff made on the same amount of goods, the jury were instructed that they were to "examine the evidence, and say whether there was sufficient proof to satisfy them that any and how many customers were diverted from the plaintiffs to the defendant."

* 257 ab the same * time, it must be certain, from the use of the words in the statute, "actual damages," if not for other and more general reasons, that, in the words of an eminent judge used in declaring the decision of the Supreme Court of the United States, in a very important case, "Actual damages must be actually proved, and cannot be assumed as a legal inference from any parts which amount not to actual proof of the fact." (x)

ants; whether the plaintiffs were prepared to supply, and were prevented from supplying, the articles made by the defendants; in short, whether, by the competition of the defendants, the plaintiffs were limited, hindered, checked, or interfered with in their business, or otherwise actually damaged to an amount equal to the profits which they could have made, if they had made and sold the goods made and sold by the defendants, over and above what they (the plaintiffs) did in fact make and sell; and, if so, that the jury might return a verdict for actual damages to this amount." See also *Pitts v. Hall*, 2 Blatchf. 229; *Livingstone v. Jones*, 2 Fish. 207. Where the patentee has an established license fee for the use of his invention, it is well settled that the amount of this is the measure of actual damages. *McCormick v. Sey-*

mour, 16 How. 480; *Hogg v. Emerson*, 11 How. 607; *Sanders v. Logan*, 2 Fish. 167; *Goodyear v. Bishop*, 2 Fish. 164; *Sickles v. Borden*, 3 Blatchf. 535.

(x) *McCormick v. Seymour*, 16 How. 480; *Whittemore v. Cutter*, 1 Gall. 431; *Poppenhausen v. N. Y. G. P. C. Co.* 2 Fish. 69; *Burdell v. Denig*, id. 588; *Schwarzl v. Holenahade*, 8 Fish. 116. But the defendant is not accountable for such profits as he might have made with reasonable diligence. *Livingston v. Woodworth*, 15 How. 559; *Dean v. Mason*, 20 How. 203. It was formerly held that the jury might allow, as part of the "actual damages," a reasonable sum for counsel fees; but it is now settled otherwise. *Tees v. Huntington*, 23 How. 8; *Parker v. Hulme*, 1 Fish. 44; *Blanchard G. S. Man. Co. v. Warner*, 1 Blatchf. 272; *Stimpson v. The Railroads*, 1 Wall. Jr. 100.

* CHAPTER XIV.

* 257 ac

OF THE LAW OF COPYRIGHT.

THE Statute of July 8, 1870, already referred to in the preceding chapter on the Law of Patents, in the sections 85 to 110, inclusive, regulates the law of copyrights.

The subjects of copyright may be a book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph, or negative thereof, or a painting, drawing, chromo, statute, statuary, and of models and designs intended to be perfected as works of the fine arts. The copyright may be taken by any one who is a citizen of the United States, or a resident therein, and the author, inventor, designer, or proprietor of the thing to be copyrighted.

It is obvious that the foundation on which this law stands, is very similar to that of the law of patents. The State secures to the holder the exclusive right to publish a certain work for a certain time. It gains by this an important and most operative stimulus to literary and artistic invention and labor, in all directions. If there are those who think, that, if the motive of pecuniary profit were entirely withdrawn from all intellectual labor, as in earlier ages, the results of this labor would greatly improve in quality, all must admit that they would be much diminished in quantity. Nor does there seem to be any sufficient reason why the product of this labor should not be adequately paid for in money, as all other labor is, nor any effectual way of securing this except by the law of copyright. It is certain that, until publication, every man has, at common law, the exclusive control of his literary productions, and therefore the exclusive right to their first publication. (a)

(a) Yates, J., in *Millar v. Taylor*, 4 Burr. 2878, says: "Ideas are free. But while the author confines them to his study, they are under his own dominion. It is certain every man has a right to keep his own sentiments, if he pleases: none but he can have a right to let fly; he has certainly a right to judge whether

* 257 ad * The belief that a man has naturally and always a right to what have been called "the children of his brain," led a few years ago, to a determined effort, by authors and publishers, to establish at common law a permanent and exclusive right to their books. And this effort found some sympathy even in courts. (b)

he will make them public, or commit them only to the sight of his friends. In that state, the manuscript is in every sense his peculiar property; and no man can take it from him, or make any use of it which he has not authorized, without being guilty of a violation of his property. And as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication; and whoever deprives him of that priority, is guilty of a manifest wrong, and the court have a right to stop it." In the case of the Duke of Queensbury *v.* Shebbeare, 2 Eden, 329, an injunction was granted against printing the second part of "Lord Clarendon's History," by one to whom the manuscript had been lent. And in Webb *v.* Rose, an injunction was granted against the publication of the plaintiff's "Precedents of Conveyancing," which had been stolen from his chambers and printed. See also Pope *v.* Carl, 2 Atk. 342; Macklin *v.* Richardson, Amb. 694; Prince Albert *v.* Strange, 1 Hall. & Tw. 1; s. c. McN. & Gor. 25; Turner *v.* Robinson, 10 Ir. Ch. R. 510; Gee *v.* Pritchard, 2 Swanst. 402; Touson *v.* Walker, 8 Swanst. 678; Little *v.* Hall, 18 How. 170; Bartlette *v.* Crittenden, 4 McLean, 300; Woolsey *v.* Judd, 4 Duer, 379. This right is recognized by a provision in our copyright act, § 102.

(b) Whether, after publication, an author has an exclusive copyright at common law, was long a disputed question, though now apparently settled in the negative. It was very thoroughly discussed by the Court of King's Bench, in the celebrated case of Millar *v.* Taylor, 4 Burr. 2308, where Lord Mansfield and two of the other judges affirmed the right, Judge Yates alone dissenting. They also held, that this copyright was not affected by the statute of Anne regulating the matter of copyright. Soon after, this opinion was overruled in the House of Lords, in the equally celebrated case of Donaldson *v.* Beckett, 4 Burr. 2408, 2 Bro. Parl. Cas. 129. In this case the following questions were propounded to the judges: "First. Whether, at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale,

and might bring an action against any person who printed, published, and sold the same without his consent?" This question they decided in the affirmative, by a majority of eight to three. "Second. If the author had such right originally, did the law take it away upon his printing and publishing such book or literary composition? And might any person afterwards reprint and sell, for his own benefit, such book or literary composition, against the will of the author?" This was decided in the negative, by a majority of seven to four. "Third. If such action would have lain at common law, is it taken away by the Statute 8 Anne? And is an author, by said statute, precluded from every remedy, except on the foundation of the said statute, and on the terms and conditions prescribed thereby?" This was answered in the affirmative, six to five. This case therefore decided that, although the author had a copyright in his works at common law, even after publication, the statute had deprived him of that right, and substituted a limited privilege in its place. Subsequently, in Beckford *v.* Hood, 7 T. R. 620, Lord Kenyon expressed a decided opinion against the existence of a common-law copyright, and Lord Ellenborough inclined to the same opinion in Cambridge University *v.* Bryer, 16 East, 317. The question has recently undergone another careful consideration, in the case of Jefferys *v.* Boosey, 4 H. L. C. 815, where the majority of the judges repudiated the doctrine of a common-law copyright, and affirmed the position that the rights of authors depend entirely upon the statute. In the case of Wheaton *v.* Peters, 8 Pet. 583, a majority of the Supreme Court of the United States were of opinion, that the common law of England did not recognize an author's copyright in his works after publication; but that, whether this was so or not, an author in this country has no exclusive property in his published works, except as given by the Constitution of the United States, and the laws of Congress made in pursuance thereof. See also, Stevens *v.* Gladding, 17 How. 454; Clayton *v.* Stone, 2 Paine, 382; Stowe *v.* Thomas, 2 Wall. Jr. 547; Dudley *v.* Mayhew, 3 Comst. 12.

But this question is now settled, and it is * certain that * 257 *ae* no author has any right in or to his work after it is published, which courts can respect, except that which is given him by statute.¹ It is expressly held that Congress, in the statute of copyright, created a new right, and did not sanction an existing right. (*bb*)

The present statute leaves the former law much as it was, excepting the important change it makes in the manner of securing a copyright. We give, in our notes, the sections defining what may be the subject of a copyright; the length of time during which the copyright is in force; the manner in which the copyright may be obtained; and what the proprietor must do to enable himself to maintain an action for infringement of his right. (*c*)

(*bb*) *Wheaton v. Peters*, 8 Pet. 593, *supra*.

(*c*) Act 1870, § 86, "Any citizen of the United States, or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph, or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and his executors, administrators, or assigns, shall, upon complying with the provisions of this act, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and, in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others; and authors may reserve the right to dramatize or to translate their own works." § 87. "Copyrights shall be granted for the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter directed." § 88. "The author, inventor, or designer, if he be still living, and a citizen of the United States, or resident therein, or his widow or children, if he be dead, shall have the same exclusive right continued for the further term of fourteen years, upon recording the title of the work, or description of the article so secured, a second time, and complying with all other regulations in regard to original copyrights, within six months before the expiration of the first term. And such person shall, within two months from the date of said renewal, cause a copy of the record thereof to be published in one or more newspapers printed in the United States, for the space of four weeks." § 89. "No person shall be entitled to a copyright unless he shall, before publication, deposit in the mail a printed copy of the title of the book or other article, or a description of the painting, drawing, chromo, statue, statuary, or model or design for a work of the fine arts, for which he desires a copyright, addressed to the Librarian of Congress, and, within ten days from the publication thereof, deposit in the mail two copies of such copyright book or other article; or in case of a painting, drawing, statue, statuary, model or design for a work of the fine arts, a photograph of the same, to be addressed to the said Librarian of Congress, as hereinafter to be provided." § 90. "The Librarian of Congress shall record the name of such copyright, book, or other article, forthwith in a book to be kept for that purpose, in the words following: 'Library of Congress, to wit: Be it remembered, that on the day of Anno Domini, A. B., of hath deposited in this office the title of a book (map, chart or otherwise, as the case may be, or description of the article), the title or description of which is in the following words, to wit: (here insert the title or description), the right whereof he claims as author, originator (or proprietor, as the case may be), in conformity with the laws of the United States respecting copyrights. C. D., Librarian

¹ The bringing out and representation on the stage of a dramatic composition is not such a dedication of it to the public as will authorize others to print and publish it without the author's permission, or that of his assignee. *Palmer v. De Witt*, 47 N. Y. 532.

* 257 *af* * The statute also provides that the proprietor of every copyright book "shall" mail to the Librarian of Congress at Washington, within ten days after its publication, two copies. And then follows a provision which effectually prevents a question which had arisen under analogous provisions in former statutes. It fixes the penalty of twenty-five dollars for default in this duty; and thus severs all connection between this duty and the validity of the copyright, leaving that unaffected by any default in this duty. (*d*)¹

As the title of the book or other article must be deposited in the mail before the publication, it is important to determine what is publication in this sense. The delivery of a lecture to an audience who paid for admission, has been held not to be a publication, (*e*) and we should say the gratuitous delivery to an invited audience would not be.

The merely printing of a book certainly is not, for the publisher may delay the publication long after his books are printed.

* 257 *ag* We sometimes read on a title-page, "printed not * published," or "printed only for private circulation," and no copyright is taken. Could the author afterwards deposit the title and take out a copyright? There are English cases which favor the conclusion that such a private circulation is not a publication; (*f*)

of Congress.' And he shall give a copy of the title or description, under the seal of the Librarian of Congress, to said proprietor, whenever he shall require it." § 97. "No person shall maintain an action for the infringement of his copyright, unless he shall give notice thereof, by inserting in the several copies of every edition published, on the title-page, or the page immediately following, if it be a book; or, if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words, viz.: 'Entered according to act of Congress, in the year , by A. B., in the office of the Librarian of Congress at Washington.'"

(*d*) Act 1870, §§ 93, 94.

(*e*) *Abernethy v. Hutchinson*, 1 Hall

& Tw. 28. In this case the plaintiff's lectures on surgery had been taken down in short-hand, and published in a medical journal without his consent. The chancellor granted an injunction, saying: "I am clearly of opinion that when persons were admitted as pupils or otherwise to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of short-hand, yet they could do that only for the purposes of their own information, and could not publish for profit that which they had not obtained the right of selling." See also *Keene v. Kimball*, 16 Gray, 645; *Bartlette v. Crittenden*, 4 McLean, 300; *Turner v. Robinson*, 10 Ir. Ch. R. 510.

(*f*) Thus, in the case of *Prince Albert v. Strange*, 1 Hall & Twells, 1, 1 McN. & Gor. 26, the defendants had surreptitiously obtained impressions of etchings and engravings made by the plaintiff and the Queen for their own amusement, but

¹ *Merrell v. Tice*, 104 U. S. 557, is, however, to the effect that such a deposit of books is a condition precedent, failure to show proof of which will prevent the issuing of an injunction for an infringement.

and other cases which would lead to an opposite conclusion. (*g*) In practice, the publication is supposed to take place when the book is advertised; for then it is offered to the public for a price. If the giving away of a few copies was not a publication, the sale of them would * seem to be, and to have the effect * 257 *ah* of making the copyright invalid. (*h*) The acting or representing a play will not avoid a subsequent copyright. (*i*)

which had never been published or exhibited, although a few copies had been given to particular friends. The defendants had announced an exhibition of these etchings, and had published a descriptive catalogue of them; but were enjoined not only from exhibiting or copying the impressions which they had, but from publishing their catalogue, which the court considered as but another means of publishing the contents of the etchings. So in *Bartlette v. Crittenden*, 4 McLean, 800. The plaintiff, a teacher of book-keeping, had reduced the system he taught to writing on separate cards, for the convenience of instructing his pupils, who were permitted to copy the cards for that purpose. The defendant, one of his pupils, afterwards embodied the contents of the plaintiff's manuscripts in a work on book-keeping, which he published as his own composition. In granting an injunction, *McLean*, J., said: "Copies of the manuscripts were taken for the benefit of his pupils, and to enable them to teach others. This, from the facts and circumstances of the case, seems to have been the extent of the plaintiff's consent. It is contended that this is an abandonment to the public, and is as much a publication as printing the manuscripts; that printing is only one mode of publication, which may be done as well by manuscript copies. This is not denied; but the inquiry is, Does such a publication constitute an abandonment? The complainant is, no doubt, bound by this consent, and no court can afford him any aid in modifying, or withdrawing it. The students of the complainant, who made these copies, have a right to them, and to their use, as originally intended. But they have no right to a use which was not in the contemplation of the complainant, and of themselves, when the consent was first given. Nor can they, by suffering others to copy the manuscripts, give a greater license than was vested in themselves." And, again: "No length of time, where the invention does not go into public use, can invalidate the right of the inventor. He may take his own time to

perfect his discovery, and apply for a patent. And the same principle applies to the manuscripts of an author. If he permit copies to be taken for the gratification of his friends, he does not authorize those friends to print them for general use. This is the author's right, from which arise the high motive of pecuniary profit and literary reputation." See also *s. c. 5 McLean*, 82; *Paley's case*, cited 2 V. & B. 28; *White v. Geroch*, 2 B. & Ald. 298; *s. c. 1 Chitty*, 24; *Keene v. Wheatley*, 9 Am. Law Reg. 65; *Keene v. Kimball*, 16 Gray, 547.

(*g*) In *Novello v. Ludlow*, 12 C. B. 177, 16 Jur. 689, the plaintiff was the owner of the copyright of a certain musical composition. A musical society, of which the defendant was a director, desiring to perform this piece, caused a sufficient number of copies to be printed for their own use, which were used by the members, and then restored to the library of the society, but none were offered for sale. This was held to be a publication, rendering the defendant liable as an infringer. See also *Gee v. Pritchard*, 2 Swanst. 402; *Alexander v. McKenzie*, 9 Sess. Cas. 2d ser. 748.

(*h*) *Baker v. Taylor*, 2 Blatchf. 82. "It is argued for the plaintiffs that these alleged sales were only consignments of the work in advance of the publication, and that publication, by putting the book in circulation, was not made till after the date of the deposit of the title. There is no proof to support this version of the facts. A sale naturally imports publication. The purchaser, having the right to know the contents of the book, and make them known to others, no presumption can be raised that the right was not exercised, or that an actual publication did not follow the sale. On the contrary, the presumption is the other way."

(*i*) *Bouicault v. Fox*, 5 Blatchf. 87; *Roberts v. Myers*, 28 Law Rep. 397. And, in England, it is held, that the public representation of a copyrighted play is not a publication within the statute of Anne, so as to render the performers liable for infringement. *Coleman v. Waltham*, 5 T. R. 245; *Murray v. Ellis*,

A book, in the law of copyright, means every volume, *257 *ai* or *part or division of a volume, a pamphlet, a sheet of letter-press, or of music, or a map, chart, or plan separately published. (*j*) A man cannot copyright a map of London and thereby prohibit every one from making a map of London. No one can copy his map; but any one may make and publish another map of the same place. (*k*) What may con-

ton, 5 B. & Ald. 657. By Stat. 5 & 6 Vict. ch. 45, § 20, it is now provided that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent to the first publication of any book. And in § 101 of our Copyright Act, a penalty is imposed upon the unauthorized performance of a dramatic composition for which a copyright has been obtained. See *post*, note (*kk*), p. *257 *ai*. But it is held that the representation of an uncopyrighted play, by the author's consent, is so far a dedication of it to the public that any person may memorize it and perform it himself. The law on this subject is thus laid down by *Hoar*, J., in *Keene v. Kimball*, 16 Gray, 647, giving a summary of the elaborate opinion of *Cadwalader*, J., in *Keene v. Wheatley*, 9 Am. Law Reg. 38: "An unqualified publication, such as is made by printing and offering copies for sale, dedicates the contents to the public, except so far as protection is continued by the statutes of copyright. But there may be a limited publication by communication of the contents of the work by reading, representation, or restricted private circulation, which will not abridge the right of the author to the control of his work any further than necessarily results from the nature and extent of this limited use which he has made, or allowed to be made, of it. And, in the absence of legislation, when a literary proprietor has made a publication in any mode not restricted by any condition, other persons acquire unlimited rights of republishing in any modes in which his publication may enable them to republish; so that the literary proprietor of an unprinted play cannot, after making or sanctioning its representation before an indiscriminate audience, maintain an objection to any such literary or dramatic republication by others as they may be enabled, either directly or secondarily, to make from its having been retained in the memory of any of the audience. In other words, the public acquire a right to the extent of the dedication, whether complete or partial, which the proprietor has made

of it to the public." But the liberty thus granted does not extend to taking notes of the performance for publication, either by printing them or acting from them. *Macklin v. Richardson*, Amb. 698. So in *Crowe v. Aiken*, 4 Am. Law Rev. 460. *Nelson*, J., admitting that one might lawfully repeat a play from memory, said that the improbability of this being done was so great that very strong evidence would be required to support such a defence. "I am also of opinion," he says, "that, as the law now exists in this country, the mere representation of a play does not of itself appropriate it to the public, except so far as those who witness its performance can recollect it; and that the spectators have no right to cause its reproduction by phonographic or other verbatim reports, independent of memory." Both in this case and in *Keene v. Wheatley*, *supra*, it was held, that where the defendant's performance was from copies surreptitiously obtained, an injunction would be granted. So also *Bouicault v. Wood*, 16 Am. Law Reg. 539.

(*j*) *Clementi v. Goulding*, 11 East, 244, 2 Camp. 25; *Hime v. Dale*, 2 Camp. 27 n.; *Bach v. Longman*, Cowp. 523; *University of Cambridge v. Bryer*, 16 East, 317; *White v. Geroch*, 2 B. & Ald. 298, 1 Chitty, 24; *Clayton v. Stone*, 2 Paine, 388; *Keene v. Wheatley*, 9 Am. Law Reg. 68.

(*k*) "A man has a right to the copyright of a map of a State or country which he has surveyed or caused to be compiled from existing materials, at his own expense or skill or labor or money. Another man may publish another map of the same State or country, by using the like materials, and the like skill or labor or expense. But, then, he has no right to publish a map taken substantially and designedly from the map of the other person, without any such exercise of skill, labor, or expense. If he copies substantially from the map of another, it is downright piracy." Per *Story*, J., in *Emerson v. Davies*, 3 Story, 768. See also *Blount v. Patten*, 2 Paine, 397; *Smith v. Johnson*, 4 Blatchf. 252; *Sayre v. Moore*, 1 East, 361; *Kelly v. Morris*,

stitute an infringement of a dramatic performance is considered in an interesting case in New York. (*kk*)

If there be many volumes, it is enough if the copyright be inserted on the page following the title-page of the first volume. (*l*) A newspaper, or price-current, (*m*) or a label of an article offered for sale, (*n*) cannot have a copyright.

The statute gives the right to a copyright, to the "author, inventor, designer or proprietor." What is necessary to constitute an "author" is a question of some difficulty. It is perhaps impossible to determine this by an exact and adequate definition. If he uses only old materials in an old way, if he compiles his books from other books without the addition of anything new from his own mind, he certainly is not an author. One may make a scrap-book by pasting on the blank leaves of a book interesting articles cut from newspapers; and such a volume might, if printed, have a certain * attractiveness and value; but it * 257 *aj* would not be easy to regard the maker as an author. And yet a mere commonplace book — like Southey's, for example, — consisting wholly of extracts, might be entitled to copyright, on the ground of the care and labor or skill which had made so valuable a collection.

It is certain that the plan or system of a book, and the classification and arrangement of the topics, are embraced among the things covered and protected by the copyright of the book. (*o*)

Law Rep. 1 Eq. 252; *Wilkins v. Aiken*, 17 Ves. 422.

(*kk*) In *Daly v. Palmer*, 6 Blatchf. 256, it is held, that there is an infringement, if the copyrighted series of events, when represented on the stage, although by new and different characters, using different language, conveys substantially the same impressions to, and causes the same emotions in the mind, in the same order as the original. But this does not extend to mere spectacles or scenic arrangements, without literary character; nor to a mere exhibition, spectacle, or scene; nor to any composition of an immoral or indecent character.

(*l*) *Dwight v. Appletons*, 1 N. Y. Legal Observer, 198.

(*m*) *Clayton v. Stone*, 2 Paine, 382.

(*n*) *Coffeen v. Brunton*, 4 McLean, 517; *Scoville v. Tolland*, 6 West. L. J. 84.

(*o*) Thus, in *Greene v. Bishop*, 1 Clif. 190, *Clifford*, J., says: "The author of a book who takes existing materials from sources common to all writers, and arranges and combines them in a new form,

is protected in the exclusive enjoyment of what he has thus collected and produced; for the reason that he has exercised selection, arrangement, and combination, and thereby has produced something that is new and valuable." So, in *Emerson v. Davies*, 8 Story, 768, *Story*, J., says: "The question is not whether the materials which are used are entirely new, and have never been used before; or even that they have never before been used for the same purpose. The true question is whether the same plan, arrangement, and combination of materials have been used before for the same purpose, or for any other purpose. If they have not, then the plaintiff is entitled to a copyright, although he may have gathered hints for his plan and arrangement from existing and known sources. He may have borrowed much of his material from others; but if they are combined in a different manner from what was in use before, and, *a fortiori*, if his plan and arrangement are real improvements upon the existing modes, he is entitled to a

It may be possible for an author who uses nothing but * 257 *ak* what may be found in print elsewhere, to found * a copyright upon the use he makes of his materials; but it is difficult to imagine how he can do this if the volume contains no product of his own thought, and nothing which has not been thought and said before. We shall recur to this topic when considering what is an infringement of the right secured by a copyright.

Letters may be the subject of copyright; but the right of publication belongs to the writer and his representatives, and not to the receiver, who has at most only a special property in them. (*p*)

copyright in the book embodying such improvements. It is true he does not thereby acquire the right to appropriate to himself the materials which were common to all persons before, so as to exclude those persons from a future use of such materials; but, then, they have no right to use such materials with his improvements superadded, whether they consist in plan, arrangement, or illustrations, or combinations, for these are strictly his own." So, in *Atwill v. Ferritt*, 1 Blatchf. 39, *Batts*, J., says: "To constitute one an author, he must, by his own intellectual labor applied to the material of his composition, produce an arrangement or compilation new in itself."

Thus, copyrights have been supported for a grammar, *Gray v. Russell*, 1 Story, 11; *Greene v. Bishop*, *supra*; an arithmetic, *Emerson v. Davies*, *supra*; a road-book, giving an enumeration of highways and the distances from place to place, *Cary v. Longman*, 1 East, 857; a topographical dictionary, *Lewis v. Fullarton*, 2 Beav. 6; a court calendar, *Longman v. Winchester*, 16 Ves. 269; a directory, *Kelly v. Morris*, Law Rep. 1 Eq. 697; *Morris v. Ashbee*, Law Rep. 7 Eq. 34; *Matthewson v. Stockdale*, 12 Ves. 270; a series of mathematical tables, *Bayley v. Taylor*, 1 Russ. & My. 78; a chronology, *Trusler v. Murray*, 1 East, 862 n; a collection of statistics, *Scott v. Stanford*, Law Rep. 8 Eq. 718; and even a catalogue, unless it be a mere list of dry names, *Holten v. Arthur*, 1 H. & M. 608, 32 L. J. Ch. 771. See also *Jarrauld v. Houston*, 3 K. & J. 708; *Hogg v. Kirby*, 8 Ves. 215; *Barfield v. Nicholson*, 2 Sim. & St. 1; *Carna v. Bowles*, 2 Bro. Ch. 80; *Webb v. Powers*, 2 Wood. & M. 497; *Story v. Holcombe*, 4 McLean, 806.

So it has been held, that where a person had adapted words of his own to an old air and added a prelude and accompaniment he was entitled to a copyright for the entire combination. *Lover v. Davidson*, 1 C. B. (n. s.) 182.

(*p*) *Pope v. Carl*, 2 Atk. 342; *Millar v. Taylor*, 4 Burr. 2308; *Oliver v. Oliver*, 11 C. B. (n. s.) 189; *Palin v. Gathercole*, 1 Coll. 565; *Thompson v. Stanhope*, Ambl. 737; *Earl of Granard v. Dunkin*, 1 Ball & Beatty, 207; *Gee v. Pritchard*, 2 Swanst. 408; *Folsom v. Marsh*, 2 Story, 100; *Woolsey v. Judd*, 4 Duer, 379. A distinction was drawn, in *Perceval v. Phipps*, 2 V. & B. 19, between letters having the characteristics of literary productions and those of a merely personal or business nature; and it was held that the publication of the latter would not be restrained upon the ground of there being a right of property in them, but only when such publication would be a breach of confidence. The correctness of this distinction was doubted by Lord *Eldon*, in *Gee v. Pritchard*, *supra*, and it is not supported by the subsequent English authorities. In New York it was approved in *Wetmore v. Scovill*, 8 Edw. Ch. 515, and in *Hoyt v. McKenzie*, 8 Barb. Ch. 820; but it was afterwards rejected in the same State, in *Woolsey v. Judd*, 4 Duer, 379. It was rejected also in *Folsom v. Marsh*, 2 Story, 100, by *Story*, J., who held that, "the author of any letter or letters, or his representatives, whether they are literary compositions, or familiar letters, or letters of business, possess the sole and exclusive copyright therein; and no persons, neither those to whom they are addressed, nor other persons, have any right or authority to publish the same upon their own account or for their own benefit. But, consistently with this right, the persons to whom they are addressed may have, nay, must by implication possess, the right to publish any letter or letters addressed to them upon such occasions as require or justify the publication or public use of them, but this right is strictly limited to those occasions." That the receiver may use letters for the purpose of justification or defence, see also *Perceval v. Phipps*, 2 V. & B. 19; *Gee v. Pritchard*, 2 Swanst. 408.

For a distinction between literary letters and business or personal letters, see our note.

As the law cannot be called upon to enforce or protect rights founded upon a violation of law, no copyright is valid for a book of which the character and purpose are immoral, (*q*) or blasphemous, (*r*) or treasonable, (*s*) or otherwise illegal, or where the work is in any way a fraud upon the public. (*ss*) But the English cases have gone farther * in the refusal to * 257 *et* protect copyrights for these causes, than any cases in this country, and, we think, farther than the courts of England would now go.

It is now settled that the decisions of courts cannot be the subject of copyright, although the reporter may protect his own abstracts of cases or arguments. (*t*) We should say he might protect reports, prepared by him, in his own words, of the judgments rendered by judges. (*u*)

SECTION II.

OF ASSIGNMENT.

A copyright is a vested interest which a holder may assign, in whole or in part, for such consideration and upon such terms as he pleases. But any assignment or transfer should be recorded

(*q*) *Stockdale v. Onwhyn*, 5 B. & C. 173; 7 D. & R. 625; 2 C. & P. 163. And see *Fores v. Johnes*, 4 Esp. 97; *Hime v. Dale*, 2 Camp. 28; *Southey v. Sherwood*, 2 Meriv. 435.

(*r*) *Lawrence v. Smith*, 1 Jac. 471; *Murray v. Benbow*, 1 Jac. 474; *Burnett v. Chetwood*, 2 Meriv. 441; *Cowan v. Milbourn*, Law Rep. 2 Exch. 230.

(*s*) *Priestley's case*, cited 2 Meriv. 437.

(*ss*) As where a devotional work professed to be a translation from the German of Sturm, a celebrated writer on religious subjects, and it appeared that no such work was ever written by Sturm, it was held that the fraud invalidated the copyright. *Wright v. Tallis*, 1 C. B. 893, 9 Jur. 946. See also *Hogg v. Kirby*, 8 Ves. 215; *Sealey v. Fisher*, 11 Sim. 581.

(*t*) *Wheaton v. Peters*, 8 Pet. 593. In this case the Supreme Court of the United States say: "The court are unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any re-

porter any such right." But no doubt was expressed as to the plaintiff's right to the marginal notes and abstracts of arguments prepared by him, and the case was remanded for the purpose of trying the question whether he had complied with the requisitions of the statute. See Judge Story's remarks on this case in *Gray v. Russell*, 1 Story, 11. In *Sweet v. Benning*, 16 C. B. 459, the plaintiffs were the proprietors of the "Jurist," in which were published the decisions of the courts specially reported for them, and accompanied by the usual marginal notes and abstracts of the arguments. The defendant, having copied these notes and abstracts into his publication, the "Monthly Digest," was held to have invaded the plaintiff's copyright. See also *Little v. Gould*, 2 Blatchf. 165, affirmed in 18 How. 165.

(*u*) So held in *Butterworth v. Robinson*, 5 Ves. 709; *Sweet v. Mangham*, 11 Sim. 51; *Saunders v. Smith*, 3 M. & Cr. 711; and see *Sweet v. Benning*, 16 C. B. 459.

in the office of the Librarian of Congress, as otherwise it will have no force or effect against a subsequent purchaser

* 257 am for a valuable consideration without notice. (v) * It has been held that an assignment of a copyright for a limited locality operates at law as a mere license; although, if made for a valuable consideration, it will be carried into effect in equity; (vv) and that the author's right to his unpublished manuscript may be assigned so as to give the assignee the exclusive right of taking out a copyright; and, as this assignment is not regulated by statute, it may be by parol. (vw) And in a recent case it was held, that where one agreed to furnish gratuitously notes and comments for two new editions of a copyrighted book, the right to copyright these editions with these notes and comments vested at once in the owners of the original work. (vx)

Where an artist was employed by the government on an exploring expedition, with an understanding that all his drawings made in this capacity were to be the property of the government, it was held that he could have no copyright in them. (vy) But it was held that one employed to write a play to be performed at a particular theatre might have a copyright; and the proprietor of the theatre had no other right than that of having the play performed at his theatre. (vz)

Much question has arisen as to whether a general assignment of a copyright carries with it the right to the extension of

* 257 an fourteen years provided by section 88. (w) The *conclu-

(v) Act 1870, § 89. "Copyrights shall be assignable at law, by any instrument of writing, and such assignment shall be recorded in the office of the Librarian of Congress within sixty days after its execution; in default of which, it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice."

(vv) Keene v. Wheatley, 9 Am. Law Rep. 46; Roberts v. Myers, 13 Law Rep. 401. Under the English statute there can be no partial assignment. Jeffreys v. Boosey, 4 H. L. C. 493.

(vw) Pulte v. Derby, 5 McLean, 528. (vx) In his opinion, Clifford, J., said: "The complainant gave the contributions to the proprietor for those two editions of the work; and the title to the same vested in the proprietor, as the work was done, to the extent of the gift, and subject to the trust in favor of the donor, as necessarily implied in the terms of the arrangement. Delivery was made as the

work was done; and the proprietor of the book needed no other muniment of title than what was acquired when the agreement was executed. Vested as the property of the contributions was in Mrs. W. (the proprietor of the work), she could not acquire anything by an assignment from the contributor, as he had neither the immediate title to the contributions nor any inchoate right of copyright in those editions." Lawrence v. Dana, C. C. U. S. Mass. Dist. 1869. See also Little v. Gould, 2 Blatchf. 362; Atwill v. Ferritt, 2 Blatchf. 46; Hatton v. Kean, 7 C. B. (n. s.) 267.

(vy) Heine v. Appletons, 4 Blatchf. 125; Siebert's case, 7 Op. Att. Gen. 656.

(vz) Roberts v. Myers, 23 Law Rep. 396; Boucicault v. Fox, 5 Blatchf. 87; Crowe v. Aikin, 4 Am. Law Rev. 450; Shepherd v. Conquest, 17 C. B. 427.

(w) Act 1870, § 88: "The author, inventor, or designer, if he be still living, and a citizen of the United States, or

sion would seem to be, that the intent of this extension regarded the author and his family, rather than his assignees; and that the taking out this second term is obtaining a new title or interest, rather than confirming or completing a former one; (*x*) but that it is in the power of the author to transfer this right. There can be no presumption that he intends this. But if the instrument shows clearly that this was the intention of the parties, although it be not expressly declared, a court of equity, if not of law, will carry this intention into effect. And it has been held that a general assignment of "all the author's interest" in a copyright, assigned the conditional as well as the present interest. (*y*)

The Act of Congress of Aug. 18, 1856 (11 United States Statutes at Large, 188), provides that any copyright of the author or proprietor of any dramatic composition, confers the sole right of representation. (*yy*)

* SECTION III.

* 257 *ao*

OF INFRINGEMENT.

The sections of the statute which prohibit and punish any violation of the rights conferred by the statute, will be found in our notes. (*z*) The section following these recognizes the rights of any author or proprietor in his unpublished manuscript. (*a*)

resident therein, or his widow or children, if he be dead, shall have the exclusive right continued for the further term of fourteen years, upon recording the title of the work or description of the article so secured a second time, and complying with all other regulations in regard to original copyrights, within six months before the expiration of the first term. And such person shall, within two months from the date of said renewal, cause a copy of the record thereof to be published in one or more newspapers printed in the United States, for the space of four weeks."

(*x*) *Pierpont v. Fowle*, 2 Wood. & M. 42. Says *Woodbury*, J.: "The copyright is given in the statute to the author alone, and to others only who purchase from him. By construction, then, we should not extend it beyond the words and design

of the statute made to benefit authors, unless it seems to be actually meant by the author to be transferred forever, and including any future contingency, and a clear and adequate consideration paid for the extended term." In this case, a publisher agreed with an author that the latter should prepare a certain book for the press, and the publisher agreed to pay a certain sum "for the copyright of the said book." It was held, that the first term only passed to the publisher. See also *Rundell v. Murray*, Jac. 315.

(*y*) *Carnan v. Bowles*, 2 Bro. Ch. R. 80.

(*yy*) See *post*, section on Infringement.

(*z*) Act 1860, § 99. "If any person, after the recording of the title of any book as herein provided, shall, within the term limited, and without the consent of the proprietor of the copyright first obtained in

the United States, or resident therein), shall be liable to said author or proprietor for all damages occasioned by such injury, to be recovered by action on the case, in any court of competent jurisdiction."

It is entirely impossible to lay down a definite rule which shall determine, in all cases, whether a copyright has been infringed. Absolute originality is very, very rare.

Nevertheless a man who produces what has in it a distinct element of novelty, must be protected in the rights which the law gives him to the profits arising from his work.

Plagiarism is one thing; piracy, another. They may be separated, not by a sharply-defined line, but by a wide "Debatable Land." But they must be distinguished in some way. On the one hand, every writer must be permitted to use sentiments, descriptions, definitions, or expressions, which in their very nature are common property, and therefore not subject to any exclusive right; and mere imitation is pardonable, because, in the matter of copyright as of patent, resemblance is not the question, but identity. And, on the other hand, every author is entitled to the fruits which the law permits him to reap from the fields he has himself cultivated. The product of his own intellectual labor is made by the law of copyright his own property, as much as common law makes the product of his manual labor to be so. (b)¹

writing, signed in presence of two or more witnesses, print, publish, or import, or, knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such book, such offender shall forfeit every copy thereof to said proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor, in any court of competent jurisdiction." § 100. "If any person, after the recording of the title of any map, chart, musical composition, print, cut, engraving or photograph or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as herein provided, shall, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, or import, either in whole or in part, or by varying the main design with intent to evade the law, or, knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the said pro-

prietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed; and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported or exposed for sale; and, in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or which have by him been sold or exposed for sale: one moiety thereof to the proprietor, and the other to the use of the United States, to be recovered by action in any court of competent jurisdiction." § 101. "Any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof, or his heirs or assigns, shall be liable in damages therefor, to be recovered by action in any court of competent jurisdiction; said damages in all cases to be assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subsequent, performance, as to the court shall appear to be just."

(b) This distinction is well expressed by Vice-Chancellor James in *Pike v. Nichols*.

¹ An author's or publisher's right, under the copyright law, is infringed only when other persons produce a substantial copy of the whole or of a material part of the book or

Seldom is a whole work reprinted without change. But a part of it may be reprinted word for word; or the whole, or an important part may be reprinted under a colorable disguise. Either will be, generally, an infringement.

If a reviewer quotes from the book under review, is this an infringement? Certainly not, if it be done honestly, and only to illustrate the various opinions concerning the book or its topics. But it must be obvious, that even such a disguise as this might be adopted to cover up a piracy. (*c*)

* It is certain that a copyright may be infringed by * 257 *aq* copying a part of the book, if it be of sufficient extent and importance. But if a book infringe the copyright of another book only in one distinctly severable part, it is a rule that the remedy will not extend beyond the injury. (*d*)

elis, L. R. 5 Ch. Ap. 255, 38 L. J. Ch. 529. "Plagiarism," he says, "does not necessarily amount to a legal invasion of copyright. A man publishing a work gives it to the world, and, so far as it adds to the world's knowledge, adds to the material which any other author has a right to use, and may even be bound not to neglect. The question then is between a legitimate and a piratical use of an author's work. There is no monopoly in the main theory of the plaintiff, or in the theories or speculations by which he has supported it, nor even in the published results of his own observations. But the plaintiff has a right to say that no one is to be permitted, whether with or without acknowledgment, to take a material and substantial portion of his work, of his argument, his illustrations, his authorities, for the purpose of making or improving a rival work." See also *Stowe v. Thomas*, 2 Am. Law Reg. 229.

(*c*) Thus, in *Campbell v. Scott*, 11 Sim. 31, the defendant had published a work called "The Book of the Poets;" consisting of extracts from the works of

different authors, those of the plaintiff among others; the whole being preceded by a general disquisition on the nature of the poetry of the nineteenth century, but without any particular observations being appended to the poems which followed. It was held, that this could not be protected as a book of criticism. See also *Bell v. Whitehead*, 8 L. J. Ch. 141; *Whittingham v. Wooller*, 2 Swanst. 428; *Bohn v. Bogue*, 10 Jur. 420; *Saunders v. Smith*, 3 My. & Cr. 711; *Wilkins v. Alkin*, 17 Ves. 422; *Mawman v. Tegg*, 2 Russ. 385; *Folsom v. Marsh*, 2 Story, 106.

(*d*) *Story v. Holcombe*, 4 McLean, 315; *Emerson v. Davies*, 3 Story, 795; *Webb v. Powers*, 2 Wood. & M. 521; *Greene v. Bishop*, 1 Clif. 201; *Lawrence v. Dana*, C. C. U. S. Mass. Dist. 1869; *Mawman v. Tegg*, 2 Russ. 385; *Carnan v. Bowles*, 2 Bro. Ch. R. 85; *Jarrold v. Houlston*, 3 K. & J. 721. In *Tolson v. Walker*, cited 4 Burr. 2325, Lord Hardwicke granted an injunction against the publication of an edition of Milton with Dr. Newton's notes, the infringement being of the notes only. But this is certainly not the modern prac-

other thing for which he secured a copyright. *Perris v. Hexamer*, 99 U. S. 674. *Chatterton v. Cave*, L. R. 10 C. P. 572; 2 C. P. D. 42, decided that in order to recover penalties under the Dramatic Copyright Act, for pirating a dramatic production, the plaintiff must show that a material and substantial part has been pirated. That an infringement of the registered copyright of the music of an opera may be committed where the opera itself has not been published, and so no copy of it could be deposited, and where the music has been made the subject of two piano "arrangements," one without the voice, another for the voice, and, those arrangements having been published, the infringer has used them for his own production, see *Fairlie v. Boosey*, 4 App. Cas. 711. The reproduction in a book, in a reduced form, of nine cartoons from "Punch," sometimes with and sometimes without the descriptive writing, without the consent of its proprietors, was held to be an appropriation of a substantial part of their sheets of letterpress, and an infringement of their copyright. *Bradbury v. Hotten*, L. R. 8 Ex. 1.

Neither the intention of the party charged with infringement, (*e*) nor his ignorance that he was infringing, (*f*) can be taken into consideration, except so far as they bear upon the only fact that is inquired into,—Is there actual infringement? It has been said that the word "book" in the statute does not include a translation. It may be sound doctrine that a copyright of a book is not infringed by the publication of a translation of it into another language. But it cannot be law, that, if one in this country makes a translation into English of a foreign work, he cannot have a valid copyright of his translation. Every day's

* 257 ar practice is otherwise. (*g*) * In England it has been intimated, that if an English book be translated into German, and from German be retranslated into English, this retranslation would be an infringement of the original copyright. (*h*)

The question whether a compilation from a copyright book is an infringement, often depends upon the farther question, What is the limit to the right which an author has to profit by the labors of an earlier author? Whoever publishes a book does so in the hope that he may increase human knowledge, or rectify

vice, unless so large a portion of the defendant's work consists of pirated matter that an injunction against this renders the remainder of the work entirely useless. See *Mawman v. Tegg, supra*; *Lewis v. Fullarton*, 2 Beav. 6. So where the parts which have been copied are so interwoven with original matter that they cannot be separated without destroying the work, the publication of the whole work will be restrained. See cases just cited.

(*e*) *Scott v. Stanford*, L. R. 3 Eq. 723; *Roworth v. Wilkes*, 1 Camp. 94; *Campbell v. Scott*, 11 Sim. 31; *Hodges v. Welch*, 2 Ir. Eq. 266; *Wilkins v. Aikin*, 17 Ves. 422; *Emerson v. Davies*, 3 Story, 768; *Story v. Holcombe*, 4 McLean, 306; *Nichols v. Ruggles*, 3 Day, 158. But although the absence of fraudulent intent will not excuse a palpable violation of another's copyright, still, in doubtful cases, or where the amount taken is small, it often has an important bearing upon the question whether a fair use has been made of the materials taken, and whether an injunction should be granted or the party left to his remedy at law. *Cary v. Kearsley*, 4 Esp. 170; *Spiers v. Brown*, 6 W. R. 533; *Cary v. Faden*, 5 Ves. 23; *Reade v. Lacy*, 1 Johns. & H. 526; *Webb v. Powers*, 2 Wood. & M. 497; *Lawrence v. Dana*, C. C. U. S. Mass. Dist. 1869.

(*f*) *Millet v. Snowden*, 1 West. L. J.

240; *Gambart v. Sumner*, 5 H. & N. 5; *West v. Francis*, 5 B. & Ald. 737.

(*g*) In *Stowe v. Thomas*, 2 Am. Law Reg. 210, it was first expressly decided that a translation of a copyrighted work is not an infringement. It was there held to be well settled that the author's property in a published book consists only in the "right of copy;" that "a book, in the language of the copyright law, necessarily conveys the idea of thoughts or conceptions, clothed in language or in musical characters, written, printed, or published. Its identity does not consist merely in the ideas, knowledge, or information communicated, but in the same conceptions clothed in the same words, which make it the same composition. A copy of a book must, therefore, be a transcript of the language in which the conceptions of the author are clothed; of something printed and embodied in a tangible shape. The same conceptions clothed in another language cannot constitute the same composition; nor can it be called a transcript or copy of the same book." See also *Wyatt v. Barnard*, 3 V. & B. 77; *Burnett v. Chetwood*, 2 Mer. 441; *Millar v. Taylor*, 4 Burr. 2310, 2348; *Prince Albert v. Strange*, 2 Dr. G. & Sm. 693. Under section 86 of the Act of 1870, authors "may reserve the right to dramatize or translate their own works."

(*h*) *Murray v. Bogue*, 1 Drew. 358, 368.

human thought, or entertain if he does not instruct. The law of copyright is founded upon the stimulus it gives to the production of useful books. Then, one who makes use of them to be himself an author, and a better author than he could be without them, makes a legitimate use of the books. But he must stop short of the line which separates such use from the naked adoption as his own, or the mere copying, of another man's appropriated work. We know no principle which may better serve to designate this line of distinction, than that which says, a compilation is not an infringement, when it is made with so much of original thought and of new result on the part of the compiler as to make his book a new book. (i) This question has arisen particularly as to books of statistics.

(i) *Reade v. Lacy*, 1 J. & H. 524; *Spiers v. Brown*, 6 W. R. 352. In the latter case, which related to the copyright of a dictionary, Vice-Chancellor *Wood* refers with approval to the words of Lord *Eldon*, in *Wilkins v. Aikin*, 17 Ves. 422, where he says: "The question upon the whole is, whether this is a legitimate use of the plaintiff's publication, in the fair exercise of a mental operation, deserving the character of an original work." He said further, that the real issue which the court was called on to decide was one of the most difficult ever presented to him; namely, as to how far a very considerable use of the work of another might be taken to be legitimate. There was no concealment of some use having been made, no colorable alteration proved, nor anything tending to show a fraudulent design to make an unfair use of the work of another. Though a good deal had been taken from the plaintiff, yet a good deal of labor had been bestowed upon what had been taken. Upon the whole, he could not think the defendant had gone beyond what the court would allow, having produced that which was in fact an original work. So in *Jarrold v. Houlston*, 3 K. & J. 708, 3 Jur. (n. s.) 1051. The plaintiffs were the publishers of Dr. Brewer's "Guide to Science," — a work in the form of questions and answers, giving simple explanations of common natural phenomena. The defendant had published a similar work, under the title of "The Reason Why." In considering the question whether an unfair use had been made of the former work, Vice-Chancellor *Wood* said: "As regards all common sources, he is entitled to make what use of them he can; but as Lord *Langdale* said, in *Lewis v. Fullarton*, 2 Beau. 6, 'he is not entitled to make any use of a work, protected by copyright, which is not what can be called a fair use.'" In the same opinion, the learned judge specifies two uses of the prior publication, which he considered legitimate, — viz., first, as a guide to common authorities which, when known, any person is entitled to use; and, second, as a means of detecting errors or omissions in the subsequent work, to be afterwards rectified by information to be obtained from common sources. On the other hand, he says: "I take the illegitimate use as opposed to the legitimate use of another man's work on subject-matter of this description to be this: If, knowing that a person, whose work is protected by copyright, has with considerable labor compiled from various sources a work in itself not original, but which he has digested and arranged, you, being minded to compile a work of a like description, instead of taking the pains of searching into all the common sources, and obtaining your subject-matter from them, avail yourself of the labor of your predecessor, adopt his arrangements, adopt, moreover, the very questions he has asked, or adopt them with but a slight degree of colorable variation, and thus save yourself pains and labor, by availing yourself of the pains and labor which he has employed, that I take to be an illegitimate use." So in *Emerson v. Davies*, 3 Story, 768, Judge *Story*, speaking of a similar class of cases, says: "In cases of this nature, I think it may be laid down as the clear result of the authorities, that the true test of piracy or not is to ascertain whether the defendant has in fact used the plan, arrangements, and illustrations of the plaintiff as the model of his own book, with colorable alterations and variations only, to disguise

- * 257 *as* * A similar question arises, to be answered, we think, in a similar way, as to an abridgment of a copyright
- * 257 *at* book. The *cases on this question are numerous. And perhaps they agree in nothing else but in making manifest the extreme difficulty of the question.

In Mr. Curtis's work on copyright, he seems to favor the conclusion that any abridgment whatever must needs be an infringement. (*j*) We think the weight of authority and

the use thereof; or whether his work is the result of his own labor, skill, and use of common materials and common sources of knowledge open to all men, and the resemblances are either accidental or arising from the nature of the subject; in other words, whether the defendant's book is *quoad hoc* a servile or evasive imitation of the plaintiff's work, or a *bona fide* original compilation from other common or independent sources." See also *Gray v. Rossell*, 1 Story, 11; *Greene v. Bishop*, 1 Clif. 186; *Webb v. Powers*, 2 Wood. & M. 497; *Story v. Holcombe*, 4 McLean, 306; *Lawrence v. Dana*, C. C. U. S. Mass. Dist. 1869; *Folsom v. Marsh*, 2 Story, 100; *Mawman v. Tegg*, 2 Russ. 385; *Sweet v. Benning*, 16 C. B. 459. On the other hand, in *Sayre v. Moore*, 1 East, 360 n., which was an action for the piracy of sea charts, Lord *Manfield* held, that if the defendants had corrected errors existing in the original work, it was not a servile copying, and therefore no violation of the plaintiff's rights, although it appeared that the body of the defendant's work had been taken from that of the plaintiff. So in *Cary v. Kearsley*, 4 Esp. 168, Lord *Ellenborough* is reported to have said, that one may lawfully copy the work of another if he accompany it with notes and comments of his own, and does this in good faith, and not as a mere pretext for pirating the work. Similar observations are made in *Matthewson v. Stockdale*, 12 Ves. 275; *Martin v. Wright*, 6 Sim. 298. But it seems clear, according to later authorities at least, that such use of a prior publication would be deemed a piracy, if damage resulted to its owner, without regard to the purpose for which the matter was taken. "In the case of a dictionary, map, guide-book, or directory," says Vice-Chancellor *Wood*, "when there are certain common objects of information, which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done. In case of a road-book, he must count the mile-stones for himself. In the case of a

map of a newly-discovered island (an illustration put in the case), he must go through the whole process of triangulation, just as if he had never seen any former map, and, generally, he is not entitled to take one word of the information previously published, without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information; and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained." *Kelly v. Morris*, L. R. 1 Eq. 697. See also, *Morris v. Ashbee*, L. R. 7 Eq. 38; *Scott v. Stanford*, L. R. 3 Eq. 718; *Cary v. Longman*, 1 East, 358; *Trusler v. Murray*, 1 East, 362; *Matthewson v. Stockdale*, 12 Ves. 270; *Bailey v. Taylor*, 1 Russ. & M. 73; *Cornish v. Upton*, 4 L. T. (n. s.) 863; *Blount v. Patten*, 2 Paine, 397. Where so much is directly taken from the original that its value is sensibly diminished, or the labors of the original author are substantially, to an injurious extent, appropriated by another, that is sufficient, in point of law, to constitute a piracy *pro tanto*. But it is clear that the quantity taken will not always be a true criterion of the extent of the piracy. Said Lord *Cottenham*, in *Bramwell v. Halcombe*, 3 My. & Cr. 737: "When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the work in quantity. It is not only quantity, but value, that is always looked to. It is useless to refer to any particular cases as to quantity." The true rule on this point seems to be that laid down by *Story*, J., in *Folsom v. Marsh*, 2 Story, 100: "In short, we must, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the material used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work."

(*j*) *Curtis on Copyright*, p. 271. "There can be no doubt that the definition of an abridgment given in the anonymous case

* of reasoning does not go so far. The test would still * 257 an be, as in regard to compilation, Has the alleged infringer only made, by a manipulation of the materials of the other, with nothing of his own, a shorter copy of the book? for then it would be an infringement, however dexterous the work; or, Has the later author only made use of thoughts or facts which the earlier author gave to the public, in such wise as to produce, by his own original efforts, a new book of his own? (k)

in Loftt, is correct, in a critical sense. That the understanding must be employed in the act of 'carrying a larger work into a smaller compass, and rendering it less expensive, and more convenient both to the time and use of the reader;' and that when this is done, the person who does it exhibits, according to Lord Hardwicke, his own 'invention, learning, and judgment,' is obvious. But whether this can be done with any work really original, and actually under the protection of copyright,—whether the property of the original author can be taken, and the taking justified, by any amount of learning, judgment, or invention, shown in the act by him who thus appropriates the property of another,—is the great question which seems to be assumed, and not satisfactorily solved, by these authorities. There are many modes in which the wrongful taker of another's property may exhibit vast talent and ingenuity, and even genius, both in the act of taking and in the use which he makes of it; so that he may really be said to have incorporated with it both his own labor and his own intellectual energy. But the question of original title is still apt inconveniently to recur in such cases. In like manner, invention, learning, and judgment, are often shown in the appropriation of the literary labors of others; but the courts have not hesitated, on this account, to ascertain what part of a book, laboring under suspicion, was taken from the complainant; and, if the title of the latter is made out, to grant redress, even to the destruction of all that the piratical author can call his own. In the case of a colorable curtailment of the original work, there may be the exercise of a mental operation, as well as in a professed abridgment; and if the original author is injured by the latter, as well as by the former, it seems to be a very unsatisfactory answer, in either case, to say that his book has been made, by a mental operation, to wear the appearance of a new work. In both cases, the true inquiry is, Has anything been taken which belongs to another? In either case, the form under which the

original matter reappears should be treated as a disguise; and the extent of the transformation shows only the extant to which the disguise has been carried, as long as anything remains which the original author can show to be justly and exclusively his own."

(k) In Newbury's case, Loftt's R. 775, Lord Chancellor Apsley, after consulting Mr. Justice Blackstone, said that "they were agreed that an abridgment, where the understanding is employed in retrenching unnecessary and uninteresting circumstances, which rather deaden the narrative, is not an act of plagiarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work." In the previous case of Gyles v. Wilcox, 2 Atk. 141, it was held, that merely leaving out certain passages of the original work and translating a few Latin and French quotations, did not constitute a fair abridgment. And in the subsequent case of Butterworth v. Robinson, 5 Ves. 709, it was held, that a selection of cases from the Term Reports, copied verbatim, but arranged under heads and titles instead of chronologically, was not a fair abridgment. In Folsom v. Marsh, 2 Story, 100, Story, J., said: "It is clear that a mere selection or different arrangement of parts of the original work, so as to bring the original work into a smaller compass, will not be held to be a *bonâ fide* abridgment. There must be a real substantial condensation of the materials, and intellectual labor and judgment bestowed thereon, and not merely the facile use of the scissors, or extracts of the essential parts constituting the chief value of the work." And in Story v. Holcombe, 4 McLean, 306, it is said: "It must be in good faith an abridgment, and not a treatise interlarded with citations. To copy certain passages from a book, omitting others, is in no just sense an abridgment of it. It makes the work shorter, but it does not abridge it. The judgment is not exercised in condensing the views of the author. His language is copied, not condensed; and the views of the writer, in this mode, can be but par-

in making his application, he could not expect the prompt relief of an immediate injunction, although whatever rights he proved on a final hearing would be protected. (*o*)

Third. The court would consider where would be the preponderance of the mischief caused, on the one hand by an * 257 *ax* * injunction, or on the other by a refusal. This must depend upon the character of the book, and of the sale, and upon other similar circumstances. While the merits of the case are in doubt, as they must be in the mind of the court until a final hearing, the court would be unwilling to do a great harm to one party, to prevent a small mischief to another. Hence, if the book complained of was such that its sale could be only temporary, and would, however great now, last but a brief period, an injunction until a hearing would be fatal, and as injurious, in fact, as a perpetual injunction. In such case, the court would not grant such an injunction, unless on a clear case of merit on the one side and wrong on the other. (*p*)

Fourth. The plaintiff should, in his bill, state his title, whether derivative or original; and describe the infringement, not very specifically, (*q*) but so as to show to the court what it was. If the allegations are sustained by affidavit, or are confessed, the temporary injunction might issue. Formerly, equity would not thus interfere until the plaintiff had proved his title by a trial at law. (*r*) Now, this is not required as a matter of course. It is believed, however, that if, on the plaintiff's own showing, there was a real doubt as to his title, or as to his having suffered any certain wrong, an injunction would be refused. (*s*) But if he had what has been called "a clear color of title,"—legal or equitable, (*t*)—and makes out a *prima facie* case, a temporary injunc-

(*o*) *Saunders v. Smith*, 3 My. & Cr. 711; *Rundell v. Murray*, 1 Jac. 311; *Platt v. Button*, 19 Ves. 447; *Baily v. Taylor*, 1 Russ. & M. 78; *Mawman v. Tegg*, 2 Russ. 285; *Lewis v. Chapman*, 3 Beav. 133; *Buxton v. James*, 5 De G. & Sm. 80; *Robinson v. Wilkins*, 8 Ves. 224 n.

(*p*) *Spottiswoode v. Clarke*, 2 Phil. 154; *McNeil v. Williams*, 11 Jur. 344; *Bramwell v. Halcomb*, 3 My. & Cr. 737; *Saunders v. Smith*, 3 My. & Cr. 711.

(*q*) *Sweet v. Maughan*, 11 Sim. 51.

(*r*) *Baskett v. Cunningham*, 2 Eden, 137; *Jeffreys v. Baldwin*, Ambl. 164; *Blanchard v. Hill*, 2 Atk. 488; *Hills v. Univ. of Oxford*, 1 Vern. 275; *Redfield*

v. Middleton, 7 Bosw. 649, 2 Story, Eq. Juris. § 935.

(*s*) In such case the motion for injunction is usually directed to stand over till the hearing, or till after a trial at law, the defendant in the mean time being ordered to keep an account of the number of copies sold; but where circumstances require it, an injunction is sometimes granted pending the trial of the legal right. See *Walcot v. Walker*, 7 Ves. 1; *Wilkins v. Aikin*, 17 Ves. 422; *Jollie v. Jacques*, 1 Blatchf. 626; *Miller v. McElroy*, 1 Am. Law Reg. 205, and cases cited *supra*, note (*p*).

(*t*) *Sweet v. Cater*, 11 Sim. 572; *Colburn v. Duncomb*, 9 Sim. 151.

tion will be given him upon such terms as the rights and interests of all parties seem to require. (u)

* It may be added, that, if the mischief by the infringement be obviously insignificant, the court will not hear the case. (v)

It may be that the infringement complained of is of such a kind that its existence may be ascertained at once by inspection. This, then, the court will do. But in this country it is seldom that the judges go into any detailed comparison of the two books, to ascertain whether there be or be not an infringement. In England, it may be inferred from some cases that the courts go farther in this direction than they do here. (w) With us it is a very general practice to refer the case to a master, with general directions, or sometimes with very special directions, to examine the two books, and report in detail all the facts he finds, which may bear upon the question of infringement. Upon this report the final hearing is usually had. (x)

The bill commonly prays for an account by the defendant. And this is commonly granted. The terms and method of account are specified with greater or less minuteness, as counsel may suggest or require, and the court think right. The main purpose of the court is, that, if on a final hearing the plaintiff prevails, the court may have in their possession all the facts necessary to enable them to do him, by their decree, whatever justice the law allows. (y)

(u) *Mawman v. Tegg*, 2 Russ. 385; *Bohn v. Boggs*, 10 Jur. 420; *Univ. of Oxford v. Richardson*, 6 Ves. 689, 706; *Chappell v. Purday*, 4 Y. & C. 485; *Pierpoint v. Fowle*, 3 Wood. & M. 35. As to the extent of the injunction where only part of the original work has been appropriated, see ante, note (d).

(v) *Baily v. Taylor*, 1 Russ. & M. 73; *Whittingham v. Wooler*, 2 Swanst. 428; *Webb v. Powers*, 1 Wood. & M. 522.

(w) *Jarrold v. Houlston*, 3 K. & J. 708; *Spiers v. Brown*, 6 W. R. 352; *Pike v. Nicholas*, L. R. 5 Ch. Ap. 261; *Murray v. Boggs*, 1 Drew. 368.

(x) The American practice is thus stated by Judge Story: "In some cases of this nature a court of equity will take upon itself the task of inspection and

comparison of books alleged to be a piracy. But the usual practice is to refer the subject to a master, who then reports whether the books differ, and in what respects; and upon such a report the court usually acts in making its interlocutory, as well as its final decree." 2 Story, Eq. Jur. § 941. See also *Folsom v. Marsh*, 2 Story, 100; *Webb v. Powers*, 2 Wood. & M. 497; *Story v. Holcombe*, 4 McLean, 306; *Greene v. Bishop*, 1 Clif. 186; *Lawrence v. Dana*, C. C. U. S. Mass. Dist. 1869.

(y) See *Colburn v. Simms*, 2 Hare, 543; *Grierson v. Eyre*, 9 Ves. 341; *Kelly v. Hooper*, 1 Y. & C. (Ch.) 197; *Baily v. Taylor*, 1 Russ. & M. 73; *Hogg v. Kirby*, 8 Ves. 215; 2 Story, Eq. Jur. § 928.

ON TRADE-MARKS.

SECT. I.—*What a Trade-mark is.*

THE Statute of July 8, 1870, to which we have referred as the statute now governing the law of patents and of copyrights, also provides for and protects trade-marks. (a)¹ From

(a) The Act of July 8, 1870, §§ 77 to 84, inclusive, provides substantially as follows:—

§ 77. That any person or firm domiciled in the United States, or any corporation therein, and any person, firm, or corporation belonging to any foreign country, which, by treaty or convention, affords similar privileges to citizens of the United States, who are entitled to the exclusive use of any lawful trade-mark, or who intend to adopt any trade-mark for exclusive use in the United States, may obtain protection for said trade-mark by complying with the following requirements: 1. By recording at the Patent-Office the names of the parties, their residences, and place of business. 2. The class of merchandise and the particular description of goods comprised in such class, by which the trade-mark has been or is intended to be appropriated. 3. A description of the trade-mark itself, with fac-similes thereof, and the mode in which it has been or is intended to be applied and used. 4. The length of time, if any, during which the trade-mark has been used. 5. The payment of a fee of twenty-five dollars, in the same manner and for the same purpose as the fee required for patents. 6. The compliance with such regulations as may be prescribed by the Commissioner of Patents. 7. The filing of a declaration, under oath, by the person claiming the trade-mark, that he has a right to the use of the same,

and that no other person has the right to such use, either in the identical form, or having such near resemblance thereto as might be calculated to deceive, and that the description and fac-similes presented for record are true copies of the trade-mark sought to be protected.

§ 78 provides that such trade-mark shall remain in force for thirty years from the date of registration, except when it applies to articles not manufactured in this country, and where it receives protection under the laws of a foreign country for a shorter period, in which case it shall cease to have any force under this act at the same time that it becomes of no effect elsewhere; while in force it shall entitle the person, &c., registering to the exclusive use thereof, so far as regards the description of goods to which it is appropriated in the statement filed under oath; and no other person can lawfully use the same or any colorable imitation thereof. Provided that, six months prior to the expiration of the thirty years, application may be made for a renewal of registration; and, on payment of the same fee as before, an extension shall be granted for the further term of thirty years. "And provided further, that nothing in this section shall be construed as abridging, or in any manner affecting unfavorably, the claim of any person, &c., to any trade-mark after the expiration of the term for which such trade-mark was registered."

§ 79. Any person counterfeiting such

¹ *United States v. Steffens*, 100 U. S. 82, declared that property in trade-marks depended for its protection upon the common law and the various State statutes, and was neither created by, nor relieved for its enforcement upon, this act of Congress, and decided that the legislation of Congress relating to trade-marks was unconstitutional, as being neither within the clause of the Constitution respecting patents or copyrights, nor that authorizing the regulation of foreign and interstate commerce or with the Indians.

* the language of the statute it would seem that "merchandise" and "goods" were to be the subjects of trademarks; and it has been held that a mere "product of nature" could not be protected by a trade-mark. (*aa*)¹ * 257 *ba*

A trade-mark may be defined as a name or device used by a seller in connection with goods sold by him, to indicate that they are made by him, or that he has some exclusive right to sell them, and thus to secure to him the profits arising from the peculiar character of the goods bearing that mark.

The right to be protected in the use of trade-marks, by which we mean the rule of law which prohibits the false assumption by a stranger of such a name or device, or, as it is called in the earliest case on the subject, such a *mark*, is very ancient. The first case, so far as we can learn from the reports, occurred in 22 Eliz. or 32 Eliz. It is mentioned by *Doddridge*, J., in *Popham's Reports*, (*b*) and again by the same judge, in a report of the same case in *Croke*. (*c*) Our * notes will show that Dod- * 257 *bb*

trade-mark shall be liable to an action for damages, and party aggrieved may also have a writ of injunction. The Commissioner of Patents shall not receive any proposed trade-mark which cannot become a lawful trade-mark, or which is merely the name of a person, &c., unaccompanied by any mark distinguishing it from the same name when used by other persons, or which is the same as or closely resembles a mark already registered.

§ 80 treats of evidence of registration, &c., in a trade-mark suit.

§ 81 gives authority to Commissioner to make rules and regulations, &c.

§ 82. Person making fraudulent application for registry, making fraudulent entries, &c., liable in damages to any person injured thereby.

§ 83. "Nothing in this act shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trademark might have had if this act had not been passed."

§ 84. No action shall be maintained under this act by any person claiming a trade-mark "which is used or claimed" in any unlawful business, or upon any article which is injurious in itself, or upon any

trade-mark which has been fraudulently obtained, or which has been formed and used with the design of deceiving the public in the purchase or use of any article of merchandise."

(*aa*) Hence the rights of a trade-mark were refused to "Congress Water" in *Congress and Empire Spring Co. v. High Rock Congress Spring Co.* 57 Barb. 526.

(*b*) *Southern v. How*, *Popham*, 144. "Doderidge said that, 22 Eliz. an action on the case was brought in the Common Pleas by a clothier, that whereas he had gained great reputation for his making of his cloth, by reason whereof he had great utterance, to his great benefit and profit; and that he used to set his mark to his cloth, whereby it should be known to be his cloth; and another clothier, perceiving it, used the same mark to his ill-made cloth, on purpose to deceive him; and it was resolved that the action did well lie."

(*c*) *Southern v. How*, *Cro. Jac.* 471. "Doderidge cited a case to be adjudged, 32 Eliz. in the Common Pleas. A clothier of Gloucestershire sold very good cloth, so that in London, if they saw any cloth of his mark, they would buy it without searching thereof; and another who made ill cloth put his mark upon it without his

¹ But *Congress Spring Co. v. High Rock Spring Co.* 45 N. Y. 391, on appeal, reversed *Congress, &c. Co. v. High Rock, &c. Co.* 57 Barb. 526, *supra*, and decided that the owner of a peculiar product of nature like natural mineral water, who has applied to it a conventional name, as "Congress," by which it has become generally known, and under which it has been extensively sold by him as a useful article, is entitled to be protected in the exclusive use of such name as his trade-mark in the sale of the article.

dridge's words are reported in the two books quite differently. As given in Popham, they would leave it uncertain whether the action were brought by one whose trade-mark had been falsified, or by a purchaser who had been deceived by this falsification and led by it to purchase goods of inferior quality. But, as reported in Cro. James,—and it must be the same case, although Popham dates it ten years earlier than Croke, and the name of it is given by neither,—it is certain that the action was base on the deceit, and was brought by the purchaser of the goods. This is important, as showing that the foundation of the law of trade-marks was not a property in them by the trader, but the injury to the purchaser of the goods caused by the fraudulent falsification of the mark.

A trade-mark may be a device or symbol which may be in itself meaningless, or it may as a descriptive word indicate the origin, nature and character of the chattel, or it may consist of the name of a person together with some device. In these respects, they are of indefinite variety. The essential point is, that it should be used to designate the true origin and ownership of the article to which they are affixed. (d)¹ Whatever they are, whether names, words, figures or symbols, if they do not relate to or indicate the origin and the ownership of the article, but are intended only to express their name or describe their quality, they are not, properly

privy; and an action upon the case was brought by him who bought the cloth, for this deceit; and adjudged maintainable." Com. Dig. Action on the case for Decat A. 9, thus cites the same case from Cro. Jac.: "So (i. e., an action will lie) if a clothier sell bad cloths, upon which he put the mark of another who made good cloths." The same case is also reported in 3 Rolle, 28, where, after stating that it was held that an action on the case lay against the clothier, the reporter says: "But Mr. Justice *Doddridge* did not say whether the action was brought by the clothier who originally had the mark, or by the vendee, but semble que gist pur le vendee."

(d) *Fetridge v. Wells*, 4 Abb. Pr. 144; *Stokes v. Landgraff*, 17 Barb. 608; *Amoskeag Man. Co. v. Spear*, 2 Sandf. Sup. Ct. 609; *Corwin v. Daly*, 7 Bosw. 222; *Falkenburg v. Lucy*, 35 Cal. 64; *Newman v. Alvord*, 49 Barb. 588; *Filley v. Fassett*, 44 Mo. 168; *Ferguson v. Davol Mills*, 2 Brews. 316; *Dixon Crucible Co. v. Guggenheim*, 2 Brews. 321. The name of a place where goods are manufactured may be adopted as a trade-mark, as against a person living in another place, *Newman v. Alvord*, 49 Barb. 588, but not against one living in the same place. *The Brooklyn White Lead Co. v. Mesury*, 25 Barb. 419.

¹ It is not essential to property in a trade-mark that it should indicate any particular person as the maker of the article to which it is attached; it may represent to the purchaser the quality of the thing offered for sale, and in that case is of value to any person interested in putting the commodity to which it is applied upon the market, and he is entitled to protection in its use, *Godillot v. Harris*, 81 N. Y. 363; thus, numerals arbitrarily selected, used in combination with other devices to denote origin of goods, form a valid trade-mark, *Lawrence Mfg. Co. v. Lowell Mills*, 129 Mass. 325; or the name of a place, as "Akron Cement," *Newman v. Alvord*, 51 N. Y. 189; or pictures, symbols, or a peculiar form or fashion of label, or simply of a word or words, *Hier v. Abrahams*, 82 N. Y. 519.

speaking, trade-marks. (*e*)¹ If, however any one invents a * new word to designate an article made by him, he * 257 *bc* may obtain an exclusive right to it as his trade-mark, although the word indicates the nature or composition of the article. (*ee*) This principle has been adopted in England, although held not to apply where the article is patented, as the name then becomes identified with the goods. (*ef*) Although words in common use and not of themselves denoting ownership or origin can-

(*e*) See cases cited in note (*d*). In *Town v. Stetson*, 5 Abb. Pr. (n. s.) 218, protection was sought for the name "De-siccated Codfish," but this was held a mere term of description, and an injunction was refused. So in *Wolfe v. Goulard*, 18 How. Pr. 64, the name "Schiedam Schnapps" was refused protection for a similar reason; while in *Corwin v. Daly*, 7 Bosw. 222, the words "Club-House," applied to gin, was considered indicative of quality only, and, as such, not capable of exclusive appropriation as a trade-mark. In this case, Judge Robertson, after an elaborate examination of the authorities, in which he shows that, in many cases where injunctions were granted, the imitation was in the manner and form of presenting the words, and not merely in the use of the words themselves, concludes by saying: "None of the cases enumerated impugn the doctrine, that names having a definite and established meaning in the language, which do not indicate ownership or origin, or something equivalent, cannot be appropriated by one so as to exclude a similar use by others." See also *Bininger v. Wattles*, 28 How. Pr. 206; *Gillott v. Esterbrook*, 47 Barb. 455, affirmed in 48 N. Y. 374; *The Leather Cloth Co. v. The American Leather Cloth Co.* 11 H. L. C. 523; *Liebig's Extract of Meat Co. v. Hanbury*, 17 L. T. Rep. (n. s.) 298. But in *Braham v. Bustard*, 1 Hem. & M. 447, the defendants were restrained from using the word "Excalior," as applied to a particular kind of soap. And see *Boardman v. Meriden Britannia Co.* 35 Conn. 402.

(*ee*) In *Burnett v. Phalon*, 9 Bosw. 192, the court say: "Every man has a right

to the reward of his skill, his energy, and his honest enterprise, and when he has appropriated as his trade-mark letters combined into a word before unknown, and has used that word, and long published it to the world as his adopted trade-mark, he has acquired rights in it which the courts will protect." In this case the word in question was the word "Cocaine," which had been invented by the plaintiff, and applied by him to a peculiar preparation for the hair, made in part from cocoa and oil. So in *Caswell v. Davis*, 4 Abb. Pr. (n. s.) 6, the term "Ferro-phosphorated," forming a part of the name of a medicine, was protected as being a new word, although it indicated the ingredients of which the article were composed. In *Davis v. Kendall*, 2 R. I. 569, the name of the plaintiff's medicine, "Vegetable Pain-killer," was held a good trade-mark. So of a new combination of words forming the name of a newspaper. *Mateell v. Flanagan*, 2 Abb. Pr. (n. s.) 459. See also *Wolfe v. Goulard*, 18 How. Pr. 64. But in *Fetridge v. Wells*, 4 Abb. Pr. 144, the doctrine laid down in *Burnett v. Phalon*, is considered as doubtful in point of principle. The plaintiff gave his book-store the name of "Antiquarian Book-store," and used this name in his advertisements and business transactions. Held, that he had no exclusive right to it as a trade-mark. *Choynski v. Cohen*, 39 Cal. 501.

(*ef*) In an English case, where an inventor had for many years called his manufacture "The Original," another manufacturer was enjoined against using those words. *Young v. MacRae*, 9 Jur. (n. s.) 322.

¹ *Gilman v. Hunnewell*, 122 Mass. 139; *Van Bell v. Prescott*, 82 N. Y. 630. But *Dunbar v. Glenn*, 42 Wis. 118, decided that the word "Bethesda," as applied to plaintiff's spring, to indicate its origin and ownership, and not as a generic or geographical name, or as merely descriptive of the article, was a valid trade-mark, and would be protected. The mere idea represented by some figure on an article sold for polishing purposes, that it will make things bright enough to be used as mirrors, was held not to be a subject for appropriation as a trade-mark, in *Enoch Morgan's Sons' Co. v. Troxell*, 89 N. Y. 292.

not generally be appropriated, it has been held that where the use imparted a new attribute, meaning, or office to the word, in no way trenching upon any previous use or purpose to which it had been applied, it might be adopted as a trade-mark. (*eg*)

Some difficulty has been found in applying the general rule above stated. If a man, by greater care, skill or * 257 *bd* * honesty makes a certain article better than others make it, and informs all purchasers by a mark on the article that it is of his make, a purchaser who wishes to buy that article must not be cheated into buying another article, by some one who falsely puts upon it the mark used by the maker to designate his work. And if the maker profits by his reputation, and puts the mark to secure this profit, he must not be cheated out of it.

But if a maker chooses to assert that his wares are of extraordinary excellence, and puts a label on them simply expressing this, as "extra superfine all-wool broadcloth," another may say his cloth is quite as good, and assert this by affixing to them the very same label; and the purchaser must look out for himself. The distinction is this:—the law does not undertake to guard any one against or give him compensation for the inferior quality of the goods he buys; it says to him *caveat emptor*; he must ascertain for himself the quality of the goods, or take a warranty. But the law will protect him against the deception which would cause him to buy a certain article when he supposed he was buying and paying for a different article. If A has a high reputation for making, we will say, gloves, and B sells to C other gloves, falsely asserting that they were made by A, it might be that C would have his remedy for the fraud; but it is certain that A would be without remedy, unless he had the practice of placing a definite mark upon his own gloves by which they might be known and recognized as of his manufacture, and in that way distinguished from all others, and this mark were falsified by B. Such a mark would be A's trade-mark. It must be intended by him as his trade-mark, and known and recognized as such. And the fraud, for which he has his remedy, consists in the use by another of this mark, for the purpose of deception, or in such a way as to lead to deception.

(*eg*) *Messerole v. Tynberg*, 4 Abb. Pr. *McAndrew v. Bassett*, 10 Jur. (n. s.) 492. (n. s.) 459; *Newman v. Alvord*, 49 Barb. In all these cases proper names, either of 588; *Barrows v. Knight*, 6 R. L 434; men or of places, were used as trade- *Howard v. Henriques*, 3 Sand. Ch. 725; marks.

The legal test must always be, Did the mark itself ascribe the manufacture to him who used the mark? It might be that a mark would do this, or might after a while become capable of doing this, because of the general recognition of this meaning, although it contained no name nor initials nor * other indication of a name. But such cases must be * 257 *be* rare; if a man used a mark which in no way referred to him, the reasonable presumption would be against his intention to mark the thing in that way as his own. (*f*) But it would seem to be now well settled by the decisions, that any arbitrary symbol, though in itself meaningless, may be adopted as a trade mark, if it has never before been applied to a similar purpose. (*g*) The safest course is to follow the custom which is now nearly if not quite universal; and that is, to connect with a mark a name or designation which should connect the thing bearing the mark, with the man who uses the mark.

(*f*) "The moment," says Judge *Robertson*, "that the straight-forward and simple mode of indicating ownership by the owner's name, is abandoned, the burden is thrown upon the complaining party of showing that the designation used does not mean something relating to the quality of the article, or some other attribute." *Corwin v. Daly*, 7 Bosw. 222. So *Hobbs v. Francais*, 19 How. Pr. 567. On the other hand, in *Williams v. Johnson*, 2 Bosw. 1, Judge *Woodruff* says: "If the plaintiffs had chosen to stamp their soap with some impression, having no other meaning than to distinguish their manufacture from that of others, and had given it out as their mark, and, by this discrimination, soap of their manufacture had acquired reputation and sale, they would be plainly entitled to protection." And, in this case, it was considered a proper question for a jury, whether the words "Genuine Yankee" had been used by the plaintiffs to designate ownership, or merely as words of quality. So in *Barrows v. Knight*, 6 R. I. 434, plaintiffs claimed a trade-mark in the words, "Roger Williams Long Cloth," as applied to goods of their manufacture, and it was held to be a question

for the jury, whether the goods bearing that mark were known by the public as the manufacture of the plaintiff.

(*g*) Thus, in *Gillott v. Esterbrook*, 47 Barb. 455, affirmed in 48 N. Y. 374, the number 303, used as a trade-mark on pens, was protected. In *Harrison v. Taylor*, 11 Jur. (n. s.) 408, the figure of an ox was placed by the plaintiffs on the boxes of mustard put up by them, and held a good trade-mark. In *Edleston v. Edleston*, 9 Jur. (n. s.) 479, the figure of an anchor was used to designate the plaintiff's iron. And in *Kinahan v. Bolton*, 15 Irish, Ch. 75, the letters L. L. used to designate a particular brand of whiskey, were considered a good trade-mark, although the plaintiffs always placed their own name upon their labels in addition. See also, *Motley v. Downman*, 3 My. & Cr. 1; *Hall v. Barrows*, 10 Jur. (n. s.) 55; *Cartier v. Carlile*, 8 Jur. (n. s.) 183; *Ransome v. Bentall*, 3 L. J. (n. s.) Ch. 161; *McAndrew v. Bassett*, 10 Jur. (n. s.) 492; *Meserole v. Tynberg*, 4 Abb. Pr. (n. s.) 459; *Davis v. Kendall*, 2 R. I. 569; *Dale v. Smithson*, 12 Abb. Pr. 237; *Seizo v. Provezende*, Eng. Eq. Rep. 1 Ch. Ap. 192.

SECTION II.

OF THE RIGHT WHICH A TRADE-MARK SECURES.

The law of trade-marks was originally founded upon the fraud of him who used them falsely, and upon that fraud as * 257 *bf* * practised on the buyer. It was a second and a distinct step which extended this law to the fraud practised on the seller. By this step it protected him against the injury sustained by him from the use by another of his trade-mark, and this is the principle of the recent statutory provision. It protects him in the enjoyment of a right which, even at common law, came very near to being a right of property. No one has ever doubted that the exclusive right secured by a patent or copyright is regarded in law as a property. And now the same statute which regulates patents and copyrights includes trade-marks, and makes the exclusive right to use a trade-mark analogous at least to that secured by patent or copyright, and a right of property, or something very like that right.

Although the statute has now come in aid of the common law in the matter of trade-marks, the earlier adjudication on the nature of the right, or the property, has not lost its interest nor its usefulness. And we give the leading cases on this subject in our notes. (*gg*)

(*gg*) This question was fully discussed, and finally settled in the several cases of *Taylor v. Carpenter*, in the Circuit Court of the United States, and in the Court of Chancery in New York. The plaintiffs, citizens of England, were manufacturers of thread, which was largely exported to the United States and had there gained a valuable reputation. The defendant, a citizen of Massachusetts, also a manufacturer of thread, had been in the habit of placing upon his own thread labels marked with the plaintiff's name, and in every respect closely imitating those used by the plaintiff upon his own goods. One of the principal grounds of defence relied on was that the plaintiffs, being aliens, had no right to a trade-mark in this country which an American court would protect. But Chancellor *Walworth* said: "The fact that the complainants are subjects of another government, and the defendant is a citizen

of the United States, as stated in the answer, cannot alter the rights of the parties or deprive the complainants of the favorable interposition of the court, if those rights have been violated by the defendant. So far as the subject-matter of the suit is concerned, there is no difference between citizens and aliens." 11 *Paige*, 292. On appeal to the court for the correction of errors, the decree was affirmed. 2 *Sandf. Ch.* 511. In another suit between the same parties in the United States Circuit Court in Massachusetts, *Story*, J., said: "It is suggested that the plaintiffs are aliens. Be it so. But in the courts of the United States, under the Constitution and laws, they are entitled to the same protection of their rights as citizens. There is no difference between the case of a citizen and that of an alien friend when his rights are openly violated." 3 *Story C. C. Rep.* 459. Finally, in an action on the case for

* SECTION III.

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WHO MAY HAVE A TRADE-MARK.

We do not see that the statute determines this. It only provides that our own citizens and certain aliens, if they "are entitled to the exclusive use of any lawful trade-mark, or who intend to adopt and use any trade-mark for exclusive use within the United States," may be protected in such use by using the means indicated. As any one may buy, and any one may sell, there would seem to be no exception to the rule that every one who makes and sells a particular article may put his trade-mark upon it, and have his rights therein respected by all persons. Hence our courts have heretofore protected aliens equally with citizens; and they have done this without reference to the question whether the country to which the alien belongs protects a similar right in our citizens who may be there, on the ground that this protection of the manufacturer's trade-mark is the protection of the community against fraud; and that it is equally the duty of our own courts to give this protection to our own community, whether another government does or does not protect its own community. (*h*)

The recent statute, however, expressly confines the right to citizens of foreign countries which, "by treaty or convention, afford similar privileges to citizens of the United States." It would seem, therefore, not to be enough if the courts of that for-

damages between the same parties, Judge *Woodbury*, after an able examination of the rights of aliens in the courts of the United States, confirmed the doctrine laid down by Judge *Story* and Chancellor *Walworth*, 2 *Wood. & M. I.* So *Coated v. Holbrook*, 2 *Sandf. Ch.* 586; *Gillott v. Esterbrook*, 47 *Barb.* 455; affirmed in 48 *N. Y.* 374; *Clark v. Clark*, 25 *Barb.* 76. The English case of *Delondre v. Shaw*, 2 *Sim. Ch.* 237 has been thought to maintain an opposite doctrine; but the point actually decided in that case was that the court would not protect the copyright of a foreigner, and on the question of trade-mark no opinion was given. Later English cases fully adopt the views expressed by

the American courts. Thus, in the *Collins Co. v. Brown*, 3 *Kay & J.* 428, in which the plaintiffs were American citizens, Vice-Chancellor *Wood*, after showing that the question in these cases is one of fraud, says: "Any fraud may be redressed in the country in which it is committed, whatever be the country of the person who has been defrauded." So *The Collins Co. v. Cowen*, 3 *Kay & J.* 423; *Farina v. Silverlock*, 39 *Eng. L. & Eq.* 577; *Cartier v. Carville*, 8 *Jur. (n. s.)* 183.

(*A*) *Taylor v. Carpenter*, 2 *Sandf. Ch.* 603, 3 *Story, C. C. Rep.* 450, 2 *Wood. & M. I.*; *The Collins Co. v. Brown*, 3 *Kay & J.* 428; *The Collins Co. v. Cowen*, 3 *Kay & J.* 423.

eign country gave our citizens that protection, in the absence of treaty or convention.

* 257 *bh* * Can one who is only the seller of the goods, place on them his own trade-mark, and claim protection for it?

It is primarily and essentially the right of the manufacturer only. But it would seem, from authority, from practice, and for good reasons, lawful for one who is only a seller to possess this right by derivation from the manufacturer. We do not mean by transfer or assignment,—for that question will be considered presently; but by some arrangement or connection with the manufacturer, whereby the seller is made the representative of the manufacturer in this respect. (i) It seems plain that one who buys, from a domestic or foreign manufacturer, certain goods which the manufacturer sells as readily to any one else, cannot put his own mark on them, and by force thereof claim to be the only seller of those goods. But if a manufacturer— we will say of gloves, in Paris— has acquired an extensive reputation by the excellence of his goods, and arranges with a merchant in New York that the goods shall be sold to him, and to no one else in this country, that merchant would have a right to call himself the exclusive importer of these goods, and to indicate this by

* 257 *bi* the use of the manufacturer's trade-mark, or his * own, or by both united into one. This would not prevent any person who could get these goods in Europe from bringing them

(i) *Walton v. Crowley*, 3 Blatchf. C. C. Rep. 440. In this case the plaintiffs were by an arrangement with the English manufacturers the sole importers of the goods to which they affixed their own trade-mark. It was objected that the manufacturers should have been made parties to the bill, but the objection was overruled, and the court said: "The party whose interests are directly affected by the wrong is entitled to proceed in his own name to procure its suppression, and the person for whom goods are manufactured has the same legal right to affix and maintain a special trade-mark as the manufacturer himself." In *Partridge v. Menck*, 2 Sandf. Ch. 625, Chancellor *Walworth* says: "The question in such cases is, not whether the complainant was the original inventor or proprietor of the article made by him, and upon which he now puts his trade-mark, or whether the article made and sold by the defendant under the complainant's trade-mark is an article of the same quality or value; but the court pro-

ceeds upon the ground, that the complainant has a valuable interest in the good-will of his trade or business; and that having appropriated to himself a particular label or sign or trade-mark, indicating to those who give him their patronage that the article is manufactured or sold by him, or by his authority, or that he carries on business at a particular place, he is entitled to protection against a defendant who attempts to pirate upon the good-will of the plaintiff's friends or customers, or the patrons of his trade or business, by sailing under his flag without his authority or consent." See *Taylor v. Carpenter*, 2 Sandf. Ch. 603; *Amoskeag Manuf. Co. v. Spear*, 2 Sandf. S. C. 599; *Dixon Crucible Co. v. Guggenheim*, 2 Brews. 321; *Lockwood v. Bostwick*, 2 Daly, 521. One may bring a suit in his own name for the infringement of a trade-mark, although others are also interested in the mark. *Dent v. Turpin*, 2 J. & H. 139; *Hine v. Lart*, 10 Jur. 106.

here, or selling them here as those very gloves. (*j*) But he would have no right to assume the trade-mark which indicated that he was, by an arrangement with the manufacturer, his exclusive representative in this country, and which therefore gave to the buyer an authorized assurance that he was buying the goods he desired to buy.

A question has been raised, in one case at least, whether this trade-mark right may not be connected in some way with a certain place. (*k*) The case is peculiar in its facts, nor does

(*j*) *Samuel v. Burger*, 4 Abb. Pr. 88. The plaintiff in this case had purchased, from one Brindle, a watchmaker of extensive reputation, the exclusive right to stamp Brindle's name upon watches of the plaintiff's own manufacture. The defendants offered for sale watches made by Brindle himself, and stamped with his name. An injunction to prevent such sales was prayed for, but was refused, the court saying that "the rule of law invoked by the plaintiffs might well have been claimed by the defendants as applicable to them, but would not at all avail the plaintiffs, who could not call upon the court to aid them in passing off the watches made by them as those manufactured by Brindle."

(*k*) *Motley v. Downman*, 3 My. & Cr. 1. The facts of the case were these. The boxes of tin plates made at the Carmarthen Works were for a long series of years distinguished by the brand M. C. The plaintiff, while lessee of the works, used this mark as his predecessors had done, and subsequently removing his manufactory to other works, at a distance of forty miles, continued to use the same mark upon the plates manufactured at the latter place. For some years the Carmarthen Works remained unoccupied, but afterwards the defendants, styling themselves the M. C. Tin Plate Co. having taken a lease of the works, carried them on, and branded their boxes with the mark M. C. An injunction was obtained against the defendants, but on appeal it was dissolved by Lord Chancellor Cottenham, who said: "If by the successful manufacture of the persons who had carried on these works, the goods made there acquired an extraordinary value, it was an extraordinary value which attached to the premises on which the works were carried on; and, no doubt, when the owner came to dispose of the works again, the circumstance of the reputation which the manufacture of these works had acquired, would enable him to dispose of them on more advantageous terms. The real question is, whether the

plaintiffs have acquired a right to prevent other subsequent tenants of the works at Carmarthen from using a mark which it is clear was originally derived from those works; for although they were not called the M. C. works, yet the persons carrying on the manufacture of tin plates at them have always used the mark M. C." A question somewhat similar arose in the case of *Woodward v. Lazar*, 21 Cal. 448. The plaintiff had leased a lot of land in San Francisco, on which he erected a building, which he used as a hotel, under the name of the "What-Cheer House." Subsequently he purchased an adjoining lot, upon which he erected a larger building, and for a time occupied both buildings as the What-Cheer House, having, however, removed the sign to the larger building. Soon after, he surrendered the leased lot, and continued the business under the same name in the building last erected. The defendant having purchased the first-named lot and building, opened a hotel under the name of the "Original What-Cheer House," but was restrained by the court from the further use of that name. It would seem that where the value of a manufactured article is mainly owing to the superior quality of the raw material of which it is made; as, for instance, where ore dug at a particular place produces a superior quality of iron, and the product is known by a particular trademark, that that mark might become inseparably connected with the place, and not follow the original user to another place. This view may have influenced the decision of the court in the case of *Motley v. Downman*. In the case of *Newman v. Alvord*, 35 How. Pr. 108, the plaintiffs, living in Akron, N. Y., were makers of water lime, and their products were widely known in the market by the name of Akron water lime. The defendants, living in Onondaga, a distant town, and also makers of water lime, re-named their own quarry, calling it Onondaga Akron, and this name they placed on their goods. Plaintiffs applied for an injunc-

* 257 *bj* * it settle the legal questions which arise in it. We are unable to see any good reason for enlarging or qualifying, by any reference to place, the right which belongs to the manufacturer, to protect, by his trade-mark, the public against deception, and secure to himself the advantage he has gained by the greater excellence of his work.

We exhibit in our notes some cases showing that the law of trade-marks, or, at least, analogous principles, have been extended beyond manufactured articles (to which, at first and for a long time, they were confined), to such things as omnibuses, places of amusement, hotels, publishers of periodicals, and the like. The only good reason on which this extension can rest, would seem to be that it is only an extension of protection to the public against fraud. (*l*)

tion, claiming the word Akron as their trade-mark. In granting the relief prayed for, Judge *Marvin* said: "The name of the place where the cement is made indicates to the public far more than the place of manufacture. The article manufactured is taken from the earth. It is a bed or quarry of lime. There is no special art or skill in making it into cement. The process is the same everywhere, and yet the cement made from different beds differs greatly in quality and value. To the purchaser the name of the manufacturer is of no importance. He knows that the quality of the article is derived from the raw material; that is, the bed or quarry; and he understands that the article thus labelled by the defendants is the genuine article, which he has long known and used." The injunction was granted, and on appeal the decree was affirmed. 49 Barb. 588. See *Hall v. Barrows*, 9 Jur. (n. s.) 482; 10 Jur. (n. s.) 55. But such a trade-mark could not be appropriated as against another inhabitant of the same place. The Brooklyn White Lead Co. v. *Masury*, 25 Barb. 416. But see *Stokes v. Landraff*, 17 Barb. 608.

(*l*) In *Knott v. Morgan*, 2 Keene, 213, the plaintiffs were proprietors of a line of omnibuses, under the name of the London Conveyance Co. The defendants, owners of a rival line, adopted a similar name, and painted it upon their vehicles in the same colors, and in letters of the same form, and accompanied with other words and devices closely imitating those used by the plaintiff. An injunction restraining the defendants from such colorable imitation of the plaintiff's name was granted by Lord *Langdale*, and the ground

on which the relief was granted is thus stated: "It is not to be said that the plaintiffs have any exclusive right to the words 'Conveyance Company,' or 'London Conveyance Company,' but they have a right to call upon this court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business, by attracting custom on the false representation that carriages, really the defendants', belong to and are under the management of the plaintiffs. In *Marsh v. Billings*, 7 Cushing. 322, the plaintiffs had, by agreement with the proprietor of the Revere House, obtained the privilege of transporting passengers between that house and the railroad depots; and, as incident thereto, the exclusive right of using the words 'Revere House' as a badge on his coaches and on the caps of his drivers. A similar agreement had previously existed between the hotel proprietor and the defendant, but had been terminated by mutual consent. In an action on the case it was held, that the plaintiff might recover the damage to his business resulting from the defendant's continuing to use said badges after the termination of his agreement. The same was held in *Stone v. Carlan*, 13 Law Rep. 360, under precisely the same state of facts. In *Howard v. Henriquez*, 3 Sandf. S. C. 725, the plaintiffs were the proprietors of the Irving House, in New York. The defendant afterwards opened a public-house in the same city, called the Irving Hotel. It appeared that persons intending to go to the former place had been actually deceived by the similarity of name, and had

* The statute does not expressly determine this question. The first paragraph of the first section contains nothing which limits the trade-mark to goods or merchandise; but the third paragraph might seem to have this effect, because it requires a record of "the class of merchandise and the particular description of goods" to which the trade-mark is, or is to be, appropriated. * 257 *bk*

* SECTION IV.

* 257 *bl*

HOW THIS RIGHT MAY BE ACQUIRED.

A. *How originally acquired.*

Any one adopting and using a trade-mark may so make it his, and advertise it as his to the public. But neither this adoption and use, for any length of time, nor any advertisement or publicity would now avail, unless the statute requirements of record,

gone to the latter. An injunction was granted. See also *Woodward v. Lazar*, 21 Cal. 448; *McCardel v. Peck*, 28 How. Pr. 120. In *Hogg v. Kirby*, 8 Ves. 215, the defendant was enjoined from publishing a magazine as a continuation of one published by the plaintiff. In *Spottiswoode v. Clark*, 2 Ph. 154, 2 Sandf. Ch. 628, the name and devices upon the cover of the defendant's almanac resembled those used by the plaintiff; but the imitation was not considered by the court sufficiently close to warrant an injunction, without a previous trial at law of the legal title. See *Maxwell v. Hogg*, Eng. Eq. Rep. 2 Ch. Ap. 305. In *Matsell v. Flanagan*, 2 Abb. Pr. (n. s.) 459, the plaintiffs were publishers of the "National Police Gazette." The defendants were vendors of a publication of similar character called the "United States Police Gazette," evidently intended as an imitation of the former paper. An injunction was granted. So, in *Clement v. Maddicks*, 22 Law Rep. 428, 1 Giff. 98, the defendants were restrained from publishing a paper under the title of the "Penny Bell's Life," that being considered a fraudulent imitation of the plaintiff's paper, which was called "Bell's Life." The same principles are recognized in *Snowden v. Noah, Hopkins*, 347; *Bell v. Lock*, 8 Paige, 75; *Stevens v. De Conte*, 4 Abb. Pr. (n. s.) 47; *Dayton v. Wilkes*, 17 How. Pr. 510, in all which cases suits were brought by newspaper proprietors for fraudulent imitations of their publications, although injunctions were refused on the ground that the imitations complained of were not close enough to deceive the public. In *Christy v. Murphy*, 12 How. Pr. 77, the plaintiff had organized a band of musical performers, which he called "Christy's Minstrels," and whose performances had been attended with great success. During his temporary absence from the country the defendant and others, who had been employed by him as musicians, assumed the name of Christy's Minstrels. An injunction forbidding them to use that name was granted. In *Peterson v. Humphrey*, 4 Abb. Pr. 394, the defendant was restrained from using signs bearing the name of a partnership of which both plaintiff and defendant had formerly been members. In *Congress Spring Co. v. High Rock Spring Co.* 45 N. Y. 291, it was held that, "Congress Spring" and "Congress Water," being names of a well-known medicinal mineral water of high reputation, sufficiently indicated their objects, and the proprietors were entitled to protection in the use of these names as trade-marks.

&c., were complied with. In providing protection on these conditions, we should say it limited the protection to these conditions.

It may still be true, as it has been, that if any name, whether in part a personal or not, has become by long use recognized as the name of a certain article, without reference to its manufacture or ownership, no one can appropriate this name, and acquire

an exclusive right to it as his own trade-mark. (*m*)¹

* 257 *bm* Some question may arise as to the degree of * novelty requisite to the validity of the trade-mark. It may be law, that if a name had been long and commonly used to designate certain articles, no one could now claim an exclusive right to this name, by making it his trade-mark. But the requirement of absolute novelty in the name or mark has not been pushed, and will not be, so far as the needed novelty of a patented invention. In an American case, in which the general question is considered, it

(*m*) *Canham v. Jones*, 2 Ves. & B. 217. The plaintiff had purchased the exclusive right to manufacture a medicine known as "Velno's Vegetable Syrup." The defendant sold a similar mixture under the same name. Vice-Chancellor *Plumer held*, that as there was no patent the plaintiff had no exclusive right to prepare and sell the mixture, and dismissed the bill. But this reason might not be held to apply to a trade-mark recovered under our statute. In *Singleton v. Bolton*, the plaintiff claimed an exclusive right to manufacture "Dr. Johnson's Yellow Ointment." In both these cases it was said that the defendant had a right to use the name of the original inventor, the court evidently considering that name as having become by use an essential part of the name of the mixture. See *Perry v. Truefit*, 6 Beav. 66. In the peculiar case of *Thomson v. Winchester*, 19 Pick. 214, it was held, that the plaintiff's name had become by use so far identified with the name of the medicine invented and made by him, that any one having a right to make the medicine might call it by the plaintiff's name. C. J. *Shaw* said that, "without obtaining a patent, the plaintiff had no exclusive right or privilege to compound or vend the medicine called 'Thomsonian,' although he was the original inventor, and that he had no more right than the defendant to make and vend these medicines or call them Thomsonian, if this term had acquired a generic

meaning, descriptive of a general kind, quality, or class of medicines, and if they were not sold as and for medicines, made and prepared by the plaintiff." Where one has acquired a right in a certain sign as his trade-mark another cannot adopt it, even though it be the family crest of the latter. *Standish v. Whitwell*, 14 W. R. 512. The following cases illustrate the converse of the rule stated in the text. In *Morrison v. Salmon*, 2 Man. & Gr. 385, the plaintiffs made and sold a certain preparation under the name of "Morrison's Universal Medicine." The defendant applied the same name to a mixture sold by himself. It was decided that the name had not become generic, and that, though the defendant might sell the same mixture, he could not do so under the plaintiff's name. In *Millington v. Fox*, 3 My. & Cr. 312, the defendant had stamped the words "Millington & Crawley Millington" upon steel manufactured by him, supposing them to be used in the market merely as signs of quality; but as it appeared that the name was that of the plaintiff, and indicated that he was the manufacturer of the goods on which it was stamped, an injunction was decreed. In the case of *Day v. Binning*, 1 Cooper's Ch. 489, and *Croft v. Day*, 7 Beav. 84, it was decided that the name of the firm of *Day & Martin*, the noted blacking manufacturers, had not become so incorporated with the name of that article made by them as to become public property.

¹ A person cannot have a right in his own name as a trade-mark, as against a person of the same name, unless the latter's form of stamp or label is so similar as to represent that his goods are of the former's manufacture. *Gilman v. Hunnewell*, 122 Mass. 139.

is said, "It may be that one would have a right to use it (a name constituting a trade-mark) merely by translating it." (n)

There is one important principle which has been fully investigated and firmly established by cases in England and in this country. It is, that no man will be protected in the use of his trade-mark—certainly he should not be—if it be * not an honest mark; nor will he be, if he does not * 257 *bn* make an honest use of it. (o) Sections 82 and 84 of the statute are in full accordance with this rule.

(n) *Fetridge v. Merchant*, 4 Abb. Pr. 157. It seems to be now well settled that a familiar name may be appropriated as a trade-mark provided it has never before been used to designate the article to which it is now applied. In *Messerole v. Tynberg*, 4 Abb. Pr. (n. s.) 410, Judge Brady says: "Due consideration of the whole case results in this proposition. If the plaintiffs can be pronounced the first to use the word 'Bismark,' although a popular term, and one in general use as a designation of a particular style of paper collars made by them, and to have acquired, by its manufacture and sale under that name, a valuable interest in such designation, the defendant must be estopped from using it for the same purpose. The plaintiffs had the right to appropriate such name in common with others for a new purpose; and having done so, are entitled to avail themselves of all the advantages of their superior skill and industry. There is no reason for making any distinction between a common word or term used for an original or new purpose which has accomplished its object, and a new design adopted by a manufacturer." The same doctrine had been previously held in the important case of *Newman v. Alvord*, 49 Barb. 588, where the name Akron applied to cement made by the plaintiff was protected as a trade-mark; and in *Barrows v. Knight*, 6 R. I. 434, in which the name "Roger Williams," used to designate the plaintiff's cloth, was decided to be a valid trademark. The court in this case say: "We are not aware of any legal restriction upon a manufacturer's choice of a name for his trade-mark, any more than of his choice of a symbol; so that the name be so far peculiar, as applied to manufactured goods, as to be capable of distinguishing, when known in the market, one manufacturer's goods of a certain description from those of another. Roger Williams, though the name of a famous person long since dead, is, as applied to cloth, a fancy name." See *Howard v.*

Henriques, 3 Sandf. S. C. 725; *Knott v. Morgan*, 2 Keene, 213; *McAndrew v. Bassett*, 10 Jur. (n. s.) 492, 550; *Braham v. Bustard*, 1 Hem. & M. 447; *Maxwell v. Hogg*, Eng. Eq. Rep. 2 Ch. Ap. 305.

(o) *Piddington v. How*, 8 Sim. 477; *Perry v. Truefitt*, 6 Beav. 66; *Flavel v. Harrison*, 19 Eng. L. & Eq. 15; *The Leather Cloth Co. v. The American Leather Cloth Co.* 10 Jur. (n. s.) 81; *Partridge v. Menck*, 1 How. App. Cas., 547; *Fetridge v. Wells*, 4 Abb. Pr. 144; *Samuel v. Berger*, 4 Abb. Pr. 88; *Hobbs v. Francais*, 19 How. Pr. 571; *Smith v. Woodruff*, 48 Barb. 438; *Curtis v. Bryan*, 36 How. Pr. 33; *Fowle v. Spear*, 1 Law Rep. (n. s.) 130. In all these cases it is emphatically denied that any relief will be given where the plaintiff has been guilty of fraud, in describing the nature, origin, or composition of his goods, and this may be considered as the settled law upon the subject, though a few cases hold a different doctrine." In *Partridge v. Menck*, 1 How. App. Cas. 547, the court say: "The privilege of deceiving the public, even for their own benefit, is not a legitimate subject of commerce; and, at all events, if the maxim that he who asks equity must come with pure hands, is not altogether obsolete, the complainant has no right to invoke the extraordinary jurisdiction of a court of chancery in favor of such a monopoly." And in *Fetridge v. Wells*, 4 Abb. Pr. 144, it is said: "Those who come into a court of equity, seeking equity, must come with pure hands and a pure conscience. If they claim relief against the fraud of others, they must be free themselves from the imputation. If the sales made by the plaintiff are effected, or sought to be, by misrepresentation or falsehood, they cannot be listened to when they complain that by the fraudulent rivalry of others their own fraudulent profits are diminished. An exclusive privilege for deceiving the public is assuredly not one that a court of equity can be required to aid or sanction; to do so, would be to forfeit its name and character." On the other hand, in *Fetridge v. Merchant*, 4

* 255 *bo* * Sometimes a man has falsely inserted in his trade-mark the word "patent." Both in England and in this country, this is an offence to which penalties are annexed. But without any reference to this penalty, all protection has been withheld from one guilty of this fraud, and this even where the defendant, by using the same identical mark, was guilty of the same fraud. (*p*)

We cannot but hope that adjudication on the two sections above cited, will give the widest extent to the requirement of honesty. We would have no trade-mark protected, if the goods to which it was attached were less in quantity than they were declared to be, or different in material, or otherwise falsely and fraudulently

Abb. Pr. 156, Judge Hoffman says: "It is constantly insisted, and the position is maintained by some judges, that when the article in question is innocuous, or in some degree useful, no absurd panegyric or extravagant price is a reason for denying the interference. On the other side, it is well settled that when the deception consists in palming off upon the public articles of the party's own manufacture or composition for those of another who has obtained celebrity or notoriety, the court will remain inactive. I have always considered that upon this branch of the subject the conduct of the defendant has a material influence. Has he deliberately, without any previous connection with the particular business, but simply to break in upon the trade and profit by the notoriety obtained by another, adopted his emblems and appellations? If he has, then, in my view, the question should be judged of solely as between the intermediate parties, and the public should be left to its own guardianship." The case was, however, decided upon other grounds. A distinction between a fraudulent trade-mark and a fraudulent advertisement of the article to which the trade-mark is affixed, is made in *Curtis v. Bryan*, 36 How. Pr. 33: "There is no doubt of the principle that if a person in and by his trade-mark makes representations which deceive the public, he cannot appeal to the equitable interposition of courts of equity in his behalf; but I cannot understand how the right of a plaintiff to be protected in a trade-mark adopted by him, if it contains in itself no false or fraudulent representation is to be affected by advertisements of his article in the newspapers. The trade-mark is one thing, the notices or commendations of his medicines, when the inventor offers them for sale, is quite another. If the trade-mark contained a false statement,

and the advertisements of the plaintiff tended to establish it, they might be used for that purpose; but except as it bore on that question it would not answer to determine the right of a plaintiff to protection in his trade-mark by the standard of credit allowed to an advertisement of the qualities of the article." The same distinction is noticed in *Comstock v. Moore*, 18 How. Pr. 421, though in this case the court favor the doctrine that an innocent *humbug* is not beyond the protection of the court, and that the public must look out for themselves. See *Holloway v. Holloway*, 13 Beav. 209. In *Stewart v. Smithson*, 1 Hilton, 119, it was held no defence that the trade-mark claimed consisted of the name of a fictitious firm, and this was afterwards expressly held in *Dale v. Smithson*, 12 Abb. Pr. 237, the court being of opinion that the name was used only for the purpose of identification, like an arbitrary sign, and that it worked no fraud upon the public.

(*p*) *Flavel v. Harrison*, 19 Eng. L. & Eq. 15; *The Leather Cloth Co. v. The American Leather Cloth Co.* 10 Jur. (N. S.) 81. But in *Sykes v. Sykes*, where the plaintiff had obtained a patent for the manufacture of shot-belts which afterwards proved to be invalid from a defect in the specification, it was held, that the continued use of the word "patent" in connection with the trade-mark, did not preclude the plaintiff from relief. So in *Edleston v. Vick*, 23 Eng. L. & Eq. 51, where the patent had expired by limitation. In *Stewart v. Smithson*, 1 Hilton, 119, it was set up among other grounds of defence that the fraudulent use of the word "patent" invalidated the plaintiff's trade-mark, but the objections were all overruled, though on this precise point nothing is said in the opinion of the court.

described. Such a rule could not but have a salutary effect in checking one method of deception which is extensively practised.

B. *Of the Acquisition of the Right by Inheritance.*

As the statute provides that a trade-mark, when duly recorded, shall "remain in force for thirty years," and then be extended on "application" for thirty years more, it must be regarded as contemplating its continuance beyond the life of its original proprietor. But it is wholly silent as to who shall succeed the original proprietor. A man who possesses this right may have a son, bearing his name, who, in his father's life or at his death, makes the same goods, of the same quality, and affixes to them the same mark.¹ If so, * it would be safer for him to record the trade-mark anew, as his own. But his exclusive right to use it might undoubtedly be respected; this would be a very different thing from his procuring this right by inheritance. For, if the right were inherited, it would go to all the heirs, or next of kin; for we have used the word inheritance, not in its technical sense, in which it attaches only to real estate, but in its more popular sense. This right would go, then, to all the children alike, and be shared among them without reference to the question whether they made the article or not; and this would be unreasonable and indeed impossible. We apprehend that supplementary legislation must provide for this. We should make the same remark in reference to the subject of testamentary disposition, unless in connection with a bequest of property or means of manufacture and a continued use of those means by the devisee. (q) It may be that the

(q) We know of no case in which an express decision has been given upon either of the questions discussed in this section. In *Singleton v. Bolton*, 3 Doug. 293, the plaintiff claimed by inheritance from his father the exclusive right to make a certain medicine, and, in connection therewith, to use a certain name as a

¹ M., having a recipe (not discovered or invented by himself, or protected by a patent) for a liniment, gave it to members of his family, and permitted each to make and sell it with a label attached, furnished by himself, in words, "Old Dr. M.'s Celebrated Liniment," and other descriptive words, a certain vignette, and with the address of maker at the bottom, and each member, including M. himself, confined his sales to particular territory. After M.'s death, his widow continued to make and sell on M.'s territory, attaching the same label, and then sold her material and outfit to one of M.'s sons. Held, that such son had no right as against the other children, their assigns, or the public generally, to make the liniment, and use the label or M.'s name as descriptive of the article. *Marshall v. Pinkham*, 52 Wis. 572.

long period of validity given to trade-marks by the statute, will lead the courts to treat the right as in some way inheritable and subject to testamentary disposition.

* 257 *bq* C. *Of the Acquisition of this Right by Assignment.*

If the statute has, as we believe, made the exclusive right to use as trade-mark a property, it would have, by implication, given to the proprietor a right to transfer it. Even before the statute, courts have regarded the right in a trade-mark as a valuable right, and considered that a certain interest attached to it. But the statute goes farther than this implication. By the 81st section, the Commissioner of Patents is authorized to make rules and regulations for such transfer. Although the 78th section, concerning the extension of the right, does not give the commissioners similar authority in regard to inheritance or descent, or the persons who may profit by the extension, it may be hoped that he will find his general authority sufficient to embrace this subject also. Until such rules are made, we are much in the dark as to transfer of the right.

It may be said, however, that the right to a trade-mark may not be purely personal; it may be connected in some way with machinery and capital, and the sagacious employment of skilled labor, and with all that is understood by the now common word,

trade-mark, and in *Canham v. Jones*, 2 V. & B. 218, a similar right was claimed under a will; but in each case it was held, that the plaintiff had no exclusive right to manufacture, and that consequently he had no exclusive right to use the name which appears to have become by use the distinctive name of the article, and therefore incapable of exclusive appropriation as a trade-mark. In *Croft v. Day*, 7 Beav. 84, an injunction was granted in favor of executors who were carrying on the business for the benefit of their testator's estate, and using his trade-mark in connection therewith. But where the business and the means of manufacturing the article to which the mark is applied descend to an heir, or pass by will to a devisee, it would seem, in conformity with recent cases, that the right to use the trade-mark might in some cases pass also; and this view is confirmed by the following *dictum* of Lord Cranworth, in *The Leather Cloth Co. v. The American Cloth Co.* 11 H. L. C. 523,

11 Jur. (n. s.) 513. He says: "I further think that the right to a trade-mark may, in general, treating it as property, or as an accessory of property, be sold or transferred upon a sale and transfer of the manufactory of the goods in which the mark has been used to be affixed, and may lawfully be used by the purchaser. When he dies, those who succeed him (grandchildren or married daughters, for instance), though they may not bear the same name, yet ordinarily continue to use the original name as a trade-mark; and they would be protected against any infringement of the exclusive right to that mark. They would be protected, because according to the usages of trade they would be understood as meaning no more by the use of their grandfather's or father's name, than that they were carrying on the manufacture formerly carried on by him." See *Hine v. Lart*, 10 Jur. 106. Also, note (y), *infra*.

"the Plant." All this may be sold. And not only may the seller agree that the buyer may use the recognized trade-mark, but that he will not use it himself; and for a breach of this promise he would be liable in damages. (r)

But has the buyer bought this right as against the world? To some extent he has. For the mark indicated that goods of a certain make had a certain peculiar value; and the mark was of no value excepting so far as this indication is true, or is believed to be true. The buyer has bought the means by which they were made, and in calling himself the successor of the former maker, he undertakes to make them in the same way or with the same excellence. The public, believing him, continue to prefer * the goods bearing the old trade-mark; and they have a * 257 br right to be protected against a fraud which would make them buy against their will goods of another make. And a protection of the public against this fraud is a protection of this new user of this old mark. Still, it might be necessary, and would be safer for him, to record the trade-mark anew as his property.

Perhaps a consideration of all the authorities would lead to the conclusion that there are two classes into which trade-marks may be divided for the purpose of determining whether the right they give can be transferred. The first, where the trade-mark declares that the article is made by a particular person or firm; and this cannot be transferred. The second, where of itself the mark is arbitrary or meaningless, and is used only to indicate that the goods are made in a particular manner, or possess a particular excellence; this is capable of transfer. (s) One leading case

(r) *Edleston v. Vick*, 23 Eng. L. & Eq. 51; *Walton v. Crowley*, 3 Blatchf. 440; *Hall v. Barrows*, 9 Jur. (n. s.) 482, 10 Jur. (n. s.) 55; *The Leather Cloth Co. v. The American Leather Cloth Co.* 1 Hem. & M. 271, 10 Jur. (n. s.) 81, 11 H. L. C. 523; *Ainsworth v. Walmley*, Eng. Eq. Rep. 1 Eq. Cas. 518.

(s) In *Hall v. Barrows*, 9 Jur. (n. s.) 482, the firm of Barrows & Hall, iron manufacturers, had used as their trade-mark, which they stamped on all iron manufactured by them, the letters B. B. H. surmounted by a crown, these letters being the initials of the three original members of the firm. On the death of Hall, Barrows, as the surviving partner, claimed the exclusive right to use this trade-mark, and this suit was brought by Hall's representatives to compel a sale of the partnership property, including the

good-will and the trade-mark. Sir J. Romilly, Master of the Rolls, held, that trade-marks are of two descriptions; denoting either the person by whom the article is made, or the place at which it is made; that the former class are not assignable, but that the latter may be. The mark in question he considered as belonging to the former class. On appeal to the Court of Chancery, this decree was reversed. 10 Jur. (n. s.) 55. Referring to the distinction made by the Master of the Rolls, Lord Chancellor Cottenham, said: "It must be borne in mind that a name, although originally the name of the first maker, may in time become a mere trade-mark or sign of quality, and cease to denote or to be current as indicating that any particular person is the maker. In many cases, a name once affixed to a manufactured article continues to be used

would lead to the conclusion, that where a trade-mark was originally used to indicate the first of these suppositions, that * 257 *bs* the article was the * manufacture of a particular person or firm, but by lapse of time, by use, or perhaps by the death of the person or the dissolution of the firm first indicated, has lost this significance, and is now applied only to the manner of making or the excellence of the article, the case would fall within the second of the above-mentioned classes, and the right would be transferable. (*t*)

There are cases illustrating the question how far the sale of a "good-will" includes and conveys an exclusive right to use a certain mark. Between this "good-will," now generally recognized as a valuable interest, and the right to use a trade-mark, there is a considerable analogy, although they certainly are not the same, and the "good-will" has no statute protection. It may be held, however, as a general principle, that the "good-will," as a larger thing, includes the right to use a trade-mark as a part of it; and that the sale of the good-will would transfer the right to use the trade-mark, so far as the seller had the power to transfer it. (*u*)¹

for generations after the death of the individual who first affixed it. In such cases the name is accepted in the market either as a brand of quality, or it becomes the denomination of the commodity itself, and is no longer a representation that the article is the manufacture of any particular person." In the present case his Lordship considers "that these initial letters surmounted by a crown have become and are a trade-mark properly so called; i. e., a brand which has reputation and currency in the market as a well-known sign of quality, and that as such the trade-mark is a valuable property of the partnership, and may be sold with the works." Substantially the same distinction as to the assignability of trade-marks was made in *The American Leather Cloth Co. v. The American Leather Cloth Co.*, 1 Hem. & M. 271, 10 Jur. (n. s.) 81, 11 Jur. (n. s.) 513, 11 H. L. C. 523. See the opinion of Lord Cranworth in the House of Lords, cited in note (*u*), *supra*. See also *Bury v. Bradford*, 9 Jur. (n. s.) 956.

(*t*) *Hall v. Barrows*, 10 Jur. (n. s.) 55. See the previous note.

(*u*) In *Churton v. Douglas*, 1 H. R. V. Johnson, 176, the question arose in this form: whether on the sale of the good-

will of a business the exclusive right to use the name of the original firm passed to the assignee. The defendant had been engaged in business as a stuff merchant with others, under the firm name of John Douglas & Co. Subsequently the firm was dissolved, and the business, including the good-will, sold to the plaintiffs, who carried on the business under the name of Churton, Bankart, & Hurst, late John Douglas & Co. Douglas afterwards recommenced business in the same town, forming a new firm under the same name as before. On a bill to restrain the defendant from the use of this firm name, it was held, to be conclusively settled that the sale of the good-will of the business, without more, does not imply any contract on the part of the vendor not to set up again in a similar business himself; and that he might even do this at the very next door to his former place of business, but that he has no right to represent himself as carrying on the same business as before, or a continuation of the same business; that the name of the firm was an important part of the good-will, and that by the sale of the good-will he was estopped from the further use of it. The court say: "The name of a firm is an im-

¹ A trade-mark applied to an article manufactured by a partnership is, in the absence of agreement, partnership property. *Filkins v. Blackman*, 18 Blatchford, 440. So of a patent. *Kenny's Patent Button-Holeing Co. v. Somervell*, 38 L. T. (n. s.) 878.

* Other questions have arisen as to the assignment or transfer, by the parties or by force of law, of the right to use a trade-mark, where there has been a dissolution of partnership, and in cases where the owner of a trade-mark had become bankrupt. The authorities we cite and quote from in our notes, will show how the courts have dealt with these questions. (v) But here, as before, we must wait for the rules which will regulate this subject.

portant part of the good-will of the business carried on by the firm. A person says: I have always bought good articles at such a house of business; I know it by that name, and I send to the house of business identified by that name for that purpose. There are cases every day in this court with regard to the use of the name of a particular firm, connected generally, no doubt, with the question of trade-mark. But the question of trade-mark is in fact the same question. The firm stamps its name on its articles. It stamps the name of the firm which is carrying on the business, on each article, as a proof that they emanate from that firm, and it becomes the known firm to which applications are made, just as much as when a man enters a shop in a particular locality. That the name is an important part of the good-will of a business is obvious when we consider, that there are at this moment large banking firms and brewing firms and others in this metropolis which do not contain a single member of the individual name exposed in the firm." So *Dayton v. Wilkes*, 17 How. Pr. 510. Similar views were expressed in *Rogers v. Taintor*, 97 Mass. 291, though the final decision rested on other grounds. The case of *Howe v. Searing*, 10 Abb. Pr. 264, seems to maintain a different doctrine. The plaintiff had sold his business establishment known as Howe's Bakery, together with the good-will of the business, to the defendant, who continued for some time to carry on the business under the same name. Afterwards by an arrangement with the defendant he resumed business in the same neighborhood, but with the express agreement that he should "not in any manner interfere with the business carried on at No. 432 Broadway, known as Howe's Bakery." After the lapse of some time, however, he brought this suit to restrain the defendant from continuing to designate his establishment as Howe's Bakery. After an examination of the authorities, the court say that, "were it not for the case of *Churton v. Douglas* above cited, the defendant's case would be left without any direct authority, or even *dictum*, in its favor;" but they finally rest

their decision for the plaintiff upon a State statute. A decided dissenting opinion was given by Justice *Moncrief*. It is to be observed, however, that in *Churton v. Douglas* the assignees advertised themselves only as the successors of the original firm, while in *Howe v. Searing* the assignor's name was used without any such limitation.

(v) On the dissolution of a firm by bankruptcy, or by the death of a partner, the question has arisen, whether the good-will of the late firm survives to the partners continuing the business, or whether it forms a part of the partnership assets in which the assignees or the estate of the deceased partner has an interest. As the possessor of the good-will is entitled to represent himself as the successor of the late firm, and to that extent at least to use its name as a trade-mark, the question is noticed in this connection. The weight of authority both in England and America seems to be in favor of considering the good-will a part of the partnership assets. This is so held in *Crawshay v. Collins*, 15 Ves. 227; *Crutwell v. Lye*, 17 Ves. 335; *McDonald v. Richardson*, 1 Giff. 81; *Hitchcock v. Coker*, 1 Ad. & El. 438, 446; *Cook v. Collingridge*, cited at length in *Collyer on Partnership*, § 322, n., *Dougherty v. Van Nostrand*, 1 Hoff. Ch. 68; *Williams v. Wilson*, 4 Sandf. Ch. 379; *Howe v. Searing*, 10 Abb. Pr. 264. The contrary was held in *Hammond v. Douglas*, 5 Ves. 539; *Lewis v. Langdon*, 7 Sim. 424. If the partnership assets are divided between the partners, each is at liberty to use the mark as before. *Banks v. Gibson*, 11 Jur. (n. s.) 680. In *Edleston v. Vick*, 23 Eng. L. & Eq. 51, the plaintiff had purchased from the assignees of a bankrupt firm a certain patent for the manufacture of pins, and also the right of carrying on their trade, and of using a variety of plates, engravings, and drawings, relating to the trade and trade-marks, and the exclusive title of the plaintiff to the use of these trade-marks was sustained. In *Croft v. Day*, 7 Beav. 84, the business was carried on by the executors of the last surviving partner, for the benefit of his estate, and their right to

* SECTION V.

OF THE INFRINGEMENT OF A RIGHT TO A TRADE-MARK.

The 79th section provides, that any person or corporation who "shall reproduce, counterfeit, copy, or imitate" a recorded trade-mark shall be liable to an action for damages, and the party aggrieved shall also have his remedy in equity. The same section prohibits the commissioner from receiving and recording a mark "which so nearly resembles" a recorded trade-mark, "as to be likely to deceive the public."

Any forgery of this mark, or any imitation of it, which would naturally deceive the community into the belief that they were buying what they were not buying, would be a violation of the trade-mark thus forged or imitated. (*x*)¹

use the name of the original firm as a trade-mark was fully recognized. In *Hine v. Lart*, 10 Jur. 106, the plaintiffs claimed as their trade-mark, to distinguish black stockings of their manufacture, the word "Ethiopian," printed in a peculiar manner. It appeared that the mark had formerly been used by a firm of which they were the surviving partners, and whose business they were continuing. Vice-Chancellor *Shadwell* said that it was possible that the representatives of some of the deceased partners might have an interest in the trade-mark, as he considered that the right to use a trade-mark was in the nature of a personal chattel, but that, at all events, the plaintiffs had sufficient right to bring forward this case.

(*x*) *Amoskeag Co. v. Spear*, 2 Sandf. Ch. 607; *Rogers v. Nowill*, 5 Man. Gr. & Sc. 109; *Coffeen v. Brunton*, 4 McLean,

516; *Holloway v. Holloway*, 13 Beav. 213; *Matsell v. Flanagan*, 2 Abb. Pr. (n. s.) 407; *Williams v. Spence*, 25 How. Pr. 366; *Franks v. Weaver*, 10 Beav. 297; *Seizo v. Provezende*, Eng. Eq. Rep. 1 Ch. Ap. 192; *McCartney v. Gamhart*, 45 Mo. 593; *Palmer v. Harris*, 60 Pa. St. 156; *Filley v. Fassett*, 44 Mo. 168; *Lockwood v. Bostwick*, 2 Daly, 521; *Boardman v. Meriden Britannia Co.* 35 Conn. 402; *Rowley v. Houghton*, 2 Brews. 303; *Cotton v. Thomas*, 2 Brews. 308. But it is not sufficient that the public may mistake the goods of one manufacturer for those of another, if the mistake arises solely from the resemblance of names or marks which both have an equal right to use. "A trade-mark," says Judge *Duer*, "is frequently designed to convey information as to several distinct and independent facts, and therefore contains separate

¹ A court of equity will not restrain a defendant from the use of a label, on the ground that it infringes the plaintiff's trade-mark, unless the form of the printed words, the words themselves, and the figures, lines, and devices, are so similar that any person, with such reasonable care and observation as the public generally are capable of using and may be expected to exercise, would mistake the one for the other. *Gilman v. Hunnewell*, 122 Mass. 139. And where the similarity is so great as to deceive cautious purchasers, it is not necessary to show that any one has actually been misled. *Johnston v. Orr Ewing*, 7 App. Cas. 219. Evidence of one sale of an imitation will justify an injunction, though the defendant at the date of the application has none of the article in his store. *Low v. Hart*, 90 N. Y. 457. Where, however, the defendant had agreed not to use in a particular place a former trade-mark, under which he had carried on business, it was held, in an action to restrain him from so using, that it was no defence that its use by the plaintiff would mislead the public. *Grow v. Seligman*, 47 Mich. 607.

It is seldom that this violation is effected by a complete forgery, or by a perfect imitation. But if the imitation be such in degree and character,—perhaps by a close imitation of the true trade-mark in its most salient and obvious features, and with a difference in its subordinate and less noticeable characteristics,—it is not the less a violation; and its character would indicate the fraudulent design of the user. Hence it is certain that the imitation may be imperfect * and colorable only, and * 257 *bv* yet be a violation of a right. (*y*) And in one case it was so held, where the imitation consisted in the use of one word only, the remainder of the original trade-mark being quite different from that of the imitation which was restrained by injunction. (*z*)

words, marks, or signs, applicable to each; thus indicating not only the origin or ownership of the article or fabric to which it is attached, but its appropriate name, the mode or process of its manufacture, and its peculiar or relative quality. It is certain, however, that the use, by another manufacturer, of the words or signs indicative only of these circumstances, may yet have the effect of misleading the public as to the true origin of the goods; but it would be unreasonable to suppose that he is, therefore, precluded from using them as an expression of the facts which they really signify, and which may be just as true in relation to his goods as to those of another. Purchasers may be deceived; they may buy the goods of one person as those of another, but they are not deceived by a false representation; they are deceived because certain words or signs suggest a meaning to their minds which they do not in reality bear, and were not designed to convey." Amoskeag Co. v. Spear, 2 Sandf. S. C. 599; Stokes v. Landgraff, 17 Barb. 608; Gillott v. Esterbrook, 47 Barb. 464; 17 Eng. L. & Eq. 257. It has been held, that one who has received a prize-medal for the excellence of his wares, cannot prevent another from placing the words "prize-medal" upon his goods, though the latter has obtained no such medal. Batty v. Hill, 1 Hem. & M. 264.

(*y*) Clark v. Clark, 25 Barb. 76; Williams v. Johnson, 2 Bosw. 1; Amoskeag Co. v. Spear, 2 Sandf. Ch. 599; Davis v. Kendall, 2 R. I. 569; Barrows v. Knight, 6 R. I. 434; Fetridge v. Wells, 4 Abb. Pr. 144; Gillott v. Esterbrook, 47 Barb. 455; Newman v. Alvord, 35 How. Pr. 108, 49 Barb. 588; Seizo v. Provezende, Eng. Eq. Rep. 1 Ch. Ap. 192; Franks v. Weaver, 10 Beav. 297; Walton v. Crowley, 3 Blatchf. 440; Taylor v. Taylor, 23 Law

Jour. Ch. (n. s.) 255; Stephens v. Peel, 16 Law Times Rep. (n. s.) 145; Purser v. Brain, 17 Law Jour. Ch. 141. In the Brooklyn White Lead Co. v. Masury, 26 Barb. 416, the plaintiffs distinguished the lead of their manufacture by a label bearing their corporate name. The defendant had been in the habit of marking his lead, "Brooklyn White Lead," to which no objection was made. Afterwards he placed on his labels the words "Brooklyn White Lead and Zinc Co.," and this use of the word "Co.," the defendant not being a corporation, was held a fraudulent imitation of the plaintiff's mark. In most of the cases the imitations of the trade-mark complained of have been accompanied also by the use of similar wrappers, and by close imitations of the style of printing labels, putting up goods, &c. In Coffeen v. Brunton, 4 McLean, 516, the names of the medicines sold by the plaintiff and the defendant, respectively, were entirely dissimilar, and the injunction granted was based entirely upon the general similarity of the labels and wrappers, and on the representations contained in them. In Woollam v. Ratcliff, 1 Hem. & M. 259, the injury complained of was a fraudulent imitation of the plaintiff's peculiar manner of putting up silk in bundles. The court said: "It is not necessary that any specific trade-mark should be infringed; it is sufficient if a fraudulent intention of palming off the defendant's goods as the plaintiff's exist, but the imitation should be calculated to deceive." See also Boardman v. Meriden Britannia Co. 35 Conn. 402.

(*z*) Burnett v. Phalon, 9 Bosw. 192, affirmed in 5 Abb. Pr. (n. s.) 212. The plaintiff made a preparation for the hair, which he called Cocaine, and publicly advertised this as his trade-mark. The defendant commenced the manufacture of

Two questions, however, may arise and have arisen under this. A man, believing that his goods have all the excellence of certain other goods of high esteem in the market, may wish to * 257 bw say that his goods are as excellent as those of the * other maker. He may lawfully say this; and if this is all he says, even if he says what is not true, his conduct is no such violation of another's right as to be protected by the law of trade-marks. He may desire to say this impressively, and to draw attention to the comparison, and for that purpose use enough of the other's mark, or of an imitation, to show what it is he claims to equal or surpass. And if he so says this, and with such addition of his own name or other designation as shall indicate that he himself and not the other makes the goods he offers, he violates no right. (a) The essential question always is, Does he honestly exhibit himself as the maker of the goods? or does he only pretend to do this, and do it in such a way as to mislead the public into the mistake of supposing the man makes them who owns and uses the trade-mark lawfully, but does not in fact make these goods? It is precisely the attempt to shelter the violator in this way, and under this pretence, which gives rise to most of the colorable imitations of trade-marks. And there is no doubt that a man may, in this way, make a fraudulent use of his own name. (b) * No certain line can

a similar article under the name of Coccine, and prefixed his own name as manufacturer. The remaining portions of the respective labels were entirely dissimilar. See *ante*, p. *257 bc, note (ae). So in *Gillott v. Esterbrook*, 47 Barb. 455, affirmed in 48 N. Y. 374; the number 303 was the only part of the plaintiff's trade-mark, which the defendant placed upon the pens made by him, and the use of this was restrained by an injunction.

(a) *Canham v. Jones*, 2 Ves. & B. 218; *The Merrimac Man. Co. v. Garner*, 2 Abb. Pr. 318; *Flavel v. Harrison*, 19 Eng. L. & Eq. 15. See also *Burgess v. Burgess*, 17 Eng. L. & Eq. 257; *Wolfe v. Gouland*, 18 How. Pr. 64; *Perry v. Truefitt*, 6 Beav. 66. But where the defendant's label represented his goods as equal to those of the plaintiff, but the words "equal to" were printed in very small letters, an injunction was granted. *Day v. Binning*, 1 Cooper's Ch. Rep. 489. So *Glenny v. Smith*, 11 Jur. (n. s.) 964. So where the terms of the comparison were such as to lead to the inference that the defendant's goods were prepared by the plaintiff.

Franks v. Weaver, 10 Beav. 297. Where there is a fraudulent imitation of the plaintiff's trade-mark, it is no defence that the defendant's goods are equal in quality to those made by the plaintiff. *Biofield v. Payne*, 4 B. & Ad. 410; *Taylor v. Carpenter*, 2 Sandf. Ch. 603; 2 Wood. & M. i; *Partridge v. Menck*, 2 Sandf. Ch. 622.

(b) In *Croft v. Day*, 7 Beav. 84, Lord *Langdale* says: "The defendant has a right to carry on the business of a blacking manufacturer honestly and fairly; he has a right to the use of his own name. I will not do anything to debar him from the use of that, or any other name, calculated to benefit himself in an honest way; but I must prevent him from using it in such a way as to deceive and defraud the public, and obtain for himself, at the expense of the plaintiffs, an undue and improper advantage." So *Sykes v. Sykes*, 3 B. & C. 541; *Holloway v. Holloway*, 13 Beav. 213; *Clark v. Clark*, 25 Barb. 76; *Howe v. Howe Man. Co.* 50 Barb. 236. On the other hand, where both parties bear the same name, but no fraudulent

be drawn here. It is a question of fact rather than of law. But this question always is, Is the mark or designation complained of, such as would naturally mislead a customer by the false and simulated appearance of the article he buys?

If it would cause this deception, another question arises: Must this deception be intentional, and therefore fraudulent? It is not difficult to suppose that one who makes certain goods may affix to them a mark which is already understood as indicating that they have peculiar merit, without intending to deceive any one as to their manufacture. The authorities, and we think the better reason, would lead to the conclusion, that if this be a deception in fact, though not in intent, the law should protect the public against it. (c)

We apprehend, however, that a distinction would be drawn, which, so far as the authorities go, would seem to be warranted

representations are made, even though a loss result to one of the parties from this similarity of name, he is without a remedy. It is a case of *damnum absque iuria*. *Burgess v. Burgess*, 17 Eng. L. & Eq. 257; *Faber v. Faber*, 3 Abb. Pr. (n. s.) 115; s. c. 49 Barb. 357. But one cannot use another's name as a trademark under cover of having a workman of the same name in his employ, or by virtue of an arrangement with a third party bearing the same name, but having no interest in the business. *Rodgers v. Nowill*, 5 Man. Gr. & Sc. 109, 6 Hare, 325; *Croft v. Day*, 7 Beav. 84; *Southorn v. Reynolds*, 12 L. T. Rep. (n. s.) 75. In *Ames v. King*, 2 Gray, 379, the plaintiff was a manufacturer of shovels, and marked his goods with his own name, O. Ames; but it was averred in the bill that the letter O. was frequently effaced in the process of manufacture, and that the shovels were known in the market simply as Ames's. The defendant had stamped shovels of his own manufacture with the name Ames; but in his answer he averred on oath that he had done so not to represent them as the plaintiff's goods, but at the request of one E. B. Ames, by whom they had been ordered. Under the statutes of Massachusetts, the Supreme Court had then no general jurisdiction in cases of fraud, and their jurisdiction in the matter was derived solely from the provisions of chap. 197 of the Acts of 1852, which required proof of fraudulently representing the goods of one as actually made by another; and, as this was denied on oath, and the case

came to a hearing on bill and answer alone, an injunction was refused.

(c) In equity it is not necessary that the acts of the defendant be done with fraudulent intent. *Millington v. Fox*, 3 My. & Cr. 338; *Ainsworth v. Walmsley*, Eng. Eq. Rep. 1 Eq. Cas. 518; *Burgess v. Hills*, 26 Beav. 244; *Edleston v. Edleston*, 9 Jur. (n. s.) 479; *Cartier v. Carlile*, 8 Jur. (n. s.) 183; *Amoskeag Man. Co. v. Spear*, 2 Sandf. s. c. 608; *Coates v. Holbrook*, 2 Sandf. Ch. 586; *Coffeen v. Brunton*, 4 McLean, 516; *Messerole v. Tynberg*, 36 How. Pr. 14, 4 Abb. Pr. (n. s.) 410; *Dale v. Smithson*, 12 Abb. Pr. 237. This has been doubted in a few cases; and in *Corwin v. Daley*, 7 Bosw. 222, it is even said to be one of the "two principles steadily adhered to in all the cases in equity, that the intent to pass off the goods of the defendant as those of the plaintiff must exist;" and this is asserted also in the *Merrimac Man. Co. v. Garner*, 2 Abb. Pr. 318. But the contrary opinion is now firmly established both on principle and authority. At law the rule is different. There the remedy is by an action on the case for deceit, and an intent to deceive is of the gist of the action. *Crawshay v. Thompson*, 4 Man. & Gr. 357; *Sykes v. Sykes*, 3 B. & C. 541; *Rodgers v. Nowill*, 5 Man. Gr. & Sc. 108; *Edleston v. Edleston*, 9 Jur. (n. s.) 479; *Farina v. Silverlock*, 1 K. & J. 509. Where the use of another's trade-mark is made a statute offence, the sale of spurious goods by one ignorant of the fact does not render him liable to the penalty. *Rudderow v. Huntington*, 3 Sandf. S. C. 252.

* 257 by by them. It is this. In our next section, it will * be seen that the owner and user of a trade-mark, if it be violated, may proceed against the violator in equity or at law : in equity, to restrain and prevent this violation of his right ; at law, to obtain damages therefor. If he proceeds in equity, he should obtain the relief of injunction, although the violation did not intend deception. But if he resorts to law, to obtain damages, it may well become a material question whether the defendant was honest, intending neither harm to him or deception of the public, or fraudulent, and intending both. It would be a question which we should say would bear more upon the amount of damages than upon the verdict itself ; or, if the case were in equity, upon the question of costs. (d)

How far an imitation must go to be regarded as a violation of a right, may depend upon the question how far the courts will go in protecting the public from deception, and where they will stop, leaving purchasers to take care of themselves. There is no positive rule, and perhaps never can be, which will always answer this question. In some cases the test is said to be, Is the imitation calculated to mislead the unwary ? (e) But what is meant by unwary ? If the law is, that no imitation is a violation of a trade-mark, which the customer could not detect by sufficient care, it is obvious that no mere colorable imitation would be restrained. And in some cases, in their conclusions from the facts, courts seem to go almost to this extent. We believe the true rule — not always easy of application — to be this: Is the imitation such as would probably deceive a customer who used *ordinary care* ? and for this there can be no standard but the degree of attention

which common buyers of such articles commonly give to

* 257 bz them when they buy them. (f) Nor is it always * enough

(d) See note (o), *infra*.

(e) *Crawshay v. Thompson*, 4 Man. & Gr. 363; *Edleston v. Vick*, 23 Eng. L. & Eq. 51; *Swift v. Dey*, 4 Robt. 611; but the decision of Judge *Robertson* in this last case was overruled on appeal, and the rule laid down in *Partridge v. Menck* adopted. See the next note. In the *Brooklyn White Lead Co. v. Masury*, 25 Barb. 417, it is said, "the law must protect the right to sell to all, to the incantious as well as to the cautious." See also *Amoskeag Man. Co. v. Spear*, 2 Sandf. S. C. 609. In a very large number of cases the expression used is simply, Is the imitation "calculated to deceive the public" ?

(f) This is substantially the rule laid

down in *Partridge v. Menck*, 2 Sandf. Ch. 622. Vice-Chancellor *Sandford* there says: "Although the court will hold any imitation colorable which requires a careful inspection to distinguish its marks and appearance from those of the manufacture imitated, it is certainly not bound to interfere where ordinary attention will enable a purchaser to discriminate. It does not suffice to show that persons incapable of reading the labels might be deceived by the resemblance. It must appear that the ordinary mass of purchasers, paying that attention which such persons usually do in buying the article in question, would probably be deceived." This is cited and followed in *The Merrimac Man. Co. v.*

that a deception is caused; for it may be caused by conduct which the law permits. Thus, it is held that a man may stamp his own name, in gilt letters or otherwise, on his own goods, or their bands or covers; and if injury results to another manufacturer, he has no remedy. (*ff*)

There is no doubt that a man's right to use his own trade-mark may be violated, not only by one who uses the same or a colorable imitation thereof, but by any person who provides the means or instrument of this fraud, as by making for the use of the violator the type or tool, or printing the label, by which it is carried into effect, and that an injunction will issue to prevent this. (*g*)

* SECTION VI.

* 257 ca

OF THE REMEDY FOR VIOLATION OF THE RIGHT TO USE A
TRADE-MARK.

We are not aware of any modern case in which a customer deceived by a simulated trade-mark has brought an action for the fraud. (*h*) But actions by the party possessing or claiming to possess the exclusive right to use a certain trade-mark, for a fraudulent use of the same or a similar mark, are common both

Garner, 2 Abb. Pr. 318; Swift *v.* Dey, 4 Robt. 611. A similar rule is laid down by Lord Chancellor Cranworth, in Seizo *v.* Provezende, Eng. Eq. Rep. 1 Ch. App. 191. "What degree of resemblance is necessary, from the nature of things, is a matter incapable of definition *a priori*. All that courts of justice can do is to say that no trader can adopt a trade-mark so resembling that of a rival as that ordinary purchasers, purchasing with ordinary caution, are likely to be misled." Welch *v.* Knott, 4 Kay & J. 747. See Lond. & Prov. Law Assurance Co. *v.* Lond. & Prov. Joint-Stock Life Ins. Co. 11 Jur. 938. It is well settled that it is no defence to a suit for the infringement of trade-marks, that wholesale dealers would not be deceived if the resemblance were such as to impose upon ordinary purchasers buying from them. Sykes *v.* Sykes, 3 B. & C. 541; Shrimpton *v.* Laight, 18 Beav. 164; Coates *v.* Holbrook, 2 Sandf. Ch. 586; Taylor *v.* Carpenter, 2 Wood. & M. 1; Clark *v.* Clark, 25 Barb. 77. But otherwise, where the mistake arises from the

employment of words to which both parties have an equal right. Amoskeag Co. *v.* Spear, 2 Sandf. S. C. 608; Stokes *v.* Landgraff, 17 Barb. 608.

(*ff*) Faber *v.* Faber, 49 Barb. 357.

(*g*) Farina *v.* Silverlock, 1 Kay & J. 509, 4 Kay & J. 650. The defendant in this case printed and offered for sale labels exactly imitating those used by the plaintiff upon his Cologne water. So, too, a party has been enjoined from marking an inferior quality of the plaintiff's goods as the superior quality. Gillott *v.* Kettle, 3 Duer, 624. The owner of a trade-mark has his remedy against a seller of the goods fraudulently marked, as well as against the maker of them. Coates *v.* Holbrook, 2 Sandf. Ch. 586; Ainsworth *v.* Walmaley, Eng. Eq. Rep. 1 Eq. Cas. 518; Jurgenson *v.* Alexander, 24 How. Pr. 269; Burgess *v.* Hills, 26 Beav. 244; Matsell *v.* Flanagan, 2 Abb. Pr. (N. S.) 459; Oldham *v.* James, 13 Irish Ch. 393; 14 id. 81.

(*h*) See Southern *v.* How, *ante*, note (*b*), p. * 257 *ba*.

at law and in equity; and we do not know that the statute will greatly affect the law or practice of courts in this respect.

If the action be at law, the remedy sought is damages. And it has been held that the plaintiff has a right to recover some damage, although no actual damage is proved. (i)

If the action be in equity, an injunction is sought to restrain and prevent the continued use of the fraudulent trade-mark. It would seem that, in the year 1742, equity not only refused such an injunction, but the Lord Chancellor said he had never known an instance where such an injunction had been granted. (j) But recently a court of equity has always granted this remedy, if a case were made out; and then, having equitable jurisdiction of the case, the court would not send the plaintiff into a court of law to recover damages, but would proceed to inquire whether damages have been sustained, and, if they have been, would de-

* 257 cb cree *compensation. Upon this inquiry as to damages the court would use the means common in equity practice. It will require an exhibition of books, of accounts and sales, and, if necessary, refer the case to a master, to take evidence and report thereon whatever may enable the court to do justice between the parties. (k) As the equity for the account is strictly incident to the injunction, if this be refused no account will be given. (l) Nor in equity will anything be recovered beyond the actual damages. (m) Where no fraudulent intent appears, no account will be granted. (n)

(i) *Blofield v. Paine*, 4 Barn. & Ad. 410. This was an action at law, in which the jury had found for the plaintiff, with one farthing damages. On a motion for a nonsuit, *Littledale*, J., said: "I think enough was proved to entitle the plaintiff to recover. The act of the defendant was a fraud against the plaintiff; and if it occasioned him no specific damage, it was still, to a certain extent, an injury to his right. There must be no rule." So *Rodgers v. Nowill*, 5 Man. Gr. & Si. 108. In *Taylor v. Carpenter*, 2 Wood. & M. 1, the court say: "In a case like this, if in any, no reason exists for giving damages greater than have been actually sustained, or what have been called compensatory." "If by exemplary damages was meant a full indemnity for the individual wrong in every equitable view, and thus, by such an example, operating in a preventive manner the more effectually against the repetition of such injuries, then no error happened on the part of the court below."

(j) *Blanchard v. Hill*, 2 Atk. 484.
(k) *Taylor v. Carpenter*, 2 Sandf. Ch. 611; *Burnett v. Phalon*, 9 Bosw. 192; *Gillott v. Esterbrook*, 47 Barb. 455, affirmed in 48 N. Y. 374; *Bayly v. Taylor*, 1 Russ. & M. 73; *Adams's Equity*, 219.

(l) *Bayly v. Taylor*, 1 Russ. & M. 73.

(m) *The Leather Cloth Co. v. Hirschfield*, Eng. Eq. Rep. 1 Eq. Cas. 299.

(n) Says Lord Chancellor *Westbury* in *Edelston v. Edelston*, 1 De G. J. & S. 185: "Although it is well founded in reason, and also settled by decision, that if A has acquired property in a trade-mark, which is afterwards adopted and used by B, in ignorance of A's right, A is entitled to an injunction, yet he is not entitled to any account of profits or compensation, except in respect of any use by B after he has become aware of the prior ownership." So *Moet v. Couston*, 33 Beav. 578; but in the case of *Cartier v. Carlile*, 31 Beav. 292, decided two years before *Moet v. Couston*, the same judge, Sir J. *Romilly*, held otherwise.

As to costs, if the plaintiff's right to the trade-mark be established, the English courts give the plaintiff the costs of his application for injunction, even if the defendant be innocent of fraudulent intent, and had no notice of the plaintiff's claims. (o) But if the defendant on receiving such notice offers to pay the plaintiff's costs already incurred, and give up all further use of the mark, he will not be required to pay any farther costs in the suit. (p)

It has been held that where an injunction against the use of a trade-mark had been issued, it was a breach to use the same name, with the addition of "improved," although the defendant said on the label that it was not the original article. (r) Usually, a court of equity will not exert its high powers unless a case is made out which calls distinctly and perhaps strongly for their interposition. But it is now perfectly well settled, even in the absence of the statute, that a person may be entitled to the exclusive use of his own *trade-mark, and that a court of equity has * 257 co full jurisdiction over any wrongful interference with this use, and may prevent the same, or give indemnity for injury sustained thereby.

It may be that the original proprietor of a trade-mark has lost his right, or at least his equitable remedy, by his own laches; or, by acquiescing in the use of it by another, without objection or interference. Nor need it be, according to the view taken of this question in some cases, a long period of silence to have this effect. (s) If such laches or permission be shown, a court of equity will at least withhold its peculiar remedy and remit the plaintiff to a court of law. (t)

(o) *Burgess v. Hills*, 26 Beav. 244; *Burgess v. Hately*, 26 Beav. 249; *The Collins Co. v. Walker*, 6 W. R. 717.

(p) *Hudson v. Bennett*, 12 Jur. (n. s.) 519. In *Millington v. Fox*, 3 My. & Cr. 338, the defendant having offered to give up the mark before the suit had been commenced, no costs were granted to the plaintiff.

(r) *Ayer v. Hall*, 3 Brewster, 509.

(s) In *Flavel v. Harrison*, 19 Eng. L. & Eq. 15, a delay of four months after the infringement became known to the plaintiff, was held, under the circumstances, a bar to his application for an injunction.

(t) *The Amoskeag Man. Co. v. Garner*, 6 Abb. Pr. (n. s.) 265; *Taylor v. Carpenter*, 2 Wood. & M. 19; *Hilliard on Injunctions*, § 43; *Beard v. Turner*, 13 Law Times Rep. (n. s.) 746. In this last case,

a delay of two years was shown. On the other hand, in *The Amoskeag Man. Co. v. Spear*, 2 Sandf. S. C. 615, Judge Duer says: "I am satisfied that the doctrine of acquiescence, operating as an absolute surrender of an exclusive right, is applicable to the case. The consent of a manufacturer to the use or imitation of his trade-mark by another, may, perhaps, be justly inferred from his knowledge and silence; but such a consent, whether express or implied, when purely gratuitous, may certainly be withdrawn; and, when implied, lasts no longer than the silence from which it springs; it is in reality no more than a revocable license. The existence of the fact may be a very proper subject of inquiry in taking an account of profits, if such an account shall hereafter be decreed; but even the admission of the

It seems to be well established that equity exercises its jurisdiction in those cases only where the legal right is established or is certain. (u)

* 257 cd * In some of the States, the violation of a right to a trade-mark is prohibited by statute. We cite them in our notes. (v) How far these statutes will be superseded by the statute of the United States, or held to be concurrent with that, we do not propose to consider.

fact would furnish no reason for refusing an injunction." So *Gillott v. Esterbrook*, 47 Barb. 470, affirmed in 48 N. Y. 374. When one gratuitously permits another to use his name as a trade-mark, this permission is a mere license, revocable at the will of the person whose name is thus used. *McCardel v. Peck*, 28 How. Pr. 120; *Howe v. Searing*, 10 Abb. Pr. 264; *Christy v. Murphy*, 12 How. Pr. 77. See also *Bowman v. Floyd*, 3 Allen, 76, decided upon a statute (Mass. Gen. Stat. c. 56, §§ 1-4), forbidding the carrying on of business in the name of a third person without the written consent of the latter.

(u) "I have before this had an occasion to express an opinion," says Lord *Cottenham*, "that unless the case be very clear it is the duty of the court to see that the legal right is ascertained before it exercises its equitable jurisdiction. For this there are good reasons. The title to the relief depends upon a legal right, and the court only exercises its jurisdiction on the ground that the legal right is established." *Spottiswoode v. Clarke*, 2 Sandf. Ch. 628, 2 Phil. 154. So in *Snowden v. Noah, Hopkins*, 347, it is said: "The writ of injunction is a most important remedy; but it is used to protect rights which are clear, or at least free from reasonable doubt." So *Motley v. Downman*, 3 My.

& Cr. 1; *Bramwell v. Holcomb*, 3 My. & Cr. 747; *Piddington v. How*, 8 Sim. 477; *Rodgers v. Nowill*, 6 Hare, 325; *Wolfe v. Gouillard*, 18 How. Pr. 64; *The Merrimac Man. Co. v. Garner*, 2 Abb. Pr. 318; *Coffeen v. Brunton*, 5 McLean, 256; *Howe v. Howe Machine Co.* 50 Barb. 236.

(v) The infringement of trade-marks is a statute misdemeanor in the following States: New York, Laws of 1862, ch. 306; Massachusetts, Gen. Stat. ch. 161, §§ 55, 56; Pennsylvania, Brightly's Purdon's Digest, pp. 246, 966, Pub. Laws, 1860, p. 423, Pub. Laws, 1853, p. 643; Ohio, Swan & Critchfield's Statutes, p. 454, Act Mar. 29, 1859; Missouri, Gen. Stat. p. 912, Act Mar. 6, 1866; Michigan, Laws, 1863, No. 22; California, Stat. 1863, ch. 129, Stat. 1867-8, ch. 349; Oregon, Gen. Laws Criminal Code, ch. 44, § 583; Kansas, Gen. Stat. ch. 111. See also the Merchandise Marks Act, 25 & 26 Vict. ch. 88. In Maine and Massachusetts there are statutes in affirmation of the common law, giving the owner of a trade-mark a civil remedy in damages for its infringement, and authorizing an injunction. Me. Acts, 1866, ch. 10; Mass. Gen. Stat. ch. 56. In Missouri, California, and Oregon, provision is made for the public registration of trade-marks.

* CHAPTER XVI.

* 258

OF THE LAW OF SHIPPING.

SECTION I.

OF THE BUILDING AND OWNERSHIP OF A SHIP.

A.—*Of a Building Contract.*

THIS contract may be whatever the parties to it choose to make it. Thus, one who desires to own a ship, may propose to supply the builder with all requisite materials, the builder to do for him all the requisite labor. The ship would then never be the builder's, but would from the beginning belong to him for whom it is built. Ships are not however often built in this way. The builder usually constructs the vessel for one of four purposes. Either to supply an order, or to execute a contract, which may be regarded as substantially the same thing, or to sell it to some purchaser who may desire to buy it, or to own it himself.

One important question has arisen about which the cases are not reconcilable. If a ship be built on a building contract, and the price is to be paid by instalments, does each instalment when paid purchase the fabric as it then exists, passing the property absolutely to the purchaser, subject only to the lien which the builder has for the purposes of finishing the ship?

The cases on this subject were in much conflict. In the earlier English cases much reference is made to provisions in the English statutes and usages as to builders' certificates and the grand bill of sale, which do not exist in our own. We consider, however, that the law is now well settled, especially in this country and by recent cases. If it be the intention of the * parties * 259 that the builder should sell and the purchaser buy the ship before it is completed, and at different stages of its progress, and a bargain is made sufficiently expressive of this intention, there is no reason whatever why the law should not enforce such a bar-

gain. But no such bargain would be implied from the mere fact that payment is to be made by instalments, whether they are graduated merely on time, or on the state or condition or progress of the ship. Nor would this implication arise from, or be greatly aided by, the employment by the purchaser of a superintendent. These facts might assist in identifying the structure, or sustaining an action for a breach of the contract; and they might bear on the amount of damages. But they would not be sufficient to prove an actual sale and transfer of the property by the payment of an instalment, so that after such payment, if the property were lost or destroyed, it would be the loss of the purchaser. (*a*)

At the same time, it appears to be decided, that payment of instalments imposes upon the builder an obligation to finish and deliver under his contract the identical vessel. (*b*)

The original bill of sale by which the builder transfers the ship to the first purchaser, whether built by contract or otherwise, is called in England the Grand Bill of sale, (*c*) and is distinguished by this name from subsequent bills of sale—made by the purchaser or his transferees; but we have no such distinction in this country. (*d*)

* 260 * The builder should deliver his certificate to the first owner, and the owner give it to the collector, as required by the Statute of Registration. (*e*)

(*a*) *Wood v. Bell*, 5 Ellis & B. 772, 34 Eng. L. & Eq. 178, affirmed in the Exchequer Chamber, 6 Ellis & B. 355, 36 Eng. L. & Eq. 148; *Baker v. Gray*, 17 C. B. 462, 34 Eng. L. & Eq. 387; *Woods v. Russell*, 5 B. & Ald. 942; *Battersby v. Gale*, cited 4 A. & E. 458; *Atkinson v. Bell*, 8 B. & C. 277, 282; *Clarke v. Spence*, 4 A. & E. 448; *Laidler v. Burlinson*, 2 M. & W. 602; *Andrews v. Durant*, 1 Kern. 35; *Merritt v. Johnson*, 7 Johns. 473; *Johnson v. Hunt*, 11 Wend. 135; *Moody v. Brown*, 34 Maine, 107. A conveyance of the keel after it is laid, vests the property of it in the vendee, and draws after it all subsequent additions. *Glover v. Austin*, 6 Pick. 209. See also *Sumner v. Hamlet*, 12 Pick. 76, 82. An agreement to pledge a vessel building to cover certain advances, and that the pledgee may purchase her at a certain rate, is neither

a sale nor a mortgage or pledge, and transfers no property in the vessel, although the advances are made. *Bonsey v. Amee*, 8 Pick. 236. See *Reid v. Fairbanks*, 13 C. B. 692, 24 Eng. L. & Eq. 220. Where the property passes before the completion of the ship, the builder has a common-law lien, a right of possession to finish her and earn the full price. *Woods v. Russell*, *supra*.

(*b*) *Andrews v. Durant*, 1 Kern. 35.

(*c*) *Abbott on Shipping*, 3. In England the grand bill of sale is necessary to the transfer of a ship at sea. *Atkinson v. Maling*, 2 T. R. 462; *Gordon v. East India Co.* 7 T. R. 228, 234.

(*d*) *Portland Bank v. Stacey*, 4 Mass. 661; *Wheeler v. Sumner*, 4 Mason, 183; *Morgan v. Biddle*, 1 Yeates, 3.

(*e*) Act of 1792, c. 1, § 8, 1 U. S. Stats at Large, 291.

B.—*Of the Liens of Material Men.*

Formerly, builders of ships, as well as those who repaired, equipped, or supplied them, were called material men; (*f*) and this somewhat peculiar phrase has been in use as a term of the law-merchant for some centuries. Now, however, the phrase is confined, perhaps in law, and certainly in practice, to those who repair the ship, or furnish her with supplies, or do any work about her necessary for her seaworthiness and complete equipment. (*g*) By the maritime law of Europe, and by the Roman civil law, material men have a lien on any ship which they repair or supply. (*h*) The reason of this is obvious. Ships are often at a distance from their owners when they need and have these repairs or supplies, and therefore persons who furnish them should have a demand against the ship itself, without being obliged to recur to the owners. There is also another reason; and it is that ships may be owned by persons who are unknown to the material men. For these two reasons, the civil law and the general maritime law gives to material men this lien upon all ships, without any distinction between foreign and domestic vessels. In this country, however, it would seem that the first reason only has any influence; for with us the maritime lien is limited to foreign vessels. (*i*) But in this respect, as in the general application of the law-merchant, our States are considered as foreign to each other. (*j*)

(*f*) Jacobsen's Sea Laws, 357, note; Sir Leoline Jenkins, as cited by Lord Stowell in *The Neptune*, 3 Hagg. Adm. 142.

(*g*) Thus, it has been held, that no lien exists by the maritime law for the building of a vessel. *People's Ferry Co. v. Beers*, 20 How. 393; *Roach v. Chapman*, 22 How. 129. See *The Richard Busteed, Sprague*, 441, for an able decision in favor of the jurisdiction in such a case.

(*h*) *Dig.* 14, 1, 1; *Ord. de la Mar.* liv. 1, tit. 14, art. 16; *The General Smith*, 4 Wheat. 438; *The Nestor*, 1 Sumner, 73; *The Young Mechanic*, 2 Curtis, C. C. 404.

(*i*) In the case of a domestic vessel, by the maritime law as now settled in this country, the lien depends on possession. *The General Smith*, 4 Wheat. 438; *The St. Jago de Cuba*, 9 id. 409. But in the

case of foreign ships, the lien does not depend on possession. *The Jerusalem*, 2 Gallis. 345; *Zane v. The Brig President*, 4 Wash. C. C. 453.

(*j*) *Pratt v. Reed*, 19 How. 359; *The Brig Nestor*, 1 Sumner, 73. This doctrine grew out of a *dictum* in *The General Smith*, 4 Wheat. 438, but it may now be considered as settled. In *Beach v. Sch. Native*, U. S. D. C., N. Y., it is said, on the authority of a remark in *Pratt v. Reed*, 19 How. 359, that as the master would have no power to give a bottomry bond where the vessel belonged to an adjoining State, and as the necessity which authorizes the giving a bond differs from the necessity authorizing the imposition of a lien only in respect to the maritime interest, no lien could be imposed in such a case.

* 261 * Persons employed about a vessel may have in fact either of three liens, or in some instances all of them, which, though quite distinct in their origin, and somewhat so in their operation, are sometimes confounded together. One of these is the common-law lien of a bailee. The second is the maritime lien of material men. And the third is the statutory lien of workmen and mechanics.

By the first, a builder of a ship belonging to another person, or any person making repairs upon a ship, if for this purpose he has possession of the ship, has a common-law lien upon her for his charges, and may retain his possession to enforce this lien. And this lien may be enforced in admiralty, so far as repairs are concerned. (*k*) But if possession of the ship is parted with, this lien is lost. (*l*)

The maritime lien of material men is widely extended in admiralty, and our admiralty courts claim and exercise a full jurisdiction over all claims and questions arising under this lien. They require, however, evidence that the supplies and repairs were obtained, and that they could not have been obtained upon the personal responsibilities of the owners, without security on the vessel; (*m*) although it is not necessary that the vessel should in towns be made liable for the payment. (*n*) Hence, although the vessel is in a foreign port, if the owners are present or have an agent present, ready to advance or pay for whatever may be necessary, there is no lien. (*o*) And although the general rule confines this lien to a foreign vessel, yet if a vessel is in her home

port, and is there held out by her owners as a foreign ves-

* 262 sel, * material men who have repaired or supplied her in that belief, will have a lien which admiralty will enforce. (*p*) The residence of the owners of the vessel, and not that of the furnisher, is to be looked to in determining whether the vessel is a domestic one or not. Therefore if the vessel is in her home port, no lien exists for the supplies there furnished,

(*k*) *The General Smith*, 4 Wheat. 438, per *Story*, J.; *The Sch. Marion*, 1 *Story*, 68; *Peyroux v. Howard*, 7 Pet. 324. If material men who repair a vessel, retain possession of her and claim a common-law lien for the repairs made, they cannot add to this charge the expense of keeping the vessel, since they keep her for their own benefit. *Somes v. British Empire Shipping Co., H. of Lords*, 2 Law Times (n. s.), 547.

(*l*) See cases *supra*, note (*i*).

(*m*) *Pratt v. Reed*, 19 How. 359; *The Sarah Starr*, Sprague, 453. See *Beach v. Sch. Native*, U. S. D. C., N. Y., cited *supra*, note (*j*).

(*n*) *The Sea Lark*, Sprague, 571.

(*o*) *Boreal v. The Golden Rose*, Bee, 131.

(*p*) *The St. Jago de Cuba*, 9 Wheat. 409. See also *Musson v. Fales*, 16 Mass. 332.

although the furnisher resides and does business in another State. (q)

The third or statutory lien is of course defined and determined by the statutes of each State, and to these statutes we must refer. Some of the more important results of adjudications determined under them are as follows.

In Maine, the lien attaches to the vessel while building, and continues for four days after she is launched; and if the materials are sold on a credit which reaches beyond the four days, there is no lien. (r) The materials must actually go into the ship, and make a part of it when finished. (s)

In Massachusetts, under the Statute of 1855, it has been held, that the materials must be specifically furnished to be used in a particular vessel, in order to give a lien on that vessel; and it is not enough that they were so used, if not furnished for that vessel. (t) And a petition cannot be filed in the State court until the sum has remained unpaid sixty days after it was due. (u) But this is not so in admiralty. (v) Under the Massachusetts Statute of 1848, the term "construction" has been held to extend to alterations of a vessel. (w)

In New York, the lien of the builder attaches only when the fabric assumes the form of a ship, (x) and the creditor loses his lien by permitting the vessel to sail without enforcing it; but sailing on a trial trip only is not a departure with this effect. (y) Nor is it one if she leaves the State fraudulently; at a time when * not legally liable to arrest. (z) * 268 Wood for fuel is held in New York not to be included in the term "supplies," (a) but to come within the term "stores." (b)

In Missouri, the hire of a barge by the owners of a steamer, the

(q) *The Eliza Jane*, Sprague, 152.

(r) *Scudder v. Balkam*, 40 Maine, 291. See also *The Kearsarge*, Ware, 2d ed. 546, 550.

(s) *Taggart v. Buckmore*, 21 Law Rep. 51. See also the *Young Sam*, U. S. C. C., 20 Law Reporter, 608; *Sewall v. The Hull of a New Ship*, Ware, 2d ed. 565; *The Kearsarge*, 2 Curtis, C. C. 421. The statute does not embrace tools used by the workmen: *The Kearsarge*, Ware, 2d ed. 546; nor materials furnished for the moulds of the ship: *Ames v. Dyer*, 41 Maine, 397.

(t) *Rogers v. Currier*, 13 Gray, 129. But see *The Antarctic*, Sprague, 206.

(u) *Tyler v. Currier*, 10 Gray, 54.

(v) *The Richard Busteed*, Sprague, 441.

(w) *The Ferax*, Sprague, 180.

(x) *Phillips v. Wright*, 5 Sandf. 342.

(y) *Hancox v. Dunning*, 6 Hill, 494.

(z) *The Steamboat Joseph E. Coffee*, Olcott, Adm. 401.

(a) *Johnson v. Steamboat Sandusky*, 5 Wend. 510; *The Fanny*, cited Abbott, Adm. 185.

(b) *Crooke v. Slack*, 20 Wend. 177; *The Alida*, Abbott, Adm. 173, 185.

barge being necessary for her equipment, is regarded as a "material" for which there is a lien. (c)

In Michigan, there is no lien for supplies furnished while a vessel is building. (d)

If repairs are made or goods supplied on a credit, it has been said that the credit prevents a lien. (e) But this is not necessarily the case, nor would it be true unless the credit were in its nature inconsistent with the lien, or destructive of it. (f) If a laborer employed generally, by one engaged on a vessel, works sometimes on the vessel and sometimes elsewhere, he has no lien for that part of his work given to the vessel. (g)

The lien, whether given by maritime law or by a State statute, may be enforced against the vessel, although she is owned by government; and in the same way as if she were owned by a private citizen. (h)

Formerly, all who had a lien on a ship by a State statute might, on the authority of many decisions, enforce that lien in the admiralty courts sitting in that district. Recently, however, by a rule of the Supreme Court, the right of action in case of supplies, repairs or other necessaries furnished to a domestic ship, has

been confined to a proceeding *in personam*. (i)¹ It may be said generally, that this rule of the Supreme * Court, which gives a lien to material men for supplies or repairs, or other

*This rule
and con-
tinuing the
same to
date.*

(c) *Amis v. Steamboat Louisa*, 9 Mo. 691; *Gleim v. Steamboat Belmont*, 11 Mo. 112.

(d) *Lawson v. Higgins*, 1 Mann. Mich. 225.

(e) *Zane v. The Brig President*, 4 Wash. C. C. 453.

(f) *Peyroux v. Howard*, 7 Pet. 324, 344; *The Brig Nestor*, 1 Sumner, 73, 80; *Remnants in Court*, Olcott, Adm. 383; *The Kearsarge*, Ware, 2d ed. 546; *The Antarctic*, Sprague, 206; *The Sam Slick*, Sprague, 289.

(g) *The Calisto*, Daveis, 29; *s. c. nom.* *Read v. Hull of a New Brig*, 1 Story, 244.

(h) *The Revenue Cutter No. 1*, U. S. D. C., Ohio, 21 Law Reporter, 281. In *Briggs v. A Light Boat*, Sup. Jud. Ct. Mass. 1863, it was held, where a light boat was built under a contract with the government, the title not to vest until the vessel was completed and accepted, that a

lien was created while building, and the government took her subject to the lien.

(i) The 12th Admiralty rule which went into effect May 1, 1859, provides that "In all suits by material men for supplies, or repairs, or other necessaries for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*. And the like proceeding *in personam*, but not *in rem*, shall apply to cases of domestic ships, for supplies, repairs, or other necessities." 21 How. p. iv. In *Magnire v. Card*, 21 How. 251, the court, after mentioning the new rule, said: "We have determined to leave all these liens depending upon State laws, and not arising out of the maritime contract, to be enforced by the State courts." See also, for the reasons and objects of the new rule, *The Steamer St. Lawrence*, 1 Black, 522.

¹ *Hayford v. Cunningham*, 72 Me. 168, reviews the fluctuating opinions held by the United States courts on the jurisdiction of admiralty courts over liens given by State statutes for labor and materials furnished to vessels.

necessaries, by its very language, confines this proceeding to *material* men. And it has been held, as an effect of this limitation, that where the law of a State gave this lien to a wharfinger, yet, because he was not a *material* man, admiralty could not enforce his lien. (j)

It must be true, however, that admiralty courts, in applying statutory provisions and enforcing liens created by them, would be governed by the terms of the statute; (k) but although the case might not come within their jurisdiction except by force of the statute, in construing its terms where they were at all doubtful, they would be influenced by the principles of admiralty jurisprudence, which are always those of equity. (l)

It may be convenient to add, that a person who lends money for the use of a foreign ship, has the same lien in admiralty as a material man. (m) But stevedores, (n) or persons employed to see to a vessel's safety, ventilation, &c., (o) or to scrape her bottom preparatory for coppering, (p) or for other similar labor, or having charges against a vessel for advertising, (q) or for services as ship-broker in making or drawing contracts, have no lien. (r)

As the word "necessary" constantly occurs in determining this lien, it may be said that admiralty regards it as necessary in the sense which suffices for this lien, if the repairs or supplies * were such as a careful or prudent owner would make or supply to his own vessel. (s)

C. — *Of Owners.*

Any person may become an owner of a ship in the same way as of any other chattel, unless some peculiar means or process is required by law. It is undoubtedly true, that ships are always

(j) *Russel v. The Asa R. Swift*, 1 Newb. Adm. 553. *M'Dermott v. The S. G. Owens*, 1 Wallace, C. C. 370; *Cox v. Murray, Abbott*, Adm. 340.

(k) *The General Smith*, 4 Wheat. 438; *The Bark Chusan*, 2 Story, 455, 462; *The Robert Fulton*, 1 Paine, 620, 626; *The Calisto*, Daveis, 29, 33. *(o) Gurney v. Crockett, Abbott*, Adm. 490.

(l) See *The Richard Busteed, Sprague*, 449. *(p) Bradley v. Bolles, Abbott*, Adm. 569. *(q) The Bark Joseph Cunard, Olcott*, Adm. 120.

(m) *Davis v. Child, Daveis*, 71. See also *The Sophie*, 1 W. Rob. 368. *(r) The Gustavia, Blatchf. & H.* Adm. 189.

(n) *The Amstel, Blatchf. & H.* Adm. 215; *The Bark Joseph Cunard, Olcott*, 25. *(s) The Alexander*, 1 W. Rob. 346.

or almost always sold by a written instrument. But we cannot admit that this usage, however ancient, general, or reasonable, has the force of law. And we apprehend that the Registration Acts of this country only deny the privileges of an American ship to a vessel transferred without writing or not registered, leaving the question of the validity of the sale for all other purposes, to be determined by the common law, or the law-merchant. (t) But the act of 1850, ch. 27, (u) provides, that "no bill of sale, mortgage, hypothecation, or other conveyance of any vessel, or part of any vessel of the United States, shall be valid against any person, other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof; unless said bill of sale, mortgage, hypothecation, or conveyance, be recorded in the office of the collector of the customs, where such vessel is registered or enrolled." Possibly questions may be raised as to the construction of this statute, (v) or even as to its constitutionality. (w)

We are however disposed to hold it as now established, and * 266 as limiting the effect of a sale of a vessel, without * writing or registry to the seller, his heirs and devisees, and persons having actual notice of the sale; but leaving such a conveyance valid as to them. (x) And a transfer by operation of law is not avoided by any of our registry acts.

(t) *Weston v. Penniman*, 1 Mason, 317; *The Oriole*, Sprague, 31; *Taggard v. Loring*, 16 Mass. 336, 340; *Bixby v. Franklin Ins. Co.* 8 Pick. 86; *Weaver v. The S. G. Owens*, 1 Wallace, C. C. 359; *Barnes v. Taylor*, 31 Me. 329; *Mitchell v. Taylor*, 32 id. 434; *Leonard v. Hunting-ton*, 15 Johns. 298.

(u) 9 U. S. Stats. at Large, 440.

(v) The question naturally arises at what custom-house transfers are to be recorded. In *Potter v. Irish*, 10 Gray, 416, the court held, that it is necessary to record the conveyance at the custom-house where the vessel is at the time registered; but this has been controverted by Mr. Justice Clifford, in the case of *Blanchard v. The Martha Washington*, 1 Clifford, 463. This case holds that all conveyances must be recorded at the home port of the

vessel. In this view Mr. Justice Clifford is sustained by the S. C. of the U. S. in *White's Bank v. Smith*, 7 Wallace, 646. The act of 1850 does not apply to charter-parties. *Hill v. The Golden Gate*, 1 Newb. Adm. 308; or to the lien of a material man on a vessel, *Marsh v. Brig Minnie*, U. S. D. C., S. Car. 6 Am. Law Reg. 238. And it applies only to vessels which are registered, licensed, or enrolled. *Veazie v. Somerby*, 5 Allen, 280.

(w) The act has been held to be constitutional in the *Brig Martha Washington*, U. S. C. C. Maine, 25 Law Reporter, 22. All State statutes requiring mortgages of vessels to be made in certain places, would therefore be considered as nugatory. See *Sinnot v. Davenport*, 22 How. 227.

(x) *Cape Fear Steamboat Co. v. Conner*, 3 Rich. 335.

D. — *Of Part-owners.*

1. WHO ARE PART-OWNERS.

A part-owner of a ship is one who owns a definite part or proportion of the whole ship; and of this part his ownership is exclusive. It follows, therefore, that part-owners of a ship do not thereby become partners. And if a ship is owned by a partnership as part of the stock of the firm, the partners do not become thereby part-owners; because each partner owns the whole partnership stock, subject to the rights of the other part-owners, and no partner has an exclusive right in any part or portion of the firm stock. But ships may be and often are held as partnership property, and then all the laws and incidents of partnership attach to them. (y) And the evidence of partnership as to a ship, would seem to be governed by the same rules of law and the same principles which apply to other property.

Part-owners — whether they are so by building a ship together, or purchasing it together (in certain proportions), or subsequently purchasing parts — are always tenants in common; and if either dies, his share goes not to the survivors, but to his own representatives. (z)¹ If the proportions in which they hold the ship are not defined by some instrument or bargain, the law will regard them as owners of equal shares. (a)

*2. OF THE POWERS AND DUTIES OF PART-OWNERS.

* 267

Any part-owner may sell his share to whom he will, and for what he will.²

(y) *Doddington v. Hallet*, 1 Ves. Sen. 497; *Wright v. Hunter*, 1 East, 20; *Mumford v. Nicoll*, 20 Johns. 611; *Harding v. Foxcroft*, 6 Greenl. 76; *Phillips v. Purington*, 15 Me. 425; *Patterson v. Chalmers*, 7 B. Mon. 595.

(z) *Graves v. Sawyer*, T. Raym. 15; *Ex parte Young*, 2 Ves. & B. 242, 2 Rose 78, n.; *Ex parte Harrison*, 2 Rose, 76; *Owston v. Ogle*, 13 East, 538; *Helme v. Smith*, 7 Bing. 709; *Rex v. Collector of the Customs*, 2 M. & S. 228; *Green v. Briggs*, 6 Hare, 395; *Bulkley v. Barber*, 6 Exch. 164, 1 Eng. L. & Eq. 506; *Mumford v. Nicoll*, 20 Johns. 611; *Thorndike v. DeWolf*, 6 Pick. 120; *French v. Price*, 24 Pick. 13; *Jackson v. Robinson*, 3 Mason, 138; *Hopkins v. Forsyth*, 14 Penn. St. 38. (a) *Alexander v. Dowie*, 1 H. & N. 152, 37 Eng. L. & Eq. 551; *Glover v. Austin*, 6 Pick. 221; *Ohl v. Eagle Ins. Co.* 4 Mason, 172. But the act of 1850, c. 27, § 5, 9 U. S. Stats. at Large, 441, provides that the part or proportion of the vessel belonging to each owner shall be inserted in the register of enrolment.

¹ *The New Orleans*, 106 U. S. 18; *Courts' Appeal*, 79 Penn. St. 220; *Paynter v. Paynter*, 7 Phila. 336.

² See *Whitton v. Spring*, 74 N. Y. 169.

It has been doubted whether part-owners could displace a master who was also a part-owner, without good and adequate reason, which should be, generally at least, incapacity or wrong-doing. (b) But it seems now settled that a majority of part-owners, and more certainly a majority in interest and in number, may control and employ a ship at their pleasure, (c) and displace any master or other officer, whether part-owner or not. It is not uncommon to see advertised for sale "a master's interest," or "a sailing interest." It would seem, however, that no such interest was known at law. (cc)

If a majority do not agree, or if a majority injure or disregard the interests of a minority, a court of admiralty will interfere. In general, if a majority of part-owners will not employ a ship at all, without what seems to the court adequate reason for her idleness, the court will give the control and management of her to a minority, requiring adequate security for a just regard to the safety of the ship, her proper employment, and the interests of the majority. (d) So, if the majority wish to employ her in a way to which the minority object, such security will be required, if the court deem it just and reasonable. (e) In all such cases, we consider it as now established in this country, that a court of admiralty has sufficient authority to prevent a ship from lying useless, and to provide for her return in safety, for her proper employment, for a fair adjustment of freight, and for due protection of all the interests of all parties. (f)

* 268 * What power one part-owner has to bind his copartners as to the management of the vessel, the manning, provisioning, furnishing, or repairing her, may not be quite certain.

(b) See the *New Draper*, 4 Rob. Adm. 290. In the case of a foreign ship, as a general thing, the court will not interfere, on application of the other part-owners to dispossess a captain, who is also an owner. *The Johan & Siegmund*, Edw. Adm. 242. This power was, however, exercised where a decree of a tribunal of the country to which the vessel belonged, exercising admiralty jurisdiction, was produced, directing the master to deliver up the vessel. *The Sea Reuter*, 1 Dods. 22.

(c) *Card v. Hope*, 2 B. & C. 661; *Gould v. Stanton*, 16 Conn. 12.

(cc) *Ward v. Ruckman*, 36 N. Y. 26.

(d) There is a *dictum* to this effect in *Steamboat Orleans v. Phosbus*, 11 Pet. 175.

See, for a full discussion of this question, 2 Parsons, Mar. Law, 555.

(e) *Willings v. Blight*, 2 Pet. Adm. 288; *The Marengo*, Sprague, 506; *The Apollo*, 1 Hagg. Adm. 306; *Gould v. Stanton*, 16 Conn. 12.

(f) In *The Vincennes*, decided by Mr. Justice Ware, in 1851, but not reported, there were three part-owners, one owning a moiety, and the other two a quarter each. The owner of the moiety was in possession, and was ship's husband, but the parties disagreed as to the voyage, and on application of the two part-owners of one moiety, the vessel was ordered to be sold. See also *Davis v. Brig Seneca*, 18 Am. Jurist, 486; *Gilpin*, 10; *Skrine v. Sloop Hope*, Bee, 2.

We doubt, however, whether merely as part-owner he would have a materially different or larger power than the co-tenant of other property. (g) But questions of this kind seldom arise, because the management of the ship is usually given to one of their number, who is recognized as the Ship's Husband.

3. OF A SHIP'S HUSBAND.

This somewhat peculiar name is ancient and general, but our statutes of registration substitute for it the phrase "managing owner."¹ A ship's husband is usually, indeed almost always, a part-owner; but we are aware of no rule of law requiring this; although it is implied in the phrase which we have just stated to be employed in our statutes, of "managing owner." He is the general agent of all the owners in respect to the ship. It is not customary to define his powers or his duties by a written instrument of agency or authority, or even by an oral bargain. And the reason is, that these duties are sufficiently determined by usage. They are such as may be included in taking care of her and of her earnings. Thus, he must keep her in complete seaworthiness, as to her own condition, her furniture and all appurtenances, and her papers. He makes contracts for her freight and all her earnings, and receives the same; (h) but he cannot borrow money and bind the owners for it; (i) nor can he give up the lien for freight earned; (j) nor can he insure the ship for the owners; ² nor can he purchase a cargo for them (k) without their special authority. (l) But the universal rule of agency applies here, and any of these acts * done in their name may be ratified by them so as to bind them, equally as if an authority to do these things had been originally conferred. (m) He cannot dele-

(g) See *Brodie v. Howard*, 17 C. B. 109, 33 Eng. L. & Eq. 146; *Revens v. Lewis*, 2 Paine, C. C. 202; *King v. Lowry*, 20 Barb. 532.

(h) 1 Bell, Comm. 410, § 428, 4th ed.; id. p. 504, 5th ed.; *Sims v. Brittain*, 4 B. & Ad. 375; *Owston v. Ogle*, 13 East, 538; *Benson v. Heathorn*, 1 Younge & C. Ch. 326; *Turner v. Burrows*, 8 Wend. 144; *Gould v. Stanton*, 16 Conn. 12, 23; *Smith r. Lay*, 3 Kay & J. 103; *Darby v. Baines*, 9 Hare, 369, 12 Eng. L. & Eq. 238.

(i) 1 Bell, Comm. 4th ed. 411.

(j) 1 Bell, Comm. 4th ed. 411.

(k) *Hewett v. Buck*, 17 Maine, 147.

(l) *Ogle v. Wrangham, coram Kenyon, C. J., Guildhall Sitting*, H. T. 1790, Abbott on Shipping, 107; *French v. Backhouse*, 5 Burr. 2727; *Turner v. Burrows*, 5 Wend. 541, 8 Wend. 144; *Foster v. U. S. Ins. Co.* 11 Pick. 85.

(m) *Hagedorn v. Oliverson*, 2 M. & S. 485; *Routh v. Thompson*, 13 East, 274.

¹ As to the powers of a ship's husband, or managing owner, see *Mitchell v. Chambers*, 43 Mich. 150.

² Nor can he cancel a charter-party. *Thomas v. Lewis*, 4 Ex. D. 18. See *McCready v. Thorn*, 51 N. Y. 454; *Hamilton v. Phoenix Ins. Co.* 106 Mass. 395; *Knight v. Eureka, &c. Ins. Co.* 26 Ohio St. 664; *Woods v. Pickett*, 30 La. An. 1095.

gate his authority ; especially not where any exercise of discretion is required on his part; but like any other agent he may employ suitable persons to assist him or act under him in a ministerial capacity.

In transactions in which the ship's husband may bind the owners, a party may deal with him alone and on his personal credit only, and in such a way that he justifies the owners in believing that he deals with their agent only on his own credit. But he would not be thereby estopped from resorting to the owners, unless he had permitted them, in that belief, so to settle their accounts with their agent, that they would be injured if made responsible to the party dealing with him.(n)

By usage in this country he is entitled to a commission of two and one-half per cent for purchasing the outfits and paying the bills of a vessel ; and he may charge interest on the excess of his disbursements over the amounts received by him, from the time of the occurrence of such excess. (o)

An agent of a whaling ship who is authorized to fit the vessel for sea and purchase supplies, cannot, it would seem, bind the owners by accepting a bill of exchange in their names, for such supplies. (p) But if he has general authority to act for the vessel and to settle with the seamen, he may bind the other owners by a promise to pay the amount of a seaman's wages, with his consent, to one of the creditors, who has attached the same on trustee process, and special authority need not be shown. (q)

A general agent of all the owners would hold all the owners responsible *in solidi* (or each for the whole) for his proper charges. But if he be part-owner and ship's husband, each of the part-owners is responsible to him only for his own share. (r) But if

one or more part-owners became insolvent, a court of equity * 270 or of admiralty would require each of the solvent owners to pay his share of the deficit, so that the ship's husband might sustain only his own share of the loss. And if he himself advances the share or contribution of any part-owner he may sue him for it. But a ship's husband has no lien for his advances on the vessel or the proceeds of it. (s)

(n) *Thompson v. Finden*, 4 Car. & P. 158; *Muldon v. Whitlock*, 1 Cow. 290; *Reed v. White*, 5 Esp. 122.

(o) *Rennell v. Kimball*, 5 Allen, 356.
(p) *Taber v. Cannon*, 8 Met. 456.
(q) *Munroe v. Holmes*, 5 Allen, 201.

(r) *Helme v. Smith*, 7 Bing. 709; *Brown v. Tapscott*, 6 M. & W. 119.

(s) *The Larch*, 2 Curtis, C. C. 427; *Ex parte Young*, 2 Ves. & B. 242; *Smith v. De Silva*, Cowp. 469.

4. OF THE LIENS OF PART-OWNERS.

There might be some reason for holding that the part-owners have a general lien on the ship for their just charges or balances of accounts against each other, in relation to the ship, but this is certainly not so determined by law or by usage. Partners who own a ship as a part of the partnership stock, would have such a lien. But part-owners would not; for the reason that they are not partners. It is somewhat difficult to deal with this question. We should say, however, in general, that a part-owner, merely as part-owner, has no lien whatever; (*t*) but when his relation with the other part-owners is such as to permit the application of principles of partnership, or agency, or bailment, which would raise a lien, he would then have such lien. As, for example, if a part-owner made advances for a certain voyage and came into possession of the proceeds, he would have a lien on them for those advances; (*u*) because he would be acting as agent of the owners, and such agent so acting would have such a lien, although not part-owner. So the admission or acknowledgment of a part-owner in respect to the ship would not bind the other part-owners, (*v*) although the admission or acknowledgment of a partner in relation to the business of the firm binds all the partners.

5. REMEDIES AGAINST PART-OWNERS.

It is common for ship chandlers and others furnishing supplies or articles of furniture or apparel by the order of a ship's husband * or of any part-owner, to charge the same in their books against the vessel by name, or against "the owners of such a vessel," or against such a ship and owners. This would not necessarily give them a right to hold all the owners. It might show that the credit was given to all the owners, but it would not show that this credit was justified by the owners. (*w*)

(*t*) *Merrill v. Bartlett*, 6 Pick. 46; *Braden v. Gardner*, 4 Pick. 456; *Doddington v. Hallet*, 1 Ves. Sen. 497; *Ex parte Young*, 2 Ves. & B. 242; *Ex parte Harrison*, 2 Rose, 76; *Ex parte Parry*, 5 Ves. 575; *Nicoll v. Mumford*, 20 Johns. 611.

(*u*) *Holderness v. Shackel*, 8 B. & C. 612; *Gould v. Stanton*, 16 Conn. 12, 23; *Macy v. De Wolf*, 3 Woodb. & M. 193, 210.

(*v*) *Jaggers v. Binnings*, 1 Stark. 64.

(*w*) See *Jones v. Blum*, 2 Rich. 475; *Miln v. Spinola*, 4 Hill, 177; *Scottin v. Stanley*, 1 Dall. 129; *Henderson v. Mayhew*, 2 Gill, 393. If the creditor knew but one owner, and for that reason charged him only, this would not be deemed a discharge of the rest, provided the repairs were ordered by one authorized directly or by his position, to bind the others. *Thomson v. Davenport*, 9 B. & C. 78; *Taber v. Cannon*, 8 Met. 456.

But if, in addition to such charge, it could be shown that the owners in any way, by action or silence, had justified the credit, they would be held.

In courts of admiralty, actions may be and often are brought against the vessel directly, or, in the phrase of admiralty law, *in rem*, and this is both convenient and reasonable. For owners ought often to be held for repairs or supplies to a ship when they are unknown, or the ship is distant from them, and the same action is permitted in the common-law courts by statute in Georgia, (x) Florida, (y) Alabama, (z) Arkansas, (a) Kentucky, (b) Ohio, (c) Michigan, (d) Indiana, (e) Illinois, (f) Missouri, (g) * Iowa, (h) Mississippi, (i) Wisconsin, (j) and California. (k) But by the decisions in these States, it would seem that actions of this sort will not be sustained under these statutes, where the cause of action arose out of the States. (l)

(x) Dec. 11, 1851, Hotchkiss Stat. Law, 625; Robinson *v.* Steamer Lotus, 1 Kelly, 317; Butts *v.* Cuthbertson, 6 Ga. 159; Adkins *v.* Baker, 7 Ga. 56.

(y) 1847, Thomp. Dig. 414; Flint River Steamboat Co. *v.* Roberts, 2 Fla. 102.

(z) 1836, Clay's Dig. 139; Steamboat Robert Morris *v.* Williamson, 6 Ala. 50; George *v.* Skeates, 19 Ala. 738; Otis *v.* Thom, 18 Ala. 395.

(a) Rev. Stat. c. 14; Holeman *v.* Steamboat P. H. White, 6 Eng. 237; Steamboat Napoleon *v.* Etter, 1 Eng. 103; Steamboat P. H. White *v.* Levy, 5 Eng. 411.

(b) 1839, 3 Stat. Law, 112; 1841, 3 Stat. Law, 113; Strother *v.* Lovejoy, 8 B. Mon. 135.

(c) Stat. Swan's ed. c. 26, p. 185; Curwen's Stat. in force, 503; Keating *v.* Spink, 3 Ohio State, 105; Canal Boat Huron *v.* Simmons, 11 Ohio, 458; Young *v.* Steamboat Virginia, 1 Handy, 156; Scott *v.* The Plymouth, 1 Newb. Adm. 56; Wick *v.* The Samuel Strong, 1 Newb. Adm. 188; Jones *v.* Steamboat Commerce, 14 Ohio, 408; Steamboat Waverly *v.* Clements, 14 Ohio, 28; Kellogg *v.* Brennan, 14 Ohio, 72; Provost *v.* Wilcox, 17 Ohio, 359; Dewitt *v.* Sch. St. Lawrence, 2 Ohio State, 325; Boyd *v.* Steamboat Falcon, 1 Handy, 362; Lewis *v.* Sch. Cleveland, 12 Ohio, 341; Wayne *v.* Steamboat Gen. Pike, 16 Ohio, 421; Steamboat Albatross *v.* Wayne, 16 Ohio, 513; Sch. Argyle *v.* Worthington, 17 Ohio, 460.

(d) 1839, Sess. L. p. 70. This was repealed in 1846, R. S. c. 122. See Robinson *v.* Steamboat Red Jacket, 1 Mich. 71; Mores *v.* Steamboat Missouri, 1 Mich.

507; Truesdale *v.* Hazzard, 2 Mich. 344, Ward *v.* Willson, 3 Mich. 1; Watkins *v.* Atkinson, 2 Mich. 151.

(e) 1838, Steamboat Rover *v.* Stiles, 5 Blackf. 483; Southwick *v.* Packet Boat Clyde, 6 Blackf. 148; Olmstead *v.* McNall, 7 Blackf. 387.

(f) Rev. Stat. 1845, p. 71, ed. 1856, p. 107; Sch. Constitution *v.* Woodworth, 1 Scam. 511; Channcey *v.* Jackson, 4 Gilman, 435; Germain *v.* Steam Tug Indiana, 11 Ill. 535; Merriman *v.* Canal Boat Col. Butts, 15 Ill. 585.

(g) R. C. 1845; Williamson *v.* Steamboat Missouri, 17 Mo. 374; Jones *v.* Steamboat Morrisett, 21 Mo. 144; Ritter *v.* Steamboat Jamestown, 23 Mo. 348.

(h) Rev. Stat. 101; Code, c. 120; Steamboat Kentucky *v.* Brooks, 1 Greene, 398; Ham *v.* Steamboat Hamburg, 2 Clarke, 460; West *v.* Barge Lady Franklin, 2 Clarke, 522.

(i) Acts of 1840, 1841, Hatch. Dig. 288, art. 6; id. 290, art. 8; Steamboat Gen. Worth *v.* Hopkins, 30 Missis. 703.

(j) Rev. Stat. 116; Rand *v.* The Barge, 4 Chand. 68.

(k) Laws, 1st Sess. 189, c. 75, § 2; Compiled Laws, 1853, 576, c. 6, § 318.

(l) Steamboat Champion *v.* Jantzen, 16 Ohio, 91; The Sch. Aurora Borealis *v.* Dobbie, 17 Ohio, 125; James *v.* Steamboat Pawnee, 19 Misso. 517; Frink *v.* King, 3 Scam. 144; Turner *v.* Lewis, 2 Mich. 350; Steamboat Kentucky *v.* Brooks, 1 Greene, Iowa, 398; Strother *v.* Lovejoy, 8 B. Mon. 135; Merrick *v.* Avery, 14 Ark. 370.

Persons employed to repair a ship, or who furnish supplies necessary to her equipment and navigation, are called in the law of shipping, as we have said, material men. They have certain liens against the ship, which, with the method of enforcing them, have been considered in a previous section of this chapter.

SECTION II.

OF THE TRANSFER OF A SHIP.

A.—*Of a Sale by the Owner.*

We have already considered, in a previous section, a question which might arise under almost any transfer of a ship. It is, Can such transfer be made without a written instrument? And we have seen that there is no positive rule of law requiring such an instrument, although one is universally used; and our general statutes of registration confine the character and privileges of an American ship to one so transferred. And the Statute of 1850 certainly limits within narrow bounds the validity of an oral sale.

1. OF THE IMPLIED WARRANTY IN SUCH A SALE.

The rules of the common law as to evidence, agency, and warranty, applicable to sales of chattels, apply generally to the * sale of a ship. For example, if a ship be built for a par- * 273 ticular purpose, under a contract, there is an implied war- rancy of her fitness for that purpose; and if built for use gener- ally, there is an implied warranty that she shall be fit for such use as vessels of the kind in question are generally put to. (m) The rule of *caveat emptor* applies generally to the sale of a vessel after she is constructed, but with the established qualifications. (n)

(m) *Shepherd v. Pybus*, 3 Man. & G. 868. In *Cunningham v. Hall*, 4 Allen, 268, it was held, that if in a contract for the construction of a vessel, it is agreed that she shall be planked with pine, and that the builder shall see "that she is just right in all respects," the latter agreement is qualified by the former, and the builder is not liable for defects which are naturally incident to pine plank, and were not known to the builder, and could not have

been discovered by him, by the exercise of reasonable care and skill. This decision is contrary to the opinion of Mr. Justice *Sprague*, in the same case. *Sprague*, 404.

(n) In Louisiana there is an implied warranty by law against hidden defects, and those are considered hidden which cannot be discovered by simple inspection. *Bulkley v. Honold*, 19 How. 390.

Thus, if the ship be sold under material representations, made to affect the sale, they would be equivalent to warranty, when they would be so in the sale of any other chattel. So if a ship be sold "with all her faults," both extremes of construction are avoided; that is, neither can the buyer refuse the ship because of faults he did not know, nor is the seller now obliged to declare faults which he knows and the buyer cannot discover. But the seller is not permitted to say or do anything whatever to conceal her faults or prevent the buyer from discovering them. (o)

By the phrase "a ship with all her appurtenances," — or "with her apparel" — or "furniture" — or any equivalent phrase; and, even as we should say, by the word "ship" alone (or barque — brig — schooner, &c.), whatever is then on board of or attached to her to adapt her for the voyage or adventure in which she is engaged, passes as a part of the ship to him who buys her. There have been many adjudications on this question; and it might sometimes be affected by usage, but generally the rule is not capable of a more precise definition. (p)

* 274 * Fraud would of course vitiate and annul any contract of sale, or for a future sale of a ship, as it does every other contract.

2. OF THE REQUIREMENT AND EFFECT OF POSSESSION BY THE PURCHASER.

A ship is a personal chattel although it is one of a peculiar character. The universal rule in regard to the sale of chattels is, that the want or delay of possession by the purchaser is a badge of fraud which may defeat the sale. This rule applies to the sale of a ship, but with some modifications, arising from the peculiar character and use of the chattel. For a ship may be sent to sea, go around the world, or be absent for an indefinite period, passing

(o) In Mellish *v.* Motteux, Peake, Cas. 115, when a ship was sold, "with all her faults," it was held that the seller must disclose a fault which the buyer could not possibly ascertain. But the law is now as stated in the text. Baglehole *v.* Walters, 3 Camp. 154; Schneider *v.* Heath, 3 Camp. 506. As to the effect of these words when there is also a distinct representation as to the same particular fact, see Fletcher *v.* Bowsher, 2 Stark. 561; Shepherd *v.* Kain, 5 B. & Ald. 240; Dyer *v.* Lewis, 7 Mass. 284; Taylor *v.* Bullen, 5 Exch. 779, 1 Eng. L. & Eq. 472.

(p) Ballast does not pass. Kynter's

case, 1 Leon. 46; Lano *v.* Neale, 2 Stark. 105; Burchard *v.* Tapscott, 3 Duer, 363. As to a boat, see Starr *v.* Goodwin, 2 Root, 71; Briggs *v.* Strange, 17 Mass. 405. The cargo of a whaling vessel does not pass by a sale of the ship's stores, and their appurtenances. Langton *v.* Horton, 5 Beav. 9, 23 Legal Obs. 524. As to a chronometer, see Langton *v.* Horton, 6 Jurist, 910; Richardson *v.* Clark, 15 Maine, 421, 425. The rudder and cordage purchased for a ship are part thereof. Woods *v.* Russell, 4 B. & Ald. 942; Wood *v.* Bell, 6 El. & Bl. 355, 36 Eng. L. & Eq. 148; Baker *v.* Gray, 17 C. B. 462, 34 Eng. L. & Eq. 387.

from port to port, as profitable engagements offer. But the owner must not in the mean time be unable to sell his ship because he is unable to deliver possession. In reference to personal chattels generally, delay in transferring the possession will not defeat the sale, if the delay be brief and explained, and justified by circumstances. The reason of this rule applies to the sale of a ship, so that, as we apprehend, no delay whatever would defeat the sale, provided first, that the sale was a transfer on good consideration and in good faith, and second, that every practicable transfer of papers and of register was made, and such notice was given to the master and other parties as the case may require. We believe that such a sale, so attended, does not give to the purchaser a mere inchoate right to be completed by possession, but passes to the purchaser the whole property in the ship, subject to being divested by his laches in taking possession; and we do not believe that such laches would be proved merely by the fact, that a second purchaser or an attaching creditor had used means to get possession before the first purchaser. We think that, generally, if not always, the first purchaser may await her arrival in her home port. The rule of law must be, that the first purchaser is bound only to do at once * what has * 275 been already indicated, and afterwards to use reasonable means and reasonable speed in taking actual possession; the laches which would defeat his possession being only actual negligence. (q)¹ It is an interesting question, how far the entry of a transfer in a custom-house record, or a registration of the purchaser as owner, is a public notice to the whole world? It is well settled in England, that the register is only a private instrument, and not a public record, (r) and not even *prima facie* evidence to

(q) As between the parties to a sale the property in the goods sold will pass to the vendee, although the possession may remain in the vendor. But under the statutes of 13 Elizabeth, to render the transfer valid to third parties without notice, there must be a change of possession. But where actual delivery is impossible, symbolical delivery is sufficient, provided the purchaser, as soon as he is able, takes actual possession. See *Ex parte Matthews* 2 Ves. Sen. 272; *Atkinson v. Mailing*, 2 T. R. 462; *Hay v. Fairbairn*, 2 B. & Ald. 193; *Portland Bank v. Stubbs*, 6 Mass. 422; *Portland Bank v. Stacey*, 4 Mass. 661; *Putnam v. Dutch*, 8 Mass. 287; *Lamb v. Durant*, 12 Mass. 54, 56; *Tucker v. Buffington*, 15 Mass. 477; *Badlam v. Tucker*, 1 Pick. 389; *Gardner v. Howland*, 2 Pick. 599; *Joy v. Sears*, 9 Pick. 4; *Pratt v. Parkman*, 24 Pick. 42; *Turner v. Coolidge*, 2 Met. 350; *Winsor v. McLellan*, 2 Story, 492; *Brinley v. Spring*, 7 Greenl. 241; *Morgan v. Biddle*, 1 Yeates, 3; *Wheeler v. Sumner*, 4 Mason, 183; *D'Wolf v. Harris*, 4 Mason, 515; *Conard v. Atlantic Ins. Co.* 1 Pet. 386, 449; *Ingraham v. Wheeler*, 6 Conn. 277; *Ricker v. Cross*, 5 N. H. 570. (r) *Flower v. Young*, 3 Camp. 240; *Pirie v. Anderson*, 4 Taunt. 652.

¹ *Russell v. O'Brien*, 127 Mass. 349; *Dempsey v. Gardner*, id. 381.

charge those who are not proved to be parties to it by their own act or assent, although their names appear upon it; (*s*) nor is the register by itself evidence in a suit between third parties of the national character of the vessel. (*t*) The later American cases (*u*) conform to the English cases on this subject, and it follows, that a party who appears on the register to have the legal title, and whom it is sought to charge on that ground, is not estopped by the register from proving that the actual beneficial ownership is in a third party, although it might be *prima facie* evidence against him. (*v*)

* 276 * B.— *Of the Sale of the Ship by the Master.*

A ship is not unfrequently sold by the master. If the ship be so sold by the express authority of the owner, it is simply a sale by the owner through an agent, who may as well be the master as anybody else. And the transaction is then subject to the common law of agency. Far more frequently, however, a sale of the ship by the master is made without express authority, upon an exigency, and from necessity.

In relation to such a sale two rules are quite certain. The first is, that a master has no such power excepting from necessity. (*w*) The second is, that a sufficient necessity gives him this power. (*x*)

It is extremely important to ascertain what this necessity must be; and it is as difficult as it is important. In various cases courts have used various phrases for the purpose of making this

(*s*) Baldney *v.* Ritchie, 1 Stark. 338; M'Iver *v.* Humble, 16 East, 169; Fraser *v.* Hopkins, 2 Taunt. 5; Cooper *v.* South, 4 Taunt. 802.

(*t*) Reusse *v.* Meyers, 3 Camp. 475.

(*u*) Jones *v.* Pitcher, 3 Stew. & P. 135, 155; Ring *v.* Franklin, 2 Hall, 1; Weston *v.* Penniman, 1 Mason, 306; Leonard *v.* Huntington, 15 Johns. 298; Bixby *v.* Franklin Ins. Co. 8 Pick. 86; Colson *v.* Bonzey, 6 Greenl. 474; Lord *v.* Ferguson, 9 N. H. 380; Lincoln *v.* Wright, 23 Penn. State, 76.

(*v*) Howard *v.* Odell, 1 Allen, 85; Myers *v.* Willis, 17 C. B. 77, 33 Eng. L. & Eq. 204, 209, affirmed in the Exchequer Chamber, 18 C. B. 886, 36 Eng. L. & Eq. 350; Hackwood *v.* Lyall, 17 C. B. 124, 33 Eng. L. & Eq. 211; Mitcheson *v.* Oliver,

5 Ellis & B. 419, 32 Eng. L. & Eq. 219; Brodie *v.* Howard, 17 C. B. 109, 33 Eng. L. & Eq. 146; Mackenzie *v.* Pooley, 11 Exch. 638, 34 Eng. L. & Eq. 486.

(*w*) Somee *v.* Sugrue, 4 Car. & P. 276; Cannan *v.* Meaburn, 1 Bing. 243; Idle *v.* Royal Exch. Ass. Co. 8 Taunt. 755; The Fanny & Elmira, Edw. Adm. 117; Pope *v.* Nickerson, 3 Story, 465; Robinson *v.* Commonwealth Ins. Co. 3 Sumner, 220; Patapeco Ins. Co. *v.* Southgate, 5 Pet. 604; New Eng. Ins. Co. *v.* Brig Sarah Ann, 13 Pet. 387. The whole law of the sale of the ship by the master, is considered in The Amelia, 6 Wallace, 18.

(*x*) The Catherine, 1 Eng. L. & Eq. 679; The Glasgow, 28 Law T. Adm. 13, and cases *infra*.

definition. It has been said that it must be "a moral necessity," (y) "an imperious, uncontrollable necessity," (z) and that it is sufficient if the jury are told that the sale is "necessary," without adding any qualification. (a) A consideration of all the cases in the light of the reason and principle of the rule, leads us to doubt whether anything better can be said, than that such a sale is justified only when the master can do nothing else to save what remains of the property for the benefit of all concerned.

We think that a test which has sometimes been applied to measure this necessity is not an accurate one. That test is this: Would the owner, if a prudent and reasonable man, and present *at the time, have made the sale? (b) The objection to the test is, that such an owner then and there present might have weighed the expediency of various courses of conduct, each of which might offer its advantages; whereas a master has no such power. He can only sell when he must. The law-merchant does not clothe him with any general power to act for all concerned, but only gives him this power when somebody must exercise it, to prevent an inevitable waste of property.

At the same time it is now equally certain, that the necessity of the sale is not to be determined by subsequent events. (c) If a ship, wrecked and lying high and dry, is sold by the master, and is drawn off at the next high tide, it does not follow certainly that the sale was not justified; because the sale was necessary, if at the time an honest and rational view of all then existing facts and probabilities would have led to the conclusion that it was necessary. The master must of course have acted in good faith, and in the exercise of a sound discretion; although both these circumstances may exist, and yet the sale not be necessary.

We do not think that the mere want of funds would of itself constitute a sufficient necessity to justify a sale by the master. (d)

(y) *Somes v. Sugrue*, 4 Car. & P. 276; *Pope v. Nickerson*, 8 Story, 504; *The Ship Fortitude*, 3 Sumner, 248.

(z) *Peirce v. Ocean Ins. Co.* 18 Pick. 88.

(a) *Prince v. Ocean Ins. Co.* 40 Maine, 481. In *Post v. Jones*, 19 How. 150, the court held, that a sale of derelict property, in a distant ocean, where there was no market and no competition, to a person who had it in his power to save the crew and cargo, and drove a bargain with the master, was invalid, although the forms of a sale at auction were had.

(b) *Hayman v. Molton*, 5 Esp. 65.

(c) *The Brig Sarah Ann*, 2 Sumner, 215, affirmed on appeal, New Eng. Ins. Co. v. *Brig Sarah Ann*, 13 Pet. 387; *Idle v. Royal Exch. Ass. Co.* 8 Taunt. 755; *Fontaine v. Phoenix Ins. Co.* 11 Johns. 298; *Hall v. Franklin Ins. Co.* 9 Pick. 484; *The Henry*, 1 Blatchf. & H. Adm. 465.

(d) See *American Ins. Co. v. Ogden*, 20 Wend. 287; *Ruckman v. Merchants Ins. Co.* 5 Duer, 842; *Allen v. Commercial Ins. Co.* 1 Gray, 154.

A ship cannot often, if ever, be in a place and condition in which, if funds were procurable, they would repair and save her, and yet she would be destroyed by the delay requisite to communicate with the owners. And it is quite certain, that if the master can communicate with the owners before making the sale, either by sea intercourse, or land intercourse, or now by telegraph, or by all of these combined, he must delay his sale until he receive instructions, unless this delay imports the destruction of the property. The old rule, that a master has this power if the ship be wrecked abroad, and not if it be wrecked on the coast of his own country, was founded upon this principle. (e) But the rule has disappeared, and given place to the question of possibility *of instructions. (f) For if he can become the agent of the owners with instructions, he cannot make himself their agent from mere necessity. (g)

* 278 appeared, and given place to the question of possibility *of instructions. (f) For if he can become the agent of the owners with instructions, he cannot make himself their agent from mere necessity. (g)

C.—*Sale of a Ship under a Decree of Admiralty.*

A ship is sometimes sold either abroad or at home under a decree of Admiralty. If this rest upon a condemnation of a ship, whether as prize, or for forfeiture, or in execution of a decree to pay salvage, or to discharge a bottomry bond, or to satisfy a lien which admiralty would enforce, it would be valid and binding upon all courts and all parties of all nations, (h) unless it could be proved to be vitiated by fraud. But it seems that if the decree for a sale rests only on a survey asserting unseaworthiness, and takes place in a foreign port, then the courts of the country to which the ship belongs, will regard the decree as of little more than cumulative authority for the report of the surveyors; and will look into the actual facts to ascertain whether they justified the report and the decree. (i) But the practice of selling by decree of admiralty merely for unseaworthiness is but little known in this country. The court must be a regular admiralty

(e) *Scull v. Briddle*, 2 Wash. C. C. 150. *The Helena*, 4 Rob. 3; *Grant v. M'Lachlin*, 4 Johns. 34.

(f) *The Brig Sarah Ann*, 2 Sumner, 215, affirmed New Eng. Ins. Co. v. *Brig Sarah Ann*, 13 Pet. 387.

(g) *Pike v. Balch*, 38 Maine, 302; *Hall r. Franklin Ins. Co.* 9 Pick. 466; *Peirce v. Ocean Ins. Co.* 18 Pick. 83.

(h) *The Tremont*, 1 W. Rob. 163; *Attorney-General v. Norstedt*, 3 Price, 97;

The Helena, 4 Rob. 3; *Grant v. M'Lachlin*, 4 Johns. 34.

(i) *Reid v. Darby*, 10 East, 143; *Hunter v. Prinsep*, 10 East, 378; *Morris v. Robinson*, 3 B. & C. 203; *The Sch. Tilton*,

5 Mason, 474; *Jamey v. Columbian Ins. Co.* 10 Wheat. 411, 418; *Dorr v. Pacific Ins. Co.* 7 Wheat. 581; *The Dawn, Ware*, 487.

court, recognized by the law of nations. The sufficiency, authority, and jurisdiction of the court may be inquired into. (*j*) Neither in England nor in this country is a consul or any person holding court as a judge in a neutral port under a commission from his own country, recognized as being or having the authority of a court of admiralty. (*k*)

* D. — *Of Transfer by Mortgage.*

* 279

1. **How a Mortgage of a Ship should be Recorded.**

We know not why a ship may not be mortgaged in the same way and to the same effect as a personal chattel. Such mortgages of ships are not unfrequently made. They should now be registered under the requirements of the Statute of 1850. (*l*) Some uncertainty perhaps exists, as yet, as to the effect and operation of this statute, when it conflicts with or covers the same ground as a State statute. The decisions on this question, so far as they have arisen, are not quite reconcilable. Where a statute of the United States, on a subject which is clearly within the power of Congress, conflicts with a State statute, we should have no doubt that it superseded the State statute. But if it only covers the same ground and is not inconsistent with it, either of two views might be entertained as to its effect. One would be, that it should be held as cumulative to the State statute, both statutes remaining in full force. The other would be, that where the statute of the United States covers the whole ground, it renders the State statute unnecessary and nugatory, and in fact repeals it. We think the tendency of adjudication and of practice favors this last view. Therefore, a registry of a mortgage of a ship under the act of 1850, would make the mortgage valid, although it was not recorded in the manner required by State statutes in relation to mortgages of personal chattels. (*m*)

(*j*) *Hudson v. Gustier*, 4 Cranch, 293; *Sawyer v. Maine Ins. Co.* 12 Mass. 291; *The Mary*, 9 Cranch, 138; *Bradstreet v. Neptune Ins. Co.* 3 Sumner, 607; *The Flad Oyen*, 1 Rob. Adm. 185.

(*k*) *The Flad Oyen*, 1 Rob. Adm. 185; *The Kierliggett*, 3 Rob. Adm. 96; *Have-*

lock v. Rockwood, 8 T. R. 268; *Whe-*

wright v. Depeyster, 1 Johns. 471.

(*l*) C. 27, 9 U. S. Stats. at Large, 440.

In respect to the place where a mortgage should be recorded, see *ante*, p. * 265, n. (r).

(*m*) See *Sinnot v. Davenport*, 22 How. 227.

2. OF THE LIABILITY OF MORTGAGEES.

An owner of a ship, in possession of her, is liable for all supplies furnished, and all repairs made, and all contracts made, by his authority, for the benefit of the vessel. But the question has frequently arisen, when and how far mortgagees are thus liable.

A mortgagee who neglects to take possession, unless * 280 protected * by some statutory provision, may have his title defeated by a party who acquires a right to the ship honestly, and in ignorance of the mortgagee's title. (*n*) But if he takes possession, and, still more, if besides having taken possession, he takes out a new register in his own name, or does any act which may be regarded as giving public notice that he is owner, he then makes himself responsible as an owner. (*o*) But if he takes possession he is not liable for necessaries ordered by the master, if it is clear that the master did not order them as his agent. (*oo*)

If he does no such acts, and takes no actual possession, and is still protected in his title by record or statutory provisions, he has not then such liabilities as spring only from actual possession.

The general rule must be, that a mortgagee who is not in possession, is not liable for supplies or work rendered to the vessel; (*p*) but he may of course make himself so liable by a bargain, (*q*) and he will be held to have made this bargain if he authorized the credit to be given to him personally. But not by the mere fact that he is benefited by such supplies or repairs.

The same rule applies to persons who hold a ship as trustees. (*qq*)

E. — *Of Transfer by Bottomry.*

Hypothecation by bottomry is at once one of the most ancient and one of the most common transactions of shipping. It is

(*n*) *Ex parte Matthews*, 2 Ves. Sen. 272; *Atkinson v. Maling*, 2 T. R. 463; *Portland Bank v. Stubbe*, 6 Mass. 425; *Tucker v. Buffington*, 15 Mass. 480; *Badlam v. Tucker*, 1 Pick. 389; *The Sch. Romp, Olcott*, Adm. 196.

(*o*) *Miln v. Spinola*, 4 Hill, 177; *Tucker v. Buffington*, 15 Mass. 477; *Dean v. M'Ghie*, 4 Bing. 48; *Champlin v. Butler*, 18 Johns. 169.

(*oo*) *The Troubadour*, Law Rep. 1 Adm. & Ecc. 302.

(*p*) *Myers v. Willis*, 17 C. B. 77, 33 Eng. L. & Eq. 204, affirmed in *Exchequer Chamber*, 18 C. B. 886, 36 Eng. L. & Eq. 850; *Hackwood v. Lyall*, 17 C. B. 124, 33 Eng. L. & Eq. 211; *Howard v. Odell*, 1 Allen, 85; *Blanchard v. Fearing*, 4 Allen, 118; *M'Intyre v. Scott*, 8 Johns. 159; *Winslow v. Tarbox*, 18 Maine, 182; *Cutter v. Thurlo*, 20 Maine, 213.

(*q*) See *Fish v. Thomas*, 5 Gray, 45.

(*qq*) *Macy v. Wheeler*, 30 N. Y. 230.

almost, if not quite always, effected by an instrument known as a bottomry bond. The word Bottomry is founded upon an ancient usage still in some force, which considers the bottom or keel of the ship as the ship. (r)

Originally, the contract was made and the bond executed chiefly, perhaps only, by the master in a foreign port, to raise funds to enable the ship to return to her home port. And while it has been repeatedly asserted that admiralty has complete * jurisdiction of every bottomry bond, wherever made * 281 or however made, we are not entirely certain that this is true of any other bonds than those made as they originally were made. (s) It is, however, true that common-law courts do not usually take cognizance of bottomry bonds, nor is it easy to see how they could enforce their peculiar provisions. And, therefore, as a matter of necessity, admiralty might take jurisdiction over all bottomry bonds. They are certainly and eminently maritime contracts. A bottomry bond transfers the ship to the bottomry creditor, as a security for advances made by him. In this respect it is similar to a mortgage or a pledge. It differs from a pledge, however, in this: that possession is not transferred to the creditor. A change of possession is of the essence of a pledge, (t) and this possession seldom if ever is given to the creditor in a case of bottomry. (u)

But a contract of bottomry differs wholly from a mortgage or a pledge, in one particular, wherein it differs also from all other contracts of security. That particular is this. All contracts for security are void if, or so far as, the debt or loan which they are intended to secure is illegal and therefore void. Nearly all civilized nations have what are called usury laws; that is, they place a limit to the amount which can legally be promised for the use of money, or the forbearance of a debt. Now, bottomry bonds are valid, although they go far beyond these limits. They may indeed

(r) *The Atlas*, 2 Hagg. Adm. 53; *Scarborough v. Lyrus*, Latch, 252, Noy, 95.

Sloop Mary, 1 Paine, C. C. 671; *The Brig Draco*, 2 Sumner, 157.

(s) The jurisdiction where a bond is made by the owner in a home port, has been doubted or denied in *Blaine v. The Charles Carter*, 4 Cranch, 328; *Forbes v. Brig Hannah*, Hopk. 99, Bee, 348; *Knight v. The Attila*, Crabbe, 326; *Hurry v. The Ship John & Alice*, 1 Wash. C. C. 293; *Hurry v. Hurry*, 2 Wash. C. C. 145. The jurisdiction has been sustained in *Wilmer v. The Smilax*, 2 Pet. Adm. 295, n.; *The*

(t) Ryall v. Rolle, 1 Atk. 165; *Reeves v. Capper*, 5 Bing. N. C. 136; *Homes v. Crane*, 2 Pick. 607; *Brownell v. Hawkins*, 4 Barb. 491.

(u) There is no jus in re in such a case, but merely a jus ad rem, a right to the thing hypothecated, which can be enforced for the payment of the debt. *The Tobago*, 5 Rob. Adm. 222; *The Young Mechanic*, 2 Curtis C. C. 404.

provide for the payment of any amount of interest which the parties choose to agree upon. (v)

The interest payable by a bottomry bond is called by the law-merchant maritime interest. The reason of the rule and of the name is this: that the bond always provides, that if the * 282 * ship be lost before the bond becomes payable, no part of the debt, whether principal or interest, is payable. Or, as it is often said, the debt is paid and the bond discharged by the loss of the ship. (w) It is obvious, therefore, that the interest payable on a bottomry bond is composed of two elements. One is the amount to be paid for the use of the money; the other is a compensation to the lender for the risk of the loss of the ship, which risk he assumes. These two elements are distinct, but are never discriminated in a bottomry bond, which simply declares the amount of the whole interest.

It is absolutely essential to a bottomry bond, that the lender should assume this risk. At the same time, mortgages of other property, or any other securities, may be given to the lender to assure to him the payment of the bond when it becomes payable, including the maritime interest; provided that all these mortgages or securities are discharged, as the bond itself is, by the loss of the ship. (x)

A practice has grown up in modern times, by which bottomry bonds are in some instances changed from their original purpose, and used as a means of lending and borrowing money upon illegal interest. It is done in this way. A party lends money at fifteen per cent, or any other amount, as maritime interest on the bottomry of a ship; he gives three per cent, or some other premium, for an insurance of the whole amount of the bottomry, principal and interest, the debt being an insurable interest; then if the ship comes home in safety his bond is paid, and if it is lost his insurance is paid. Bonds and bargains of this description are usually made in a home port. (y) In its theory the bottomry

(v) *Sharpley v. Hurrel*, Cro. Jac. 208; *The Cognac*, 2 Hagg. Adm. 387; *The Atlas*, 2 Hagg. Adm. 57; *White v. Ship Dædalus*, 1 Stuart, L. Can. 130.

(w) *The Atlas*, 2 Hagg. Adm. 48; *The Emancipation*, 1 W. Rob. 124; *Stainbank v. Fenning*, 11 C. P. 51, 6 Eng. L. & Eq. 412; *The Nelson*, 1 Hagg. Adm. 169; *Simonds v. Hodgson*, 3 B. & Ad. 50; *Jennings v. Ins. Co. of Penn.* 4 Binney, 244;

Greeley v. Waterhouse, 19 Maine, 9; *Lealand v. The Ship Medora*, 2 Woodb. & M. 92; *The Brig Draco*, 2 Sumner, 157; *Bray v. Bates*, 9 Met. 237.

(x) *The Jane*, 1 Dods. 466; *The Emancipation*, 1 W. Rob. 129; *The Lord Cochran*, 2 W. Rob. 320; *The Hunter, Ware*, 249; *The Sch. Zephyr, Mason*, 341; *The Brig Atlantic*, 1 Newb. Adm. 514.

(y) See cases *supra*, p. * 281, n. (s).

bond is a means of raising money to save the ship, and send her home with the cargo ; and it creates a lien on the ship, which admiralty enforces in preference to all other liens, because it is considered as saving the ship for the benefit of the * other liens. (z) The only certain exception to this rule * 282 is that of sailors' liens for their wages, for these take precedence of all liens. (a) There is some authority for another exception, in favor of the lien of material men, for supplies or repairs indispensable to the safety of the ship. (b) For a similar reason, if there be many successive bonds, a later bond takes precedence of an earlier bond, because the later bond saves the ship for the earlier ; (c) thus reversing the rule applied to mortgages. It may be added, that bottomry bonds are always construed very liberally. (d) If, indeed, a master borrows money abroad for the necessities of the ship, and the money is so applied, although no instrument of bottomry is given, the law-merchant gives to the lender a lien on the ship therefor, and his remedy against the owner as debtor. But he can then recover only his legal interest. (e)

A bottomry bond made in the usual form, may become payable on other contingencies than the arrival of the ship ; as where the voyage is broken up and terminated, or the ship lost in any way, by the voluntary and unnecessary act of owner or master. (f)

(z) *The Mary*, 1 Paine, C. C. 671; *The Duke of Bedford*, 2 Hagg. Adm. 304; *The Orelia*, 3 Hagg. Adm. 83; *The Aline*, 1 W. Rob. 111; *The Draco*, 2 Sumner, 157.

(a) *The Madonna D'Idra*, 1 Dods. 40; *Blaine v. Ship Charles Carter*, 4 Cranch, 328; *The Virgin*, 8 Pet. 538; *The Hilarity*, 1 Blatchf. & H. Adm. 90; *Furniss v. Brig Magoun*, Olcott, Adm. 66. As to the question whether wages earned prior to the bond would have priority, see *'The Mary Ann'* 9 Jur. 94; *'The Louisa Bertha'*, 1 Eng. L. & Eq. 665.

(b) *The Jerusalem*, 2 Gallia, 345. See also *Ex parte Lewis*, id. 483.

(c) *The Betsey*, 1 Dods. 289; *The Exeter*, 1 Rob. Adm. 173; *The Trident*, 1 W. Rob. 29; *Leland v. The Medora*, 2 Woodb. & M. 113; *Furniss v. Brig Magoun*, Olcott, Adm. 66.

(d) *The Alexander*, 1 Dods. 278; *The Jacob*, 4 Rob. Adm. 249; *Smith v. Gould*, 4 Moore, P. C. 28; *Simonds v. Hodgson*, 3 B. & Ad. 50; *The Sch. Zephyr*, 3 Mason, 341; *Pope v. Nickerson*, 3 Story, 463.

(e) *Wainwright v. Crawford*, 3 Yeates, 131, 4 Dall. 225. There seems to be no reason why a bond drawn for simple interest merely, and which is payable at all events, should not be valid. See *The Emancipation*, 1 W. Rob. 130; *Stainbank v. Fenning*, 11 C. B. 51, 6 Eng. L. & Eq. 412; *The William & Emmeline*, 1 Blatchf. & H. Adm. 66; *Selden v. Hendrickson*, 1 Brock. C. C. 396; *The Brig Atlantic*, 1 Newb. Adm. 514; *The Hunter, Ware*, 249; *The Virgin*, 8 Pet. 550; *Leland v. The Medora*, 2 Woodb. & M. 107; *The Mary*, 1 Paine, C. C. 671. Where a larger sum is fraudulently inserted in the bond than that advanced, the lender being privy thereto, he can recover nothing. *The Ann C. Pratt*, 1 Curtis, C. C. 340, affirmed *Carrington v. Pratt*, 18 How. 63.

(f) As by unnecessary deviation. *Harrman v. Vanhatton*, 2 Vern. 717; *Wilmer v. The Smilax*, 2 Pet. Adm. 295. A deviation from necessity does not have this effect. *The Armadillo*, 1 W. Rob. 251.—A sale. *The Brig Draco*, 2 Sumner, 157.—Intentional loss of the ship. *Pope v. Nickerson*, 3 Story, 465; *Thom-*

* 284 * An owner may make a bottomry bond anywhere or for any reason. (g) Only one who is lawfully master of the ship (h) can make this bond abroad, and he can make it only from necessity. (i)¹ This necessity must be sufficient; (j) but it may be a less stringent necessity than that which is requisite to authorize a master to sell his ship; and we should say, that it would be a sufficient necessity if it would have induced the owner to do so if present. (k) The master cannot make this bond, if he have funds of the owner within his reach, or can borrow them on the personal credit of the owner. (l) But he certainly is not bound to take money of the shippers which may be on board, and we think he has no right to do this. (m)

The lender must use reasonable means to be sure that the necessity exists. (n) But the bond would not be avoided by a fraud of the master, (o) unless the lender knew it, or might have known it. (p)

son v. Royal Exch. Ass. Co. 1 M. & S. 30; *The Dante*, 2 W. Rob. 427; *The Elephanta*, 9 Eng. L. & Eq. 553; *Thorndike v. Stone*, 11 Pick. 183.

(g) *The Brig Draco*, 2 Sumner, 157; *Thorndike v. Stone*, 11 Pick. 183; *Greeley v. Waterhouse*, 19 Maine, 9; *The Duke of Bedford*, 2 Hagg. Adm. 294. Necessity, therefore, is not a requisite.—Same cases.

(h) *The Orelia*, 3 Hagg. Adm. 75; *The Boston*, 1 Blatchf. & H. Adm. 309; *The Kennersley Castle*, 3 Hagg. Adm. 1; *The Alexander*, 1 Dods. 278; *The Tartar*, 1 Hagg. Adm. 1; *The Brig Ann C. Pratt*, 1 Curtis, C. C. 344; *Breed v. Ship Venus*, *Abbott on Shipping*, 159, note 1; *The Jane*, 1 Dods. 461.

(i) *The Gratitude*, 3 Rob. Adm. 266; *The Nelson*, 1 Hagg. Adm. 169; *The Gauntlet*, 3 W. Rob. 82.

(j) *King v. Perry*, 3 Salk. 23; *Fontaine v. Col. Ins. Co.* 9 Johns. 29. It has been said, that a master in a port of a State of this country other than the home port, may make a bond. *Selden v. Hendrickson*, 1 Brock. C. C. 396. But this cannot now be considered correct. It makes no difference whether the ship is at a port of the country where she is owned or not; the only question is whether she is so far distant from home that the owners cannot

be consulted within a reasonable time. *Wallace v. Fielden*, 7 Moore, P. C. 398; reversing s. c. *wom.* *The Oriental*, 3 W. Rob. 243; *The Bonaparte*, 3 W. Rob. 298; *Wilkinson v. Wilson*, 8 Moore, P. C. 459; *The Bonaparte*, 20 Eng. L. & Eq. 649, 8 Moore, P. C. 483; *The Nuova Loaneese*, 22 Eng. L. & Eq. 628; *Agricultural Bank v. The Bark Jane*, 19 La. 1.

(k) *The Fortitude*, 3 Sumner, 246; *The Medora*, Sprague, 138.

(l) *The Ship Packet*, 3 Mason, 255; *Walden v. Chamberlain*, 3 Wash. C. C. 290; *The Virgin*, 8 Pet. 538; *The Medora*, Sprague, 138; *The Sydney Cove*, 2 Dods. 7. Whether the master is obliged to use his own money before resorting to a bottomry bond seems doubtful. See *The Ship Packet*, 3 Mason, 263; *Canizares v. The Santissima Trinidad*, Bee, 353; *The William & Emmeline*, 1 Blatchf. & H. Adm. 72.

(m) *The Ship Packet*, 3 Mason, 258.

(n) *The Aurora*, 1 Wheat. 96; *Thomas v. Osborn*, 19 How. 31; *Walden v. Chamberlain*, 3 Wash. C. C. 290; *Soares v. Rahn*, 3 Moore, P. C. 1; *The Royal Stuart*, 33 Eng. L. & Eq. 602; *Duncan v. Benson*, 1 Exch. 555.

(o) *Atlantic Ins. Co. v. Conard*, 4 Wash. C. C. 662, 1 Pet. 386.

(p) *Carrington v. Pratt*, 18 How. 63.

¹ A master cannot bottomry a ship without communication with his owner, if communication be practicable, and, *a fortiori*, he cannot hypothecate the cargo without communicating with its owner, if communication with such owner be practicable; and the communication must state not merely the necessity for expenditure, but also the necessity for hypothecation. *Kleimwirt v. Cassa Marittima*, 2 App. Cas. 156.

* F.—*Of Respondentia.*

* 285

The master may hypothecate the whole of the cargo, or a part of it, to raise funds, in a case of sufficient necessity. (q) He may do this by a bill of sale properly conditioned; but more usually and more properly by an instrument, which is called a Respondentia Bond.

This bond is nearly the same thing in respect to the cargo, which the bottomry bond is in respect to the ship; and it is construed and governed by similar principles as to its necessity, and as to its operation. (r) Thus, a loan on respondentia is a loan on maritime interest. It must therefore be made dependent for payment, both of principal and interest, on the safe arrival of the goods. And if they are lost, the lender has no claim for any payment whatever. (s) Usually the master gives to the respondentia creditor bills of lading, duly indorsed. This act may give to the creditor additional security, by the constructive possession of the goods; but it gives him no claim if they are lost. (t)

SECTION III.

OF CONTRACTS IN RELATION TO THE USE OF A SHIP.

A.—*Of the Use of the Ship by the Owner.*

1. WHEN HE CARRIES HIS OWN GOODS.

He may carry his own merchandise, or that of others, or he may carry both. If he carry goods for others, he carries them on freight, and the usual if not constant meaning of the word * freight in law, is, the sum agreed on as that which * 286

(q) *The Gratitude*, 3 Rob. Adm. 263; *The Lord Cochrane*, 1 W. Rob. 312, 2 id. 320; *The Osmanli*, 3 W. Rob. 214; *Pope v. Nickerson*, 3 Story, 465.

(n. s.), 272. It may be made by the owner at a home port without necessity. *Conard v. Atlantic Ins. Co.* 1 Pet. 386; *Franklin Ins. Co. v. Lord*, 4 Mason, 248.

(r) *The Gratitude*, 3 Rob. Adm. 260; *The Osmanli*, 3 W. Rob. 214; *The Nostra Senora del Carmine*, 29 Eng. L. & Eq. 572. Ship and freight are liable before the cargo. *La Constancia*, 4 Notes of Cases, 285; *The Prince Regent*, 2 W. Rob. 83; *The Priscilla*, 1 Law Times 298.

Abram v. Franklin Ins. Co. 4 Mason, 248.

(s) *Franklin Ins. Co. v. Lord*, 4 Mason, 248.

(t) *Johnson v. Greaves*, 2 Taunt. 344.

shall be paid to the owners of a ship for carrying the goods of others. But in common conversation, the word freight is also used as meaning the goods carried or the cargo, and it would seem from the early reports that this word has had this two-fold meaning for a long time. (*u*)¹ And we shall hereafter see, that by the law and usage of insurance, a ship-owner may insure his freight under that name, meaning thereby not his own cargo, but what another party would have paid him for carriage of the same goods on the same voyage.

B.—*Of the Use of a Ship by Freighters.*

1. OF THE RECIPROCAL LIENS OF THE SHIP AND THE CARGO.

The contract by which an owner carries the goods of others, is called a contract of affreightment. The law of freight applies where the owners of the ship are one party, and the owners of the cargo, or of a part of it, are another party. And the fundamental principle of the law-merchant in relation to this contract, is, that the ship and the cargo have reciprocal rights against each other, and liens each against the other, to enforce these rights. The meaning and effect of this rule is, that the ship-owner, by receiving the goods on board, and with or without a written or an express promise, agrees to carry the goods in that ship, to their destined port, by the proper route, at a proper time, and in safety. The elements of this agreement are, that the ship is seaworthy in all respects and particulars, (*uu*)² including a competent and sufficient master and crew, papers, and provisions, and that proper care shall be taken of the goods, in loading them on board, in carrying them whither they should go, in there delivering them, and in navigating the ship to her destined port without needless delay or deviation. (*v*) And if there be a failure in any of these particu-

(*u*) Bright *v.* Cowper, 1 Brownl. & G. 21. Garrett, 6 Bing. 716; Freeman *v.* Taylor, 8 Bing. 124; Hand *v.* Baynes, 4 Whart. 204; Crosby *v.* Fitch, 12 Conn. 410; Bond *v.* The Cora, 2 Pet. Adm. 373, 379, 2 Wash. C. C. 80; Knox *v.* The Ninetta, Crabbe, 534.

(*uu*) This rule is applied to river-worthiness in McClintock *v.* Lary, 23 Ark. 215.

(*v*) A needless deviation makes the carrier an insurer of the cargo. Davis *v.*

1 For a case on "freight," see Hubbell *v.* Great Western Ins. Co. 74 N. Y. 246.

2 In every contract for the carriage of merchandise by sea there is, in the absence of express provision to the contrary, an implied warranty by the ship-owner that his vessel is seaworthy. Kopitoff *v.* Wilson, 1 Q. B. D. 377.

lars, and the goods are thereby * injured, or their value lessened, not only is the ship-owner personally responsible, but the ship itself is subject to the lien of the freighter or shipper of the goods, and by that lien the shipper may enforce his rights, or get from the ship itself an indemnity for the injury sustained by a violation of his contract with the owner. (w)

And on the other hand, if the goods are so carried, not only is the owner of the goods bound to pay to the owner of the ship the freight earned by the carriage, but the ship-owner has a lien on the goods to enforce his claim for his earnings against them. (x)

Moreover, if the goods are once laden on board, the ship-owner thereby acquires a right to carry them the whole distance, and so earn his whole freight. And we should say, that the shipper cannot reclaim his goods and take them out of the ship, unless the owner consents, or unless the shipper pays to the owner his full freight. Some questions have arisen, and have been somewhat agitated in the courts, and may not be yet quite settled, as to the extent of the obligation of the shipper and the rights of the owner. We consider it certain, however, that the shipper cannot take his goods from the ship, without paying to the owner full compensation for any trouble or loss sustained by him. (y)

These rules or principles may be said to compose the whole law of freight; and while courts of common law may find some * difficulty in the enforcement of these liens, and especially * 288 the lien of the cargo against the ship, a court of admiralty

(w) *The Gold Hunter*, 1 Blatchf. & H. Adm. 300; *The Grafton*, Olcott, Adm. 43, 1 Blatchf. C. C. 173; *The Rebecca*, Ware, 188; *Clark v. Barnwell*, 12 How. 272; *Rich v. Lambert*, id. 347.

(x) *Certain Logs of Mahogany*, 2 Sumner, 601; *Drinkwater v. The Brig Spartan*, Ware, 149; *Cowing v. Snow*, 11 Mass. 415; *Pickman v. Woods*, 6 Pick. 248. — This lien is considered as waived by a delivery of the goods unconditionally. *Sears v. Certain Bags of Linseed*, U. S. D. C. Mass. 1858, affirmed in June, 1858, by the Circuit Court, and by the Supreme Court in *Bags of Linseed*, 1 Black, 108. It was also said that if the goods are put even in the warehouse of the consignee, under an agreement or understanding that this act shall not be a waiver of the lien, or if there is a local usage of the port to this effect, the goods may be held

by a process *in rem*. See also *Sears v. Wills*, 4 Allen, 212; *The Kimball*, 3 Wallace, 37; *The Eddy*, 5 Wallace, 481; *The Bird of Paradise*, 5 Wallace, 545.

(y) Some cases hold, that no lien for freight exists until the vessel has broken ground. *Curling v. Long*, 1 B. & P. 634; *Clemson v. Davidson*, 5 Binn. 392, 401; *Burgess v. Gun*, 3 Harris & J. 225; *Bailey v. Damon*, 5 Gray, 92. If this be so, then the rule of damages would be merely the expenses actually incurred. But the better rule seems to be, that the lien for freight commenced as soon as the goods are on board. *Abbott on Shipping*, 595; *Tindal v. Taylor*, 4 Ellis & B. 219, 28 Eng. L. & Eq. 210; *Thompson v. Small*, 1 C. B. 354; *Thompson v. Trail*, 2 Car. & P. 334. See also *Keyser v. Harbeck*, 3 Duer, 373; *Bartlett v. Carnley*, 6 Duer, 194.

finds no such difficulty; its process *in rem* being equal to the requirement of any case.

An owner of a ship may carry his own goods principally, or partly, and fill up his ship with the goods of others. Or he may carry only the goods of others. In this latter case, he may either offer the ship to the public as a general ship, or he may let her out by a charter-party.

When he offers his ship as a general ship, he usually advertises her, stating the name of the ship and of the master, her tonnage, her general character, the time of sailing, and her proposed voyage. And although he would not be bound to exact accuracy in all these particulars, he would undoubtedly be held to make compensation to a shipper who was injured without his own fault, by the material misrepresentation of the owner in any of these statements. (z) And if the owner changes his purpose in any of these particulars, it would be his duty to vary his advertisement, or other public notice, accordingly. (a)

Goods may be carried to the port of destination, and there delivered, but in such condition that their value is greatly diminished; and the question may then arise, how this diminution of value affects the freight. The answer must depend upon the manner in which this diminution took place, or the causes which produced it. We have seen that the ship is responsible for any damage to the goods caused by the negligence or default of the master; and so it is for injury arising from the inherent nature or properties of the goods, if it could have been prevented by a proper condition of the ship or by reasonable care on the part of the master. But if the goods are injured by a peril of the sea for

which the ship is not responsible, or by inherent causes not * 289 made operative by the fault of the ship or * master, then the ship is not responsible, and the claim for freight remains unaffected. Hence it is a rule of the law-merchant, that if goods injured by causes for which the ship is not responsible, remain *in specie*, and are delivered *in specie*, the whole freight

(z) An advertisement that a vessel will sail with convoy is a warranty of the fact. *Runquist v. Ditchell*, 3 Esp. 64; *Sanderson v. Busher*, 4 Camp. 54, note; *Magalhaens v. Busher*, 4 Camp. 54; *Freeman v. Baker*, 5 B. & Ad. 797. As to an advertisement of time when a vessel will start, see *Cranston v. Marshall*, 5 Exch. 395; *Yates v. Duff*, 5 Car. & P. 369; *Glaholm v. Hays*, 2 Man. & G. 257; *Ollive v. Booker*, 1 Exch. 416; *Howard v. Cobb*, U. S. C. C. 19 Law Reporter, 377; *Denton v. Great Northern R. Co.* 5 Ellis & B. 860, 34 Eng. L. & Eq. 154; *Mills v. Shultz*, 2 E. D. Smith, 139.

(a) *Peel v. Price*, 4 Camp. 243.

is earned, whatever be the diminution or destruction of their value. (b)

If barrels or boxes arrive in which goods *were*, but there are no goods in them, as where wine, oil, or molasses leaks out, or sugar or salt melts and washes out, but the barrels or boxes arrive in good order, freight is due if the loss is occasioned by intrinsic defect or quality of the goods, as by decay, evaporation, or leakage. (c) If the loss is by a peril of the sea, no freight is payable, (d) and if the loss is owing to the fault of the vessel, the goods are paid for, deducting freight.

2. OF THE BILL OF LADING.

This is one of the most ancient documents now in use, and is very similar in its form and provisions among all commercial nations. It is a written receipt for the goods, signed by the master as the agent of the owner, and expresses the ordinary obligations of the owner. A receipt is sometimes given for the goods, and subsequently a bill of lading; in which case the previous receipt should be given up, or the master or owner may be doubly liable.

The bill of lading may be signed by any officer of the ship having authority. Commercial usage would seem to require that it should be given by a master or officer. But a custom seems to be growing up in some of our commercial cities, for a clerk of the owners to sign and deliver a bill of lading in the counting-room; and it would probably be equally effectual. (e)

The master has, by the law-merchant, no authority to sign a bill of lading until the goods are received, and such a bill would * not bind his owners. (f) But if the goods were * 290 afterwards received, the bill of lading might then have that effect.

(b) *Jordan v. Warren Ins. Co.* 1 Story, 353; *M'Gaw v. Ocean Ins. Co.* 23 Pick. 406; *Lord v. Neptune Ins. Co.* 10 Gray, 109; *Ogden v. Gen. Ins. Co.* 2 Duer, 204; *Hugg v. Augusta Ins. Co.* 7 How. 595.

(c) *Nelson v. Stephenson*, 5 Duer, 538; *Nelson v. Woodruff*, 1 Black, 156.

(d) *Frith v. Barker*, 2 Johns. 327.

(e) See *Putnam v. Tillotson*, 13 Met. 517.

(f) *Rowley v. Bigelow*, 12 Pick. 307; *Lickbarrow v. Mason*, 2 T. R. 75; *Grant v. Norway*, 10 C. B. 665, 2 Eng. L. & Eq. 337; *Hubbersty v. Ward*, 8 Exch. 330, 18

Eng. L. & Eq. 551; *Coleman v. Riches*, 16 C. B. 104, 29 Eng. L. & Eq. 323. Nor, in such case, is the vessel liable *in rem*. *Sch. Freeman v. Buckingham*, 18 How. 182. But if there is a contract to carry certain goods, and they are lost after coming into possession of the master, but before they are on board, and the master signs bills of lading for them after the loss, although the carrier may repudiate the bills of lading, yet he cannot set them up as merging the prior contract. *The Bark Edwin*, Sprague, 477.

The bill of lading is often called a negotiable instrument; (*g*) it is not entirely so. It promises to deliver the goods to the shipper or his assigns, and not to his order. But a bill of lading indorsed by the shipper and delivered to the indorsee, will found an action by the indorsee against the ship-owner for the goods; and will be presumptive though not absolute evidence, that the goods were transferred to the indorsee. In most, but not all of our States, the indorsee must bring an action on the bill not in his own name, but in that of the shipper. (*h*) It is, however, possible for a bill of lading to be transferred by mere delivery, and transfer to the holder whatever property in the goods the bill of lading represents, if this were the intention of the parties. (*hh*)

Neither between the ship-owner and indorsee, nor between the ship-owner and the shipper himself, is the bill of lading conclusive. (*i*) But if the ship-owner resists an action, on the ground that the goods were not in fact such, or of such quality, as they were said to be in the bill, this he must prove.

The ship-owner would not be liable to the shipper for a loss of or an injury to the goods caused by an intrinsic defect or decay, but he should not be permitted to defend against an indorsee of the bill who bought the goods trusting to the bill, on the ground of any defect, if the ship-owner knew the defect, or by proper * 291 means might have known it, when the bill was * signed (*j*), and says nothing thereof in the bill; unless the nature of the goods makes their liability to decay obvious. (*k*)

The party who ships the goods is the consignor. He to whom they are to be delivered by the terms of the bill is the consignee. If

(*g*) *Evans v. Marlett*, 1 Ld. Raym. 271; *Lickbarrow v. Mason*, 2 T. R. 63; *Jenkyns v. Usborne*, 7 Man. & G. 698.

(*h*) *Thompson v. Dominy*, 14 M. & W. 402; *Tindal v. Taylor*, 4 Ellis & B. 219, 28 Eng. L. & Eq. 210; *Dows v. Cobb*, 12 Barb. 310. But in admiralty an assignee of a bill of lading may sue in his own name. *The Water Witch*, 1 Black, 494.

(*hh*) *Marine Bank v. Wright*, 46 Barb. 45.

(*i*) *Bates v. Todd*, 1 Moody & R. 106; *Berkeley v. Watling*, 7 A. & E. 29; *Wolfe v. Myers*, 3 Sandf. 7; *Ward v. Whitney*, 3 Sandf. 399, 4 Seld. 442; *Dickerson v. Selyee*, 12 Barb. 99; *O'Brien v. Gilchrist*, 34 Maine, 554; *Knox v. The Ninetta*, *Crabbe*, 534; *Benjamin v. Sinclair*, 1 *Baily*, 174; *Backus v. Sch. Marengo*, 6 *McLean*, C. C. 487; *Wayland v. Moesly*, 5 *Ala.* 430; *May v. Babcock*, 4 *Ohio*, 334;

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Sutton v. Kettell, Sprague, 309; *The Henry*, 1 Blatchf. & H. Adm. 485; *Bissel v. Price*, 16 Ill. 408; *Butler v. The Arrow*, 1 Newb. Adm. 59; *Warden v. Green*, 6 *Watts*, 424; *Portland Bank v. Stubbs*, 6 *Mass.* 422; *Sears v. Wingate*, 3 *Allen*, 108; *Manchester v. Milne, Abbott*, Adm. 115; *Goodrich v. Norris*, id. 196; *Cobb v. Blanchard*, 11 *Allen*, 409; *Meyer v. Peck*, 28 N. Y. 590; *Tarbox v. Eastern Steamboat Co.* 50 Me. 339.

(*j*) *Clark v. Barnwell*, 12 How. 272; *Ship Howard v. Wissman*, 18 How. 231; *McKinlay v. Morrish*, 21 How. 343; *Lamb v. Parkman*, Sprague, 343; *Zerega v. Poppe, Abbott* Adm. 397; *Baxter v. Leeland*, id. 348; *Bissel v. Price*, 16 Ill. 408. So if no bill of lading is given. *Hudson v. Baxendale*, 2 H. & N. 575.

(*k*) See cases *supra*, p. * 290, n. (*i*).

the goods are deliverable to the shipper himself or his assigns, he is both consignor and consignee. So he would be, if no person were named in the bill of lading as the party to whom the goods were to be delivered ; but this seldom occurs.

The consignee of the goods may transfer his interest in them to any purchaser without an indorsement or delivery of the bill ; (*l*) but if the goods have not been delivered to the consignee and the bill of lading thereby discharged, the proper and usual way of transferring the goods is by indorsement and delivery of the bill. (*m*)

Bills of lading are usually signed in the regular course of shipping in sets of three. Of these, the master retains one ; the other two are delivered to the consignor, and of these he retains one, and sends the other to the consignee, either with the goods or by a separate conveyance. There is no rule of law about this, and more or fewer bills may be signed and delivered, or disposed of, as the parties choose.¹

The effect of the bill, when delivered, depends somewhat upon the question, whether the consignor be or be not the consignee. When he is not, and the consignor sends the bill to the consignee, the goods become at once the property of the consignee. (*mm*) They are at his risk, and he is liable for their freight ; but until they actually come into his possession, they are subject to the consignor's right of stoppage *in transitu*. (*n*)

If the consignor be himself the consignee, he may send the bill to a third party. He may send it to him indorsed to him, or indorsed in blank. And if the consignee has ordered the * goods, or is to receive them as his own, when he receives * 292 this indorsed bill the property in the goods passes to him as if he had been named consignee in the bill. (*o*)² If, however,

(*l*) *Stanton v. Eager*, 16 Pick. 467 ; *Allen v. Williams*, 12 Pick. 297, 302.

Stanton v. Eager, 16 Pick. 467. See *ante*, Book III. Chap. 6.

(*m*) *Buffington v. Curtis*, 15 Mass. 528.

(*o*) *Haille v. Smith*, 1 B. & P. 563 ;

(*mm*) *The Sally Magee*, 3 Wallace, 451.

Chandler v. Sprague, 5 Met. 306 ; *Ellershaw v. Magniac*, 6 Exch. 570, n. ; *Wait v. Baker*, 2 Exch. 1.

(*n*) *Walley v. Montgomery*, 3 East, 585 ; *Allen v. Williams*, 12 Pick. 297 ;

¹ Where a master in good faith has delivered goods to a *bond fide* indorsee of one of three bills of lading, numbered "First," "Second," and "Third," and each reading "one of which bills being accomplished, the others to stand void," a previous *bond fide* indorsee of another of the bills cannot maintain an action for conversion on account of such delivery. *Glyn Mills & Co. v. East, &c. Dock Co.* 7 App. Cas. 591, a case which comments in severe terms upon the inconvenience of the practice of drawing bills of lading in sets of three.

² Where a bill of lading, and a bill of exchange to cover the goods included in the bill of lading, are sent in a letter to the purchaser of the goods, it is a well-understood

he is only the agent or factor of the consignor, this bill gives him no further property or power; and if the bill be sent without indorsement, it confers no rights of property whatever; and has little more effect than a mere notice that goods are shipped in such a vessel to such a port. (*p*)

The consignor frequently sends to a consignee a bill not indorsed, and then sends to his own agent in or within reach of the same port, an indorsed bill; it may be indorsed in blank, or to the agent, or to the party ordering the goods, and the consignor sends to his agent with the bill orders to deliver the bill to the party ordering the goods, or to receive the goods and deliver them to him, provided payment be made or secured, or such other terms as the consignor prescribes are complied with. This course secures to the consignor, beyond all question, the right and power of retaining the goods until the price for them is paid or secured to him.

Because the bills of lading are evidence against the master or owner, as to every material fact stated in them in respect to the description of the goods, it is prudent and usual to describe them only as so many boxes, or barrels, or bales, or parcels, numbered and marked as per margin; adding the words, "contents unknown," or equivalent words. Even if the words "containing" such or such goods, are added, the ship is bound only to deliver the boxes as received, and the evidence of the bill of lading may always be rebutted by proof of mistake or fraud. (*q*)¹

Then the two liens heretofore spoken of come in. It is common for the bill of lading to say, that the goods are to be delivered on payment of the freight; but whether expressed * or not, the law-merchant gives this lien. That is to say, the master cannot demand his freight without being ready to deliver

(*p*) *Brandt v. Bowlby*, 2 B. & Ad. 932; *Coxe v. Harden*, 4 East, 211.

(*q*) *Clark v. Barnwell*, 12 How. 272; *Vernard v. Hudson*, 3 Sumner, 405; *Biesel v. Price*, 16 Ill. 408; *Ellis v. Willard*, 5 Seld. 529. So if the words "weight unknown" are inserted, although the bill

of lading specifies a specific weight, the carrier is only bound to deliver the weight received. *Shepherd v. Taylor*, 5 Gray, 591; *Andover, The*, 3 Blatchf. C. C. R. 303; *Columbo, The*, id. 521; *Wentworth v. Realm*, 16 La. An. 18.

rule that the bill of exchange must be accepted, or the bill of lading cannot be retained. *Shepherd v. Harrison*, L. R. 5 H. L. 116; but if sent without special instructions to an agent for collection, a bill of lading may be surrendered to the drawee on his acceptance of the draft, it being no part of the agent's duty to hold the bill after such acceptance. *National Bank v. Merchants' Bank*, 91 U. S. 92.

¹ But where a bill of lading inadvertently described a closed case containing "silk" goods as "linen," and the master, before signing it, stamped the case with the words, "weight, value, and contents unknown," held, that the carrier was liable for the non-delivery of two pieces of the silk goods abstracted from the case. *Lebeau v. General Steam Navigation Co.* L. R. 8 C. P. 88.

the goods; (*r*) nor can the shipper demand the goods without a tender of the freight. (*s*)

If the master delivers the goods without receiving freight, or if the contract of freight be such that the goods are to be delivered at once, and the freight is to be paid at a future day, we should say, that neither the master nor the owner of the ship has any longer any lien on the goods; but must look to the consignor personally for the freight. This must be the rule generally, although there may be exceptional cases, in which circumstances prove, that while the goods were delivered, they yet remain subject to the lien. The lien is lost when it has been agreed that the goods shall be delivered, and freight paid at a subsequent period. (*t*) The lien would not be lost if the master had been induced to surrender the goods by fraud. (*u*) And if the shipper or consignee may elect whether to pay freight at a future time, or on delivery, interest being discounted, and does elect to pay on delivery, the cargo is subject to the lien. (*uu*) The bill of lading sometimes contains special stipulations in regard to the disposal of the goods or their proceeds. (*v*)

The contract for freight is in law an entire contract; that is, it is a contract for the delivery of all the goods at the end of the whole voyage; and therefore no freight is payable unless the whole voyage is performed, (*w*) nor unless all the goods are delivered, or offered for delivery on payment. (*x*)

(*r*) *Brittan v. Barnaby*, 21 How. 527.

(*s*) *Lane v. Penniman*, 4 Mass. 91; *Palmer v. Lorillard*, 16 Johns. 348; *Frothingham v. Jenkins*, 1 Cal. 42; *Loge of Mahogany*, 2 Sumner, 589; *Möller v. Young*, 5 Ellis & B. 755, 34 Eng. L. & Eq. 92, reversing the same case in the Queen's Bench, 5 Ellis & B. 7, 30 Eng. L. & Eq. 345.

(*t*) The cargo of the Anna Kimball, 2 Sprague, 33. The lien for freight, like any other, may be waived; and this is generally the case where the time and place of payment are inconsistent with the lien. *Raymond v. Tyson*, 17 How. 53; *The Sch. Volunteer*, 1 Sumner, 551; *Chandler v. Belden*, 18 Johns. 157; *Alzager v. St. Katherine's Dock Co.* 14 M. & W. 794; *Pickman v. Woods*, 6 Pick. 248. A delivery without saying anything about the freight would be considered a waiver of it. *Bags of Linseed*, 1 Black, 108. It is also stated in this case, that where goods are put in a warehouse by the consignee, under an agreement or understanding that this act shall not be a waiver of the lien, or if there is a local usage of the port to this effect, the goods

may be held for the lien. See also *Sears v. Wills*, 4 Allen, 212.

(*u*) *Bigelow v. Heaton*, 6 Hill, 43, 4 Denio, 496.

(*uu*) *Paynter v. James*, Law Rep. 2 C. P. 348.

(*v*) *Wallis v. Cook*, 10 Mass. 510; *Winchester v. Patterson*, 17 Mass. 62; *Steamboat John Owen v. Johnson*, 2 Ohio State, 142; *Jones v. Hoyt*, 23 Conn. 157. In respect to stipulations, it has been said, that they must be in words so definite as to indicate an agreement that the general operation of the law-merchant in respect to the bills of lading is not to prevail, and they must be in writing, and signed by the parties. *Brittan v. Barnaby*, 21 How. 527.

(*w*) *The Nathaniel Hooper*, 3 Sumner, 554; *Hunter v. Prinsep*, 10 East, 394; *Tirrell v. Gage*, 4 Allen, 245; *Barker v. Cheriott*, 2 Johns. 352; *Armroyd v. Union Ins. Co.* 3 Binn. 437; *Union Ins. Co. v. Lenox*, 1 Johns. Cas. 383; *Sampayo v. Salter*, 1 Mason, 43; *Caze v. Baltimore Ins. Co.* 7 Cranch, 358.

(*x*) *Sayward v. Stevens*, 3 Gray, 97.

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* 8. OF THE DELIVERY OF THE GOODS.

Although the contract of freight is entire, it may be made separable, either by the terms of the bill of lading, or by the acts of the parties. It is separable by the terms of the bill of lading, which is the contract of affreightment, when the freight is made payable either by the quantity, or package, or parcel, separately ; or where different parts of the cargo are shipped on distinct and separate terms; and in such cases, the consignee must pay for what is delivered agreeably to those terms. (y)

It is made separable, or rather it is divided by the act of the parties, if a part of an entire cargo is delivered to the consignee and accepted by him ; for then he must pay the freight of that part. (z) But the consignee may refuse to receive any part of an entire cargo, if the whole be not offered, and then is not bound to pay any part of the freight. (a) If only a part of the goods is delivered and accepted, and freight for that part is demanded, the shipper may have his claim against the ship-owner for the value of the goods not delivered ; and this he may offset against the claim for freight for what he receives. (b)

The ship-owner must indemnify the shipper for the full value of the goods if lost or injured, unless he can prove that the loss or injury arose from a cause for which he is not responsible. (c) If he discharges this burden of proof by showing that to be the case, the shipper may then reëstablish his claim by proving that the loss

or injury might have been prevented by due care and skill

* 295 on the part of the master or owner. (d) * But if the owner pays to the shipper the full value of goods not delivered, he may deduct therefrom the freight which would have been payable to him had he delivered them. (e) The freight cannot be demanded, unless the goods are delivered, or tendered, or delivery

(y) *Christy v. Row*, 1 Taunt. 300; *Ritchie v. Atkinson*, 10 East, 295; *M'Gaw v. Ocean Ins. Co.* 23 Pick. 405; *Frith v. Barker*, 2 Johns. 327.

(z) *Hinsdale v. Weed*, 5 Denio, 172.

(a) *Sayward v. Stevens*, 3 Gray, 97.

(b) *Hammond v. McCluree*, 1 Bay, 101; *Edwards v. Todd*, 1 Scam. 462.

(c) The mode of proceeding is for the shipper to prove the delivery of the goods to the carrier, and their non-delivery, or partial delivery. The burden is then on the carrier to show that he was prevented by one of the excepted perils from mak-

ing delivery. *Clark v. Barnwell*, 12 How. 280; *Hastings v. Pepper*, 11 Pick. 41; *Alden v. Pearson*, 3 Gray, 348; *The Ship Martha*, Olcott, Adm. 140; *The Sch. Emma Johnson*, Sprague, 527.

(d) *Clark v. Barnwell*, 12 How. 280; *Hunt v. Propeller Cleveland*, 1 Newb. Adm. 221, 6 McLean, C. C. 76.

(e) *Knox v. The Ninetta*, Crabbe, 544; *Arthur v. Sch. Caesius*, 2 Story, 81; *The Joshua Barker*, Abbott, Adm. 215; *Basin v. Richardson*, 20 Law Rep. 199, 5 Am. Law Reg. 459.

is prevented by the act or fault of the shipper or consignee. (*f*)¹ Still, however, if at the end of the voyage, the consignee is prevented from receiving them by the action or prohibition of government, this, although not his fault, is his misfortune; for the ship-owner has done all he is bound to do, and the whole freight is earned. (*g*) But if the ship cannot reach the port by reason of a blockade, or any similar cause, this, though not the fault of the ship, is its misfortune; for the voyage is not finished in fact, and the freight is not earned. (*h*)

The usages of trade have much influence in determining the place at which the goods should be delivered, and manner of delivery. (*i*) Thus, in general, a delivery at a suitable, safe, and reasonably convenient wharf, with prompt notice (*j*) to the consignee, is a sufficient delivery. (*k*)² And for loss or injury to goods arising from delivery on an unfit wharf or at an unfit place, the owner is responsible. (*kk*) Different consignments to different consignees should be arranged separately; (*l*) and knowledge by the consignee, that the vessel has arrived and will discharge her cargo at a particular place, if derived otherwise than from notice to him, is not sufficient. (*m*) But a notice in a news-

(*f*) *Bradstreet v. Baldwin*, 11 Mass. 229; *Clendaniel v. Tuckerman*, 17 Barb. 184; *Brown v. Ralston*, 4 Rand. 504, 9 Leigh, 532.

(*g*) *Morgan v. Ins. Co. of N. A.* 4 Dall. 455; *Bradstreet v. Heron, Abbott*, Adm. 209. Where the seizure is by custom-house officers, see *Goalring v. Higgins*, 1 Camp. 451; *Spence v. Chodwick*, 10 Q. B. 517; *Evans v. Hutton*, 4 Man. & G. 954; *Howland v. Greenway*, 22 How. 491; *Brooks v. Minturn*, 1 Cal. 481.

(*h*) *Hadley v. Clarke*, 8 T. R. 259; *Stoughton v. Rappalo*, 3 S. & R. 559; *Scott v. Libby*, 2 Johns. 336; *Lorillard v. Palmer*, 15 Johns. 20. See *Sims v. Howard*, 40 Maine, 276.

(*i*) A usage to receive goods at the quarantine ground, is admissible to prove a compliance with an engagement to de-

liver at the port. *Bradstreet v. Heron, Abbott*, Adm. 209. Where no port of delivery is mentioned, the general port for the kind of cargo carried is the proper one. *Smith v. Davenport*, 34 Maine, 520.

(*j*) *Golden v. Manning*, 3 Wilson, 429; *The Peytona, Ware*, 2d ed. 541, 2 Curtis, C. C. 21; *Salmon Falls Manuf. Co. v. Bark Tangier*, U. S. C. C. Mass. 21 Law Reporter, 6.

(*k*) *Hyde v. Trent Nav. Co.* 5 T. R. 389; *Vose v. Allen*, 3 Blatchf. 289; *The Bark Majestic*, 10 Legal Observer, 100; *Cope v. Cordova*, 1 Rawle, 203.

(*kk*) *Vose v. Allen*, 3 Blatchf. 289.

(*l*) *Ship Middlesex*, U. S. D. C. Mass. 21 Law Rep. 14.

(*m*) *Ship Middlesex*, 21 Law Rep. 14.

¹ Where a portion of a cargo was lost by an excepted peril, without fault of the master, under a charter-party to load a full cargo for a lump sum as freight, payable "after entire discharge and right delivery of the cargo," such freight becomes due in full after the delivery of the remainder of the cargo. *Robinson v. Knights*, L. R. 8 C. P. 465; *Merchant Shipping Co. v. Armitage*, L. R. 9 Q. B. 99. See *Leckie v. Sears*, 109 Mass. 424.

² A contract to deliver freight at a port implies, in the absence of any special provision, and of any custom to discharge into lighters, that the carrier is to bring his vessel to some wharf, or convenient or customary place of discharge. *Hodgdon v. New York, &c. R. Co.* 46 Conn. 277.

* 296 paper is enough if it can be shown that the * consignee read the notice; (*n*) and the want of notice is excused, if after proper efforts the consignee cannot be found. (*o*) If the master, by his own fault, omits to sign a bill of lading, ignorance of the names of the consignees is no excuse for the want of notice. (*p*) But if such omission be the fault of the shipper, notice published in the usual way, in one or more newspapers, is sufficient. (*q*) If no consignee is named in the bill of lading, or is known to the master, it is the general duty of the master to store the goods, at the expense of their owner, and for his benefit. (*r*)

The consignee has a reasonable time to inspect the goods on the wharf, and determine whether he will accept them. (*s*) The delivery must be on a suitable day as to the weather, and on a business day, and at a business hour; (*t*) for the delivery must be reasonable and proper in time, place, and circumstances; (*u*) and the liability of the vessel continues until the consignee has had his reasonable time to examine the goods. If a loss occurs because the goods were marked illegibly, this loss falls on either the owner or the shipper, as it was the fault of the one or the other. (*v*)

As to the question for what damage the owners of the ship are responsible, the cases are numerous. It has been recently determined that the owners of a general ship are liable to a shipper, for damage done to his goods from other goods stored in the hold, without wilful fault or negligence on the part of the ship-owner. (*w*) And even if the goods doing the injury be-

(*n*) *Kohn v. Packard*, 3 La. 224; *Northern v. Williams*, 6 La. An. 578.

(*o*) *Fisk v. Newton*, 1 Denio, 45; *Mayell v. Potter*, 2 Johns. Cas. 371.

(*p*) *The Peytona, Ware*, 2d ed. 541, 2 Curtis, C. C. 21.

(*q*) *Medley v. Hughes*, 11 La. An. 211.

(*r*) *Galloway v. Hughes*, 1 Bailey, 553. So if the consignee refuses to receive the goods, *Arthur v. Sch. Cassius*, 2 Story, 81; *Ostrander v. Brown*, 15 Johns. 39; *Chickering v. Fowler*, 4 Pick. 371. But he is not bound to give notice to the consignor of the refusal of the consignee to accept, unless such a course is reasonable under all the circumstances of the case, and this is a question for the jury. *Hudson v. Baxendale*, 2 H. & N. 575.

(*s*) Until he accepts he is not liable

for freight. *Sch. Treasurer, Sprague*, 473.

(*t*) *Salmon Falls Co. v. Bark Tangier*, 21 Law Rep. 6; *Goddard v. Bark Tangier*, 21 Law Rep. 12. This case held, that a delivery on Fast Day was not good, but this was reversed by the Supreme Court. *Richardson v. Goddard*, 23 How. 28.

(*u*) *Price v. Powell*, 3 Comst. 322; *Segura v. Reed*, 3 La. An. 695; *Northern v. Williams*, 6 La. An. 578.

(*v*) See *The Huntress, Daveis*, 82.

(*w*) *Gillespie v. Thompson*, cited 6 Ellis & B. 477, note, 36 Eng. L. & Eq. 227; *Brousseau v. Ship Hudson*, 11 La. An. 427; *Bark Col. Ledyard, Sprague*, 530; *Baxter v. Leland, Abbott, Adm.* 348, 1 Blatchf. C. C. 526.

long to * the shippers of the damaged goods, and were put * 297 on board by them in condition to do the injury, the ship-owner is responsible, but now only if the proximate and immediate cause of the injury be the misconduct of the master in stowing the injurious goods too near the other goods. (x) But the shippers are answerable to the ship-owners for putting on board dangerous goods, the character of which is not made known to the owners nor easily discoverable by them. (y)

The shipper is not bound to disclose the value of his goods; but the carrier has a right to inquire and have a true answer; if deceived he is not answerable; but if he makes no inquiry, and is not misled by artifice, he is responsible for the full value. (yy) He is also responsible for damage to goods or passengers, arising from unreasonable delay in carrying them, caused by his negligence or fault. (yz)

4. Of TRANSSHIPPING THE GOODS AND FORWARDING THEM IN OTHER VESSELS.

We have seen that although the ship has no lien on the cargo for payment of freight, until that be earned, the ship has a lien on the cargo once shipped on board, grounded on the right of the ship to carry it to its destination and thus earn the freight. Nor is this right lost by circumstances which would cause great delay, or diminution of value; (z) but if the lien of the ship upon the goods is only for the purpose of earning freight, the shipper may at any time reclaim his goods, by paying the full freight which would be earned upon them. (a) The authorities are very strong and decisive that the ship-owner need not deliver the goods at any intermediate place, although he is there with his ship damaged, and the cargo damaged, and long-continued and extensive repairs are required for either or both. Because he may remain there, and make the repair, and then complete his voyage, and earn all his freight. (b)¹

(x) *Alston v. Herring*, 11 Exch. 822, Co. 23 Pick. 405; *Lord v. Neptune Ins. Co.* 36 Eng. L. & Eq. 475. 10 Gray, 109; *Small v. Moates*, 9 Bing. 574.

(y) *Braas v. Maitland*, 6 Ellis & B. 470, (a) *Palmer v. Lorillard*, 16 Johns. 348, 36 Eng. L. & Eq. 221. 355; *Jordan v. Warren Ins. Co.* 1 Story, 342, 354; *M'Gaw v. Ocean Ins. Co.* 23

(yy) *Levois v. Gale*, 17 La. An. 302. Pick. 405; *Shipton v. Thornton*, 9 A. &

(yz) *Van Buskirk v. Roberts*, 31 N. Y. E. 314; *Gibbe v. Gray*, 2 H. & N. 22, 40

(z) *Tindal v. Taylor*, 4 Ellis & B. 219, Eng. L. & Eq. 531; *Tindal v. Taylor*, 4

28 Eng. L. & Eq. 210; *Clenson v. Davidson*, 5 Binn. 392; *M'Gaw v. Ocean Ins.* 28 Eng. L. & Eq. 210.

(b) See cases cited in preceding note.

¹ See *Notara v. Henderson*, L. R. 5 Q. B. 346; L. R. 7 Q. B. 225.

But he may and usually does send the cargo forward in another ship to its original destination, and thus earn full * 298 freight. (c) * And undoubtedly, to some extent, thus to transship the cargo is his duty and obligation; although that duty in this respect is not easily or distinctly defined. (d)

If he sends the goods on, and pays the expense of sending them on, he may charge the consignee with the expense of transshipment. As soon as an exigency requiring transshipment occurs, it gives the master authority to act as agent of all parties interested, whether owners, or freighters, or insurers; and makes it his duty to do the best he can for them all. And the rule is usually stated to be this: that the master must then transship if he can, and may claim his whole freight, and charge the excess of the cost of transshipment to the shipper of the goods. So that if it cost the master no more to tranship them than it would to have carried them himself, the shipper pays no more than the whole freight. (e) If the master must pay for the freight onwards more than the whole freight the owners are to receive for the whole voyage, he no longer acts as their agent, because they have no interest in the transshipment, but as the agent of the shippers whose goods he forwards. (ee)

If he is able to tranship and will not do so, the shipper is certainly entitled to his goods without making any payment of freight; because until the whole freight be actually earned, the master has no lien on the goods, and no right whatever to retain them, except for the purpose of earning his freight. (f) But instead of transshipping he may tender the goods at the intermediate port to the shipper. If the shipper accepts them, he must then pay the freight to that place, or *pro rata itineris*. (g)¹ But

also *The Brig Collenberg*, 1 Black, 170; *Herbert v. Hallett*, 3 Johns. Cas. 93; *Griswold v. N. Y. Ins. Co.* 1 Johns. 205; *Saltus v. Ocean Ins. Co.* 14 Johns. 188; *Ellis v. Willard*, 5 Seld. 529; *Clark v. Mass. F. & M. Ins. Co.* 2 Pick. 104; *Tronson v. Dent*, 8 Moore, P. C. 419, 36 Eng. L. & Eq. 41.

(c) *Luke v. Lyde*, 2 Burr. 882, 889; *Rosetto v. Gurney*, 11 C. B. 176, 7 Eng. L. & Eq. 461.

(d) See cases *supra*, also *Schieffelin v. N. Y. Ins. Co.* 9 Johns. 21; *Searle v. Scovell*, 4 Johns. Ch. 218; *Treadwell v. Union Ins. Co.* 6 Cow. 270; *Hugg v. Augusta Ins. & Banking Co.* 7 How. 609;

Whitney v. N. Y. Firem. Ins. Co. 18 Johns. 208; *Bryant v. Commonwealth Ins. Co.* 6 Pick. 130.

(e) See *Shipton v. Thornton*, 9 A. & E. 314; *Rosetto v. Gurney*, 11 C. B. 176, 7 Eng. L. & Eq. 461; *Grobs v. Gray*, 2 H. & N. 22, 40 Eng. L. & Eq. 531.

(ee) *Lemont v. Lord*, 52 Me. 365; *Thwing v. Washington Ins. Co.* 10 Gray, 443.

(f) *Hunter v. Prinsep*, 10 East, 394; *Portland Bank v. Stubbs*, 6 Mass. 422; *Adams v. Haught*, 14 Texas, 243; *Welch v. Hicks*, 6 Cowen, 504; *Armroyd v. Union Ins. Co.* 3 Binn. 437.

(g) *Luke v. Lyde*, 2 Burr. 882, 889;

¹ See *Metcalfe v. Britannia Iron Works*, 1 Q. B. D. 618; 2 Q. B. D. 423.

he may refuse to accept them, for he is under no obligation to accept them until they have reached their destination. And if he thus refuses them, he leaves the master to his duties and obligations.

Between these antagonistic rights and obligations, neither the law nor mercantile usage is yet certain; and even if they were * so, it is obvious that the great variety of circumstances would present much difficulty in the application of any rules.

Perhaps the most difficult, as well as the most important of these questions, is as to what constitutes a sufficient acceptance of the goods, by the shipper, at an intermediate port. It was once held, that any acceptance imposed upon him the duty of paying freight *pro rata*. (h) It seems now to be the law, that the acceptance must be voluntary; that is to say, if the goods or their proceeds are thrown upon him, without his action, or if the possession of the goods be forced upon him by circumstances which constitute a strict compulsion; and leave him no alternative, he thereby incurs no obligation to pay any freight. (i)¹ Thus, where a vessel was captured and the goods condemned, excepting those of a certain shipper, and the master sold his goods, and claimed to deduct from the proceeds either the whole freight on those goods, or a *pro rata* freight, it was held that no freight was due. (j) So, where a vessel was captured but not condemned, and the supercargo acting for the best interests of all concerned, sold the goods and received their proceeds, it was held that no freight was due. (k) Nevertheless, Mr. Justice Story, in an important case, held that to be a voluntary acceptance by the owners which he still declared to be "a reluctant acquiescence forced upon them by an overruling necessity." (l)

Parsons v. Hardy, 14 Wend. 215; *Rossiter v. Chester*, 1 Doug. Mich. 154; *Hunt v. Haskell*, 24 Me. 339; *Forbes v. Rice*, 2 Brev. 363.

(h) *Luke v. Lyde*, 2 Burr. 882. See also *United Ins. Co. v. Lenox*, 1 Johns. Cas. 377; *Williams v. Smith*, 2 Caines, 13; *Robinson v. Mar. Ins. Co.* 2 Johns. 323.

(i) *Liddard v. Lopes*, 10 East, 526; *Cook v. Jennings*, 7 T. R. 381; *Mulloy v. Backer*, 5 East, 316; *Vlierboom v. Chapman*, 13 M. & W. 230; *Case v. Balt. Ins.*

Co. 7 Cranch, 358; *Col. Ins. Co. v. Catlett*, 12 Wheat. 388; *The Nathaniel Hooper*, 3 Sumner, 542.

(j) *Sampayo v. Salter*, 1 Mason, 48.

(k) *Hurtin v. Union Ins. Co.* 1 Wash. C. C. 580. See also *Mar. Ins. Co. v. United Ins. Co.* 9 Johns. 186; *Armroyd v. Union Ins. Co.* 3 Binn. 487; *Callender v. Ins. Co. of N. A.* 5 Binn. 525; *Gray v. Waln*, 2 S. & R. 229; *Caze v. Balt. Ins. Co.* 7 Cranch, 358.

(l) *The Nathaniel Hooper*, 3 Sumner, 566.

¹ See *Metcalfe v. Britannia Iron Works*, 1 Q. B. D. 613; 2 Q. B. D. 433.

Nor, when it is certain that *pro rata* freight is due, is it quite certain by what rule it should be calculated. One way would be to estimate it geographically, or so much per mile or league, of what has been done out of all the miles or leagues of the whole voyage. (m) The other way is to estimate it in a pecuniary way, by the cost of bringing the goods so far and the cost of sending * them the remainder of the distance. In this country we think this latter method prevails. (n)

We have considered the rights and duties of ships as common carriers in the chapter on Bailments.

C.—*Of the use of the Vessel by Hirers or Charterers.*

1. HOW CHARTER-PARTIES ARE MADE.

An owner of a ship who lets it to others for them to use, does so by an instrument called a charter-party. This instrument is of constant use and of great importance. Printed forms are in general use; but it is quite common to vary those forms, and modify their provisions, or add any which the parties may choose to agree upon. Nor do we know of any rule of law in this country, requiring that such a bargain be evidenced by a written document. (o) But where the charter-party is in writing, parol evidence is not admissible to vary its terms. (p) And any material alteration or addition to it, not made by consent of both parties, will make it null and void, even without fraud. (q) This rule, as to evidence, should be remembered; because any stipulation previously agreed upon by the parties, but not contained in the charter-party, will be in general regarded as waived, and therefore of no force. (r) It would seem by recent authorities, that a charter-party is not a conveyance within the meaning of the act of 1850, (s) requiring registration; (t) and in point of fact we suppose a charter-party is seldom registered.

A charter-party used to be sealed in England; but is not now

(m) *Luke v. Lyde*, 2 Burr. 888.

(n) *Coffin v. Storer*, 5 Mass. 252. See *Robinson v. Mar. Ins. Co.* 2 Johns. 323.

(o) See *Taggard v. Loring*, 16 Mass. 336; *Perry v. Osborne*, 5 Pick. 422; *Muggridge v. Eveleth*, 2 Met. 286; *The Phebe, Ware*, 263; *Swanton v. Reed*, 36 Me. 176.

(p) *The Eli Whitney*, 1 Blatchf. C. C. 380; *Pitkin v. Brainerd*, 5 Conn. 451.

(q) *City of Boston v. Benson*, 12 Cush. 61; *Croockewit v. Fletcher*, 1 H. & N. 893; 40 Eng. L. & Eq. 415.

(r) *Renard v. Sampson*, 2 Kern. 561, 2 Duer, 285. See *Almgren v. Dutilh*, 1 Seld. 28.

(s) C. 27, § 1, 9 U. S. Stats. at Large, 440.

(t) *Ruckman v. Mott*, 16 Law Rep. 397; *Hill v. The Golden Gate*, 1 Newb. Adm. 308.

generally there, and very seldom has it a seal in this country. Nor is any advantage gained by a seal. (u)

* 2. OF THE DIFFERENT KINDS OF CHARTER-PARTIES. *301

A mere agreement hereafter to make a charter-party, is not a charter-party, although it might be enforced so far as to permit damages to be recovered for a breach of it. But if the agreement contains all the terms and provisions of the instrument, and appears to have been regarded and treated by the parties as a charter-party, it would be received by the court as evidence of a charter-party, which had been made but not written. (v) If the charter-party is signed by an agent purporting to be such, as "A by B, agent," the agent is not liable on the charter-party, although his principal resides out of the country. (w) The charter-party might provide and express, that the charterer hired the whole ship, and took it absolutely into his own possession, and manned, equipped, furnished and controlled her, during a certain period, or for a certain voyage. This, however, is very unusual. Generally, the charterer hires merely the carrying capacity of the ship, leaving the owner to hire the master and men, and to remain in possession of so much of the ship as is necessary for their accommodations, and for the storage of sails, provisions, &c. (x) As a general rule, the party that mans the vessel is considered as in possession. (y)

The master may hire the vessel as well as a stranger. He may agree either to pay a certain sum, or to take the vessel on shares; and generally now, when a master hires a vessel he takes it upon shares, and is then considered as having the entire control and possession of the vessel. (z) Nor is there any difference between a fishing voyage and any other in this respect. (a)

(u) For the effect of a charter-party under seal, see *Hurry v. Hurry*, 2 Wash. C. C. 145; *Ward v. Green*, 6 Cow. 173; *The Sch. Tribune*, 3 Sumner, 149; *Horsley v. Rush*, cited 7 T. R. 209; *Pickering v. Holt*, 6 Greenl. 160; *Andrews v. Estes*, 2 Fairf. 267; *New Eng. Ins. Co. v. De Wolf*, 8 Pick. 56; *Bristow v. Whitmore*, H. Johns. Ch. 98, 107.

(v) *The Sch. Tribune*, 3 Sumner, 144. See also *Lidgett v. Williams*, 4 Hare, 462.

(w) *Bray v. Kettell*, 1 Allen, 80.

(x) See *Almgren v. Dutilh*, 1 Seld. 28. (y) *Palmer v. Gracie*, 4 Wash. C. C. 110; *Marcardier v. Chesapeake Ins. Co.* 8 Cranch, 39; *The Sch. Volunteer*, 1 Sum-

ner, 551; *Logs of Mahogany*, 2 Sumner, 589. It was formerly held, that if the charter-party contained words of demise, the possession passed to the charterer, notwithstanding other provisions in the instrument inconsistent with this supposition. *Hutton v. Bragg*, 7 Taunt. 14. But this case is not now law. *Christie v. Lewis*, 2 Brod. & B. 410; *Hooe v. Groverman*, 1 Cranch, 214.

(z) *Webb v. Peirce*, 1 Curtis C. C. 104; *Thomas v. Osborn*, 19 How. 22; *Williams v. Williams*, 23 Maine, 17; *Cutler v. Winsor*, 6 Pick. 335.

(a) *Mayo v. Snow*, 2 Curtis C. C. 102. See *Harding v. Souther*, 12 Cush. 307.

* 302 * So too, one part-owner may hire the vessel from the others ; and generally, if there be a charter-party, whether the charterer be the master, or a part-owner, or a stranger, or the government, (b) the rights and obligations of the parties will be the same, and the general rules respecting charter-parties will apply.

3. OF THE PROVISIONS OF A CHARTER-PARTY.

A charter may be for one or more voyages, or for a time certain ; (c) or without limitation of time, and then there is by law a limitation of time for a reasonable term ; and such a charter-party would be determinable by either party after reasonable notice. (d)

The charter-party should express the burden of the ship correctly. A wilful misstatement by the owner would be a fraud, which might entirely avoid the contract. And in no case would the owner be permitted to profit by his fraud. (e) But the charterer is held, although the burden be stated erroneously, if the error were innocent. (f)

The owner usually stipulates that the ship is sound, stanch, and seaworthy ; that he will keep her in repair, perils of the sea excepted, and victual and man her ; but if these obligations were not expressed, the law would impose them on the owner. (g)¹ For any breach of this contract, the charterer has his remedy ; and if unable to use the vessel in the manner proposed, he is not bound to pay any party of the charter money. (h)²

(b) Fletcher v. Braddick, 5 B. & P. 182 ; Hodgkinson v. Fernie, 2 C. B. (n.s.) 415, 40 Eng. L. & Eq. 306 ; Trinity House v. Clark, 4 M. & S. 288.

(c) Havelock v. Geddes, 10 East, 555 ; McGilvery v. Capen, 7 Gray, 525.

(d) Cutler v. Winsor, 6 Pick. 335.

(e) Johnson v. Miln, 14 Wend. 195.

(f) Hunter v. Fry, 2 B. & Ald. 421 ; Barker v. Windle, 6 Ellis & B. 675 ; Ash-

burner v. Balchen, 3 Seld. 262 ; Thomas v. Clarke, 2 Stark. 450 ; Leeming v. Snaith, 16 Q. B. 275 ; Gwillim v. Daniell, 2 Cromp. M. & R. 61 ; Pembroke Iron Co. v. Parsons, 5 Gray, 589 ; Hurst v. Usborne, 18 C. B. 144.

(g) Putnam v. Wood, 3 Mass. 481 ; Ripley v. Scaife, 5 B. & C. 167 ; Kimball v. Tucker, 10 Mass. 192 ; Goodridge v.

Lord, 10 Mass. 483, 486.

(h) Dupont de Nemours v. Vance,

¹ Where the owner of a vessel charters her, there arises, unless the contrary be shown, an implied contract on his part that she is seaworthy and suitable for the service in which she is to be employed. He is therefore bound, unless prevented by the perils of the sea or unavoidable accident, to keep her in proper repair, and is not excused for any defects known or unknown. Work v. Leathers, 97 U. S. 379. This implied warranty of seaworthiness attached at the time the perils of the intended voyage commence, and is then broken if the vessel is then unfit, although seaworthy at the port of loading, when proceeding thither from anchorage, and when commencing to take on cargo. Cohn v. Davidson, 2 Q. B. D. 455. — Where the plaintiff agreed to charter a ship for twelve months after completion of her then present voyage, at the end of which time the ship, being unseaworthy, was detained for two months for repairs, it was held that he might rescind. Tully v. Howling, 2 Q. B. D. 182. — A description in a charter-party that a vessel is of a particular class is not a continuing warranty, but applies only to the classification at the time the charter-party is made. French v. Newgass, 3 C. P. D. 163.

² See Stanton v. Richardson, L. R. 7 C. P. 421.

The charterer may agree to pay a gross sum for the use of the ship, or so much a ton, for the tonnage stated, or so * much a ton for the cargo she proves to be able to carry; * 303 or so much by the bale, and in this case it is usual to stipulate that not less than so many shall be sent.

If the charterer agrees to pay by the actual ton, and to fill the vessel, he must pay for all of her burden which he fails to occupy; (i) and this is called "dead freight." But he may load her entirely with the goods of others, or fill with them the space he does not himself use. If the stipulation is for so much a ton, it should be stated whether the ton is legal custom-house measurement, or a ton of actual capacity; for these may differ widely.

If a charterer cannot fill the vessel, the master being abroad may, if not prohibited, take in for the benefit of the charterer the goods of others. (j)

The charter-party usually provides that the owner binds the ship and freight to the performance of his part of the bargain, and the shipper binds the cargo to the ship for his performance of the contract. If there be no such stipulation, the law-merchant implies this mutual obligation, equally whether the contract be by bill of lading or by charter-party. (k) If the owner is in possession, and the charterer owes the owner for the carriage of the goods, the owner has a lien on the goods for the freight. (l) If the charterer carries the goods of others, and they are to pay him for carrying them, he has his lien on the goods for his freight. (m) But in respect to these liens the parties may stipulate as they will.

If a voyage for which the vessel is chartered, be a voyage out and home, a question may arise whether any freight is due if the voyage out is safely completed, and the ship is lost on her return voyage. The parties may stipulate as they will on this point. If there are no express stipulations in the contract, the question will be determined by what the law shall understand

* and construe the contract, which they have made, to * 304

19 How. 162; Lengfield *v.* Jones, 11 La. An. 624; Christie *v.* Trott, 25 Eng. L. & Eq. 262; Putnam *v.* Wood, 3 Mass. 481; The Bark Gentleman, Olcott, Adm. 110, 1 Blatch. C. C. 196; Worms *v.* Storey, 11 Exch. 427.

(i) Thomas *v.* Clarke, 2 Stark. 450; Thompson *v.* Inglis, 3 Camp. 428; Duffie *v.* Hayes, 15 Johns. 327; Kleine *v.* Catara, 2 Gallia. 66.

(j) Hecksher *v.* McCrea, 24 Wend.

304; Ashburner *v.* Balchen, 3 Seld. 262; Shannon *v.* Comstock, 21 Wend. 457; Crabtree *v.* Clark, Sprague, 217; Clarke *v.* Crabtree, 2 Curtin C. C. 87; Wilson *v.* Hicks, 40 Eng. L. & Eq. 511; Bailey *v.* Damon, 3 Gray, 92.

(k) The Brig Casco, Daveis, 184. (l) Clarkson *v.* Edes, 4 Cowen, 470; Ruggles *v.* Bucknor, 1 Paine, C. C. 358.

(m) Lander *v.* Clark, 1 Hall, 855.

mean and to be in this respect. But there is a tendency in the courts to construe the voyage out and the voyage home as distinct voyages. (n)

4. OF LAY DAYS AND DEMURRAGE.

A charterer is usually allowed so many days for loading, and so many days for unloading the ship. These days are called Lay Days. They are a part of the voyage, and belong to the charterer. The phrase used is sometimes "running days," or "working days," (o) or merely "days." This last term would be construed to mean "running" days, (p) and not "working days," unless some usage to the contrary were proved. (q)¹

The contract also usually provides, that he may detain the ship for more days, sometimes limited in number, and for each of these days he is to pay so much. What he pays for these additional days he is said to pay for Demurrage. In construing these rights and obligations, courts regard not only the right of the owner to compensation, but the principle of public policy which forbids the wanton and unnecessary idleness of the ship.

A delay may be by compulsion; as by capture, or embargo, or any act of government, or being frozen up, or any absolute disability of the charterer, or of the consignee, which he cannot prevent. The question arises, whether such a delay gives to the owner a claim for demurrage. This question cannot certainly be answered on authority, as the cases are in conflict. We think, however, the better rule to be, that such a detention gives the owner such a claim, and that it is not confined to a voluntary detention. (r)²

(n) Mackrell v. Simond, 2 Chitty, 668; Brown v. Hunt, 11 Mass. 45; Locke v. Swan, 13 Mass. 76. In the following cases the voyage has been held to be entire. Towle v. Kettell, 5 Cush. 18; Smith v. Wilson, 8 East, 487; Coffin v. Storer, 5 Mass. 252; Sweeting v. Darthez, 14 C. B. 588; Penoyer v. Hallett, 15 Johns. 382.

(o) Brooks v. Minturn, 1 Cal. 481.

(p) Brown v. Johnson, 10 M. & W.

381; Brooks v. Minturn, 1 Cal. 481; Cochran v. Retberg, 8 Esp. 121.

(q) Where the law of the country prohibits working on Sundays or holidays, they will be excluded. Cochran v. Retberg, 3 Esp. 121. See also Gibbens v. Buisson, 1 Bing. N. C. 283; Field v. Chase, Hill & Den. 50.

(r) A delay by capture or compulsion was once regarded as giving no claim for demurrage. Douglas v. Moody, 9 Mass.

¹ A charter-party provided that the charterers were to "load and discharge as fast as the ship can work, but a minimum of seven days to be allowed merchants, and ten days on demurrage, over and above the said lying days." Held, that "lying days" meant "working" and not "running" days, so that Sunday was not to be counted. Commercial Steamship Co. v. Boulton, L. R. 10 Q. B. 346. In demurrage, a fraction of a day counts as a day, unless there is express stipulation to the contrary. Ib.

² Thus a consignee is liable for demurrage for a detention by bad weather, Thiiis v. Byers, 1 Q. B. D. 244; or by the delay of other consignees, Straker v. Kidd, 3 Q. B. D.

* 5. Of the DISSOLUTION OF A CHARTER-PARTY.

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Charter-parties, like all other contracts, may be discharged by the effect of their own terms, or by the agreement of the parties; (s) and a charter-party would be dissolved by anything which would make the execution of the agreement illegal, or impossible. Thus, a declaration of war by the country to which a ship belongs, against that to which it was to go, would dissolve the charter-party. (t) Whether an embargo, (u) or act of non-intercourse, or any other restraint or prohibition (v) by government, or a blockade (w) of the port in which the vessel is lying, or of that to which she is to go, (x) would suspend the charter-party, or go yet farther, and dissolve it, must depend on the character of the detention.¹ We think such a detention would generally, if not always, suspend it. And if it were one which would probably continue for a period so long that it would be clearly unreasona-

555. See *Duff v. Lawrence*, 3 Johns. Cas. 162. But now the rule seems to be that the consignees shall pay demurrage, although not to blame, provided the owner be not in fault. *Leer v. Yates*, 3 Taunt. 386; *Harman v. Gandalph, Holt*, N. P. 35; *Randall v. Lynch*, 2 Camp. 352; s. c. 12 East, 179; *Benson v. Blunt*, 1 Q. B. 870; *Taylor v. Clay*, 9 Q. B. 713. As by frost. *Barret v. Dutton*, 4 Camp. 398; — tide. *Clelandiel v. Tuckerman*, 17 Barb. 184; *Brown v. Ralston*, 4 Rand. 504, 9 Leigh, 532; — any act of government. *Bessey v. Evans*, 4 Camp. 131; *Hill v. Idle*, id. 327; *Bright v. Page*, 8 B. & P. 296, n.; *Brooks v. Minturn*, 1 Cal. 481; *Barker v. Hodgson*, 3 M. & S. 267.

(s) *Goss v. Nugent*, 5 B. & Ad. 58; *King v. Gillett*, 7 M. & W. 55; *Cummings v. Arnold*, 3 Met. 486; *Howard v. Macondray*, 7 Gray, 516.

(t) *Brown v. Delano*, 12 Mass. 870; *Palmer v. Lorillard*, 16 Johns. 348; *Avery v. Bowden*, 5 Ellis & B. 714, 6 Ellis & B. 963; *Barrick v. Buba*, 2 C. B. (n. s.) 563.

See also *Esposito v. Bowden*, 4 Ellis & B. 968, 7 Ellis & B. 768; *Reid v. Hoskins*, 4 Ellis & B. 979, 5 id. 729, 6 id. 963; *Clementson v. Blessig*, 11 Exch. 185.

(u) *Odin v. Ins. Co. of Penn.* 2 Wash. C. C. 312, 317; *Hadley v. Clarke*, 8 T. R. 259; *M'Bride v. Mar. Ins. Co.* 5 Johns. 308; *Baylies v. Fettiplace*, 7 Mass. 325; *Touteng v. Hubbard*, 3 B. & P. 291; *Conway v. Gray*, 10 East, 536.

(v) *Richardson v. Maine Ins. Co.* 6 Mass. 111; *Palmer v. Lorillard*, 16 Johns. 348; *Patron v. Silva*, 1 La. 275. Lowness of water, which prevents a vessel reaching her port, merely suspends the contract. *Schilizzi v. Derry*, 4 Ellis & B. 873.

(w) *Palmer v. Lorillard*, 16 Johns. 348; *Ogden v. Barker*, 18 Johns. 87; *Richardson v. Maine Ins. Co.* 6 Mass. 102.

(x) A blockade of the port of destination terminates the contract. *Scott v. Libby*, 2 Johns. 836; *The Tutela*, 6 Rob. Adm. 177.

223; *Portens v. Watney*, 3 Q. B. D. 534. — Where a charter-party contained a provision, "charterer's liability to cease when the ship is loaded, the captain or owner having a lien on cargo for freight and demurrage," the charterer was, upon loading the ship, held discharged from liability for demurrage incurred at the port of loading. *Kish v. Cory*, L. R. 10 Q. B. 553; *Francesco v. Massey*, L. R. 8 Ex. 101. See *Lister v. Van Haasbergen*, 1 Q. B. D. 269; *Sanguinetti v. Pacific Steam Navigation Co.* 2 Q. B. D. 238.

¹ A charter-party contained this memorandum: "In the event of war, blockade, or prohibition of export preventing loading, this charter-party to be cancelled." Held, that on the closing of the loading ports, the charter-party came to an end without any election by either party. *Adamson v. Newcastle Steamship Ins. Ass.* 4 Q. B. D. 462. See *Geipel v. Smith*, L. R. 7 Q. B. 404.

ble to detain the ship until the detention were removed ; or if, from the nature of the cargo, a shorter detention would be likely to destroy it, or greatly diminish its value, we should say that this detention would annul the contract. (y)

If a ship and cargo were captured, and afterwards re
 * 306 stored, * such capture would generally only suspend the charter-party until the restoration. But even then the detention might be such, that from its length, or other circumstances, it must break up the voyage ; and then it would annul the charter-party. (z)

SECTION IV.

OF INCIDENTS OF THE VOYAGE.

A.— *Of Loss by Perils of the Sea.*

Questions arising from losses or injuries by perils of the sea, come up between the owner and the insurer, and these questions will be treated of in the chapter on Insurance. They are also presented for determination between the owner of the ship and the freighter, or shipper of the goods. The owner in the bill of lading which he gives, stipulates to carry the goods safely, and deliver them in good condition, "perils of the sea excepted." If therefore a loss occurs which cannot be attributed to perils of the sea, the owner is responsible therefor to the shipper ; but if it is so attributable, the loss rests with the shipper. It therefore becomes important to determine what are perils of the sea, and for this we must look to the law-merchant.

The meaning and reason of the rule thus defining the responsibility of the owner, are obviously this. The owner should be held to take all due care of the goods in his charge, so long as they

(y) See *The Isabella Jacobina*, 4 Rob. Adm. 77.

(z) It seems to be held in England, by the Court of Admiralty, that the capture of the vessel and the univery of the cargo terminates the contract of affreightment. *The Racehorse*, 3 Rob. Adm. 101; *The Martha*, id. 106, n.; *The Hoffnung*, 6 id. 281; *The Louisa*, 1 Dods. 317; *The Wilemina Eleonora*, 3 Rob.

Adm. 284. See, however, the judgment of the court in *Beale v. Thompson*, 8 B. & P. 428; *Bergstrom v. Mills*, 3 Esp. 38; *Moorson v. Greaves*, 2 Camp. 627. In *The Nathaniel Hooper*, 8 Sumner, 542, 556, Mr. Justice Story made an elaborate review of the cases decided in the English Admiralty, and held that they could not be considered as authority in this country. See also *Spafford v. Dodge*, 14 Mass. 66.

remain in his charge. It follows, therefore, that the general definition of perils of the sea, must mean all those maritime dangers or disasters which may befall the goods, and which ordinary care and precaution cannot prevent. (a)

* These perils are those which arise from extraordinary violence by the wind, or the sea, wreck, stranding, or capture, by public enemy or by pirates. (aa) * 807

The vessel must, in the first place, be entirely seaworthy in all respects and particulars, and properly navigated; and it is not so seaworthy or so navigated, unless it is competent to encounter or avoid the ordinary perils of the voyage.

In one sense, the action of the sea need not be extraordinary to bring a loss within the perils of the sea; as, if the ship be wrecked by a current, which the master did not know, and could not justly be regarded as bound to know, this would be a loss by a peril of the sea, although not in itself extraordinary. Whether fire, as between the owner and the shipper, is a peril of the sea may not be certain; but we think that it is not, and that the carrier would by the common law be responsible, although fire was not caused by the negligence of the master or seamen. (b) But now, by statute both in England (c) and in this country, (d) a carrier is not liable for an accidental fire happening to or on board of a vessel. The act of 1851 does not apply to any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in river or inland navigation. (e) And it has been held, that a vessel on Lake Erie, bound from Buffalo to Detroit, enrolled and licensed for the coasting trade, and engaged in navigation and commerce, as a common carrier, between ports and places in different States, upon the lakes and navigable waters connecting the same, is not a vessel used in inland navigation. (f) The statute does not exonerate the ship for a loss by fire after the goods are on the wharf, but before they are delivered. (g)

The destruction of a ship by worms, would not be generally a "peril of the sea," excusing the owner, because it must be known

(a) Sch. Reeside, 2 Sumner, 567, and cases *passim*.

(d) 1851, c. 43, 9 U. S. Stats. at Large, 635.

(e) *Id.* § 7.

(aa) *Gage v. Tirrell*, 9 Allen, 299.
(b) *Morewood v. Pollok*, 1 Ellis & B. 748; N. J. Steam Nav. Co. v. Merch. Bank, 6 How. 344; *Garrison v. Memphis Ins. Co.* 19 How. 312.

(f) *Moore v. American Transp. Co.* 5 Mich. 368, 24 How. 1.

(c) 20 Geo. 3, c. 86; *Morewood v. Pollok*, 1 Ellis & B. 748.

(g) *Salmon Falls Co. v. Bark Tangier*, 21 Law Rep. 6; *The Ship Middlesex*, *id.* 14.

when and where this mischief is likely to occur, and then and there a ship should be protected against it; as this is * 808 * generally possible by adequate precautions. (*h*) So we should say the owner should be responsible for damage caused by rats (*i*) or other vermin. These are the principles applied in marine insurance, and would apply equally as between owner and shipper.

So, too, the owner would not be responsible, if without the fault of the master the goods were damaged by actual contact with sea-water; (*j*) or if, a part of the cargo being so damaged, vapor and gases arising from it injured another portion. (*k*)

Damage caused by any form of wreck, as by the ship sinking or stranding, although generally a peril of the sea, would not be one, and therefore would not excuse the owner, if it were the master's wilful fault. If the total loss of the vessel be inferred by a presumption of law, from the lapse of a reasonable time without her being heard from, it will be a part of this presumption that she perished through a peril of the sea. (*l*) But collision (to be treated of in next sub-section) arising from the negligence of the crew is not a peril of the sea within the exception in a bill of lading. (*m*)

B.—*Of Collision.*

This is a maritime peril, an injury from which is quite common in harbors, and it sometimes occurs at sea. It gives rise to a question entirely distinct from those presented by other losses or perils. This question is this: Is either of the two ships or their owners responsible to the other ship or owner, and on what ground, and to what extent? The party in fault must suffer his own loss, and compensate the other party for the loss he may sustain. (*n*)

(*h*) *Rohl v. Parr*, 1 Esp. 445; *Martin v. Salem Ins. Co.* 2 Mass. 420; *Hazard v. New England Ins. Co.* 1 Sumner, 218, 8 Pet. 557.

(*i*) See *Hunter v. Potts*, 4 Camp. 203; *Dale v. Hall*, 1 Wilson, 281; *Laveroni v. Drury*, 8 Exch. 166; *Garriguee v. Coxe*, 1 Binn. 592; *Aymar v. Astor*, 6 Cow. 236. It is so held in a recent English case, in which it appeared that the ship-owner had made use of all possible precautions to prevent this damage: *Kay v. Wheeler*, Law Rep. 2 C. P. 302; and in the New

York Circuit Court of the United States: *The Miletus*, 5 Blatchford, 335.

(*j*) *Baker v. Manuf. Ins. Co.* Sup. Jud. Ct. Mass. 14 Law Reporter, 203.

(*k*) Id. But see *Montoya v. London Ass. Co.* 6 Exch. 451.

(*l*) *Gordon v. Bowne*, 2 Johns. 150; *Brown v. Neilson*, 1 Caines, 525.

(*m*) *Grill v. Iron Screw Collier Co.* Law Rep. 1 C. P. 600.

(*n*) *The Scioto, Davids*, 859; *The Woodrop-Sims*, 2 Dods. 88; *Reeves v. Ship Constitution, Gilpin*, 579; *The Sappho*, 9 Jur. 560.

The nearly universal maritime law is, that where a collision takes place from causes which could not have been prevented by any efforts reasonably required, and no blame is imputable to either party, the loss must rest where it falls; and he who suffers it has no claim on the other. (n) We have called * this a * 309 nearly universal rule, for the only exceptions we know of prevail at Hamburg and at Calcutta, and have given rise, in both ports, to a difficult question of marine insurance, which will be treated of in the chapter on that subject.

If both ships are equally, or if, though not equally yet both substantially in fault, the rule may not be so certain. The common law would seem to lead to the same result as where there is no fault, because at common law a plaintiff has no remedy for a loss caused by an accident, if his own negligence was a substantial cause of the accident. And it has been said, that if it contributed in any degree whatever to the accident he has no remedy. (o) It has however been held, that admiralty divides the loss if both vessels are in fault. (p)¹

If it is certain that there was fault, and it cannot be ascertained on which party the fault lies, there might be reason for saying, that the result should be the same as in the case where it is known that both are in fault. There is, however, ground for saying that common law would now divide the loss between the two vessels; and perhaps still stronger ground for asserting this to be the rule of admiralty. (q) And according to very high admiralty authority in this country, the loss must be equally apportioned where

(n) *The Woodrop-Sims*, 2 Dods. 88; *The Celt*, 8 Hagg. Adm. 328, note; *The Itinerant*, 2 W. Rob. 236; *Stainback v. Rae*, 14 How. 532. An inevitable accident is defined in *The Virgil*, 2 W. Rob. 201, to be "that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill."

(o) *Dowell v. Gen. Steam Nav. Co.* 5 Ellis & B. 195; *Gen. Steam Nav. Co. v. Mann*, 14 C. B. 127; *Gen. Steam Nav. Co. v. Tonkin*, 4 Moore, P. C. 814; *Simpson v. Hand*, 6 Whart. 811; *Barnes v. Cole*, 21 Wend. 188.

(p) *Vaux v. Sheffer*, 8 Moore, P. C. 75; *The Victoria*, 8 W. Rob. 49; *The Montreal*, 24 Eng. L. & Eq. 580; *Allen v. Mackay, Sprague*, 219; *Sch. Catherine v. Dickinson*, 17 How. 177; *Rogers v. Steamer St. Charles*, 19 How. 108; *Cushing v. The John Fraser*, 21 How. 184, 196.

(q) See *The Catherine of Dover*, 2 Hagg. Adm. 145; *The Scioto, Daveis, Lucas v. Steamboat Swann*, 6 McLean, C. C. 282; *The Nautilus, Ware*, 2d ed. 529.

¹ Where both vessels are in fault for a collision, the maritime rule is to divide the entire damage equally between them, and to decree half the difference between their respective losses in favor of the one that suffered most, and the statute of limited liability does not apply until a balance is struck. *The North Star*, 106 U. S. 17; *The Stoomvart Maatschappij Nederland v. Peninsular, &c. Co.* 7 App. Cas. 795.

there has been no fault, or fault on both sides, or fault with an uncertainty on which side. (r) In the uncertainty which still rests upon this rule, it may be believed that the equity power of the court of admiralty would be sufficient, and would be exercised for the purpose of doing justice in the case. And it has been said by the Supreme Court of the United States, that the rule dividing the

loss, is, under the circumstances usually attending such dis-

* 310 asters, just and equitable, * and tending most strongly to induce care and diligence on both sides. (s) It cannot be denied, however, that the highest authorities appear to hold different opinions on this subject. (t)

It has been held, that, where both parties are wilfully in fault, the court will not interfere in favor of either party. (u) If a vessel be thrown against another with no voluntary action whatever on the part of her master or crew, she is not liable. (v) In England it has been held, that if a vessel has been employed by government, and is under the charge of a naval officer, she is not liable for damages caused by a collision, which was itself caused by his orders. (w)

In England, and in this country, by an act of Congress, and by some State statutes, (x) the responsibility of a ship for such damages is limited to the value of the ship and her cargo.

Wherever any injurious collision occurs, if any imputation of negligence is thrown by the evidence on either vessel, her owners must prove that this negligence was not a substantial cause of the collision ; (y) and, on the other hand, a plaintiff in a cause of collision must offer evidence tending to prove both his own care, and the want of care by the defendant, if his claim rests upon the defendant's negligence. (z)¹ It would be a sufficient want of care,

(r) *The Scioto, Daveis*, 359.

(s) *Sch. Catherine v. Dickinson*, 17 How. 177.

(t) Valin favors the rule. *Liv. 3, tit. 7, des Avaries.* Cleirac calls it a *judicium rusticum*. See also *De Vaux v. Salvador*, 4 A. & E. 420, per Lord Denman, C. J.

(u) *Sturges v. Murphy*, U. S. C. C., N. Y., Boston Courier, Sept. 19, 1857. On appeal the court did not consider that the facts made the collision one of this nature, but the rule appears to have received the assent of the court. *Sturgis v. Clough*, 21 How. 461.

(v) *Kissam v. The Albert*, 21 Law Rep. 41. See also *The Moxey, Abbott, Adm.* 73.

(w) *Hodgkinson v. Fernie*, 2 C. B. (n. s.) 416. See also *Fletcher v. Brad-dick*, 5 B. & P. 182.

(x) See post, * 335, n. (a).

(y) *The Sch. Lion, Sprague*, 40; *Clapp v. Young*, 6 Law Rep. 111; *War-ing v. Clarke*, 6 How. 441; *Cushing v. The John Fraser*, 21 How. 184.

(z) *Carsley v. White*, 21 Pick. 254; *New Haven S. B. Co. v. Vanderbilt*, 16 Conn. 420; *Kennard v. Burton*, 25 Maine, 39; *Davies v. Mann*, 10 M. & W. 546.

¹ *The Clara*, 102 U. S. 200.

if, although the collision could not have been prevented when it occurred, it might have been prevented by previous proper precaution. (a) And there are precautions which usage if not law seems to require.

The principal among these, is that of showing a light at night, if a ship lies in a river-way, or in a stream, under circumstances * which would make the light proper. (b) A statute * 311 of the United States requires such light on certain steam-boats, (c) and in New York it is required on board canal boats; and wherever such light is positively required, its absence would be negligence. (d) It is quite common for a vessel in a dark night, or in a heavy fog, to sound a horn, or ring a bell, or at brief intervals make other noises to indicate her position. But there is no statute on this subject, nor any distinct and peremptory usage. (e)

It is certain that all vessels, whether anchored (f)¹ or under way, (g)² should have a competent watch or look-out on deck; and neither the master of a steamer nor the helmsman is, generally, a competent watch, as they must attend to their own duties. (gg)

If ships approach each other, that which is going free must give way to that which is close hauled; (h)³ unless this would be dangerous from the nearness of the shore, or of a rock or shoals.

If both are close hauled, each should go to the right, or the ship

(a) *The Virgil*, 2 W. Rob. 206; *Steamboat New York v. Rea*, 18 How. 224; *The Clement*, 2 Curtis, C. C. 363.

(b) *The Rose*, 2 W. Rob. 4; *The Victoria*, 3 W. Rob. 49; *The Scioto*, *Daveis*, 359; *Lenox v. Winisimmet Co.* *Sprague*, 160; *Kelly v. Cunningham*, 1 Cal. 365; *The Indiana*, *Abbott*, Adm. 380; *Rogers v. Steamer St. Charles*, 19 How. 108; *Carsley v. White*, 21 Pick. 254; *Barque Delaware v. Steamer Osprey*, 2 Wallace, C. C. 276; *Cushing v. The John Fraser*, 21 How. 189; *Nelson v. Leland*, 22 How. 48; *The Steamer Louisiana v. Fisher*, 21 How. 1; *Culbertson v. Shaw*, 18 How. 584; *Ure v. Coffman*, 19 How. 56; *New York & Virginia Steamship Co. v. Calderwood*, 19 How. 241.

(c) *The Stat.* 1888, c. 191, § 10, 5 U. S. Stats. at Large, 806, is applicable to steamboats generally. That of 1849, c.

105, § 5, 9, U. S. Stats. at Large, 382, prescribes the rules for steamboats and sailing vessels on the northern and western lakes. See *Bulloch v. Steamboat Lamar*, 8 Law Rep. 275; *Foster v. Sch. Miranda*, 1 Newb. Adm. 227, 6 McLean, C. C. 221; *Chamberlain v. Ward*, 21 How. 648; *Hall v. The Buffalo*, 1 Newb. Adm. 115.

(d) *Rathbun v. Payne*, 19 Wend. 399; *Fitch v. Livingston*, 4 Sandf. 492; *Steamboat New York v. Rea*, 18 How. 223.

(e) *McCready v. Goldsmith*, 18 How. 82; *The Morning Light*, 2 Wallace, 560.

(f) *The Indiana*, *Abbott*, Adm. 380; *The Sch. Lion*, *Sprague*, 40.

(g) *Whitridge v. Dill*, 23 How. 448; *The Clement*, *Sprague*, 257, 2 Curtis, C. C. 369.

(gg) *The Ottawa*, 8 Wallace, 268.

(h) *The Gazelle*, 2 W. Rob. 515; *Allen v. Mackay*, *Sprague*, 219; *The Brig*

¹ *The Clara*, 102 U. S. 200.

² *The Nevada*, 106 U. S. 154, held that an ocean steamer, starting from a crowded slip, was liable for injury to a canal boat drawn under the steamer's propeller, when such an accident might have been avoided by employing a look-out.

³ See *The Annie Lindley*, 104 U. S. 186, as to the United States regulation relating to vessels approaching each other end on.

on the starboard tack keeps on, while the ship on the larboard tack changes her course. (*i*)

An English statute requires, that on vessels, whether under steam or canvas, meeting or coming toward each other in such way as to cause a risk of collision, the helms of both ships shall be put to port, whether they be on the port or starboard tack, and whether they are close hauled or not, unless the circumstances of the case make a compliance with the rule immediately

* 312 * dangerous. (*j*) The effect of this would be that the two vessels pass on the port side of each other. The phrase "close hauled," means usually that a vessel is as near the wind as she can go; and such a vessel on the starboard tack, cannot put her helm to port, without coming into the wind and losing her way. And as the statute contains a proviso that due regard shall be had, not only to the dangers of navigation, but to the necessity of keeping close hauled ships under command, the English Court of Queen's Bench has held, that close hauled in the statute must mean on the wind, but not so close that she cannot go closer and yet be under command. (*k*)

It has been said by American text-writers, (*l*) that where two vessels are going the same course, in a narrow channel, and there is danger that they will run into each other, that which is to windward must keep away; but it is obvious, that in such a case the rule must be just otherwise; for if the ship to windward does keep away from the wind, and the ship to leeward does not keep away, they will come together. Perhaps the writers supposed that "keep away" meant to keep away from the other vessel; whereas "keep away" as a sea term always means to keep away or turn off from the wind. The general rule must be, that if the vessel astern is the faster sailer, she must in passing the other keep out of her way. (*m*)

If two steamboats approach, they must go to the right of each other. (*n*) As they can always move in any direction, they are

Emily, Olcott, Adm. 132; The Rebecca, 1 Blatchf. & H. Adm. 347. This case does not support the position for which it is cited.

(*i*) The Jupiter, 8 Hagg. Adm. 320; The Ann Caroline, 2 Wallace, 598. (*m*) Whitridge v. Dill, 28 How. 448. This case virtually overrules the case of

(*j*) Merchants Shipping Act, 17 & 18 Vict. c. 104, § 296. The Clement, Sprague, 257, 2 Curtis, C. C. 363.

(*k*) Chadwick v. City of Dublin Steam Packet Co. 6 Ellis & B. 771. (*n*) New York & Balt. Transp. Co. v. Philadelphia, &c. Steam Nav. Co. 22 How. 461; Union Steamship Co. v. New York, &c. S. Co. 24 How. 307; Wheeler v. The

citing Marsh v. Blythe, 1 McCord, 360. Eastern State, 2 Curtis, C. C. 141.

considered by law and usage as vessels which always have a free wind. Their extreme power and speed, lay upon them the obligation of extreme watchfulness. (o)¹ Many cases illustrate this; and where the laws of a place forbid a vessel from going * beyond a certain speed, in certain waters, it is no excuse, * 313 in case of collision, that the vessel was going within that speed, if its speed was then dangerous. (p) Nor is it an excuse that the vessel was under a contract with the government to carry the mails at that rate. (pp) The American rule permits a steamer to go either to the right or the left of a sailing vessel, which has the wind free; (q) the English statute rule requires her to go to the right, and we prefer the English rule. (r) It has been held in admiralty, that if the boats are running in opposition, both will be presumed to be in fault; at least *prima facie*. (s) And in Louisiana, evidence that a boat was racing, was admitted to show negligence on her part. (t)

It may be said in general, that rules and usages known and established, should be complied with, because every vessel has a right to expect that every other vessel will conform to them, and may govern herself accordingly. But a departure from a rule or usage, is not only justified when a compliance would be dangerous from special circumstances, but becomes a positive duty when such compliance would endanger or injure another vessel, and then a compliance with the rule or usage would be no excuse. (u)

It has been held in this country, that if two American vessels collide in a foreign port, the rights of the parties, even in an action in this country, will be determined by the law of the place

(o) *The Europa*, 2 Eng. L. & Eq. 564; *The Bay State*, Abbott, Adm. 235; *McCready v. Goldsmith*, 18 How. 89; *Steamboat New York v. Bea*, 18 How. 228; *Rogers v. Steamer St. Charles*, 19 How. 108; *Thomas Martin, The*, 3 Blatchf. C. C. R. 517; *Northern Indiana, The*, id. 92.

(p) *Netherland Steamboat Co. v. Styles*, 40 Eng. L. & Eq. 25.

(pp) *James Adger*, 3 Blatchf. C. C. R. 515.

(q) *The Osprey, Sprague*, 245; *Steamer Oregon v. Rocca*, 18 How. 570.

(r) 17 & 18 Vict. c. 104, § 296.

(s) *The Steamboat Boston, Olcott*, Adm. 407.

(t) *Myers v. Perry*, 1 La. An. 372.

(u) *Allen v. Mackay, Sprague*, 219; *The Vanderbilt, Abbott*, Adm. 361; *The Friends*, 1 W. Rob. 478; *The Commerce*, 3 W. Rob. 287; *The Steamer Oregon v. Rocca*, 18 How. 572; *Crockett v. Newton*, id. 583.

¹ *The Benefactor*, 102 U. S. 214, declared that it is the imperative duty of a steamer to keep out of the way of a schooner sailing close-hauled in clear weather, and with unobstructed navigation. A tug and vessel connected by a hawser, being in contemplation of law one steam vessel, must keep out of the way of a sailing vessel. *The Civilita and The Restless*, 108 U. S. 659. But a sailing vessel will not be allowed to unnecessarily deviate from her course because a steamer is bound to look out for her. *The Illinois*, 103 U. S. 298.

where the collision took place. (v) But in England it is held, that in such a case, a party seeking a remedy has that which is given him by the law of the country in which that remedy is given and enforced. (w) It may be added that, in case of collision, it is unquestionably the duty of a ship which is without fault to render all possible assistance to the injured vessel, although that be in fault. (x)

In measuring the damages in case of collision, all direct and *immediate consequences are to be taken into consideration, with the losses and expenses flowing from them. (y)

In admiralty, the lien which a ship injured by a collision has upon the ship that causes the damage, continues long enough to give the injured party a reasonable opportunity to enforce his claim. (z)

We have hitherto considered only those questions arising between the colliding vessels. But questions may also come up between the owner of, and the shipper of the cargo in, the injured vessel; for the owner is responsible to the shipper, if the collision was caused merely by a fault of the master, but not if the collision were caused by a peril of the sea. (a)¹ If, however, it were caused by the fault of another vessel, wilfully, or by mere negligence, and without any violence of wind or tide, or any stress of navigation, we should doubt whether this would be either a peril of the sea, (b) or the act of God, (c) or would excuse the owner,

(v) Smith *v. Condry*, 1 How. 28.

(w) *The Vernon*, 1 W. Rob. 316; *General Steam Nav. Co. v. Guillou*, 1 M. & W. 877; *The Johann Friederich*, 1 W. Rob. 35.

(x) *The Celt*, 3 Hagg. Adm. 321.

(y) *The Countess of Durham*, 9 Month. Law Mag. (Notes of Cas.) 279; *The Mellona*, 3 W. Rob. 7; *The Pensher*, 20 Law Rep. 471; *Ralston v. The State Rights*, Crabbe, 22; *Steamboat Co. v. Whilldin*, 4 Herring. Del. 238. Compensation is allowed for the injury sustained by the detention of the vessel while repairing. *Williamson v. Barrett*, 18 How. 111.

(z) That the lien exists, and that it will be enforced even though the vessel be in the hands of a *bona fide* purchaser, provided there are no laches on the part of the libellants, is now well established. *The Bold Buccleugh*, 3 W. Rob. 220; *Harmer v. Bell*, 7 Moore, P. C. 267; *Edwards v. Steamer R. F. Stockton*, Crabbe, 580. But this lien, like any other in admiralty, may be lost by a delay to enforce it. *The Admiral*, 18 Law Reporter, 91.

(a) *Buller v. Fisher*, 8 Esp. 67.

(b) *Marsh v. Blythe*, 1 McCord, 380.

(c) *Mershon v. Hobensack*, 2 Zab. 372.

¹ Where goods were injured by a collision in which both vessels were in fault, and had a common owner, notwithstanding the bill of lading excepted liability for "collision" and "accidents, loss, or damage from any act, neglect, or default whatsoever of the pilots, master, mariners, or other servants of the company, in navigating the ship," the carrier was held liable to the shipper, in *Chartered Mercantile Bank v. Netherlands, &c. Co.* 9 Q. B. D. 118.

whether a bill of lading was given or not. It has been intimated, however, that a collision caused by no fault, nor an act of God, or any inevitable accident, is nevertheless, in itself, a peril of the sea. (*d*)

Cases arising from collision are very frequent in the courts having jurisdiction of them. In our note we give the most interesting among the recent cases. (*dd*)

C.—*Of Salvage.*

1. WHAT SALVAGE IS.

This word has two distinct meanings in maritime law. It sometimes means that which is saved from wrecked property, whether ship or cargo; and questions respecting it in this sense arise under policies of insurance, and will be considered in the next chapter.

* It also means the compensation which is earned by persons who have voluntarily assisted in saving a ship or cargo from destruction. This last sense is the more general, and the more important; and it is of salvage in this sense that we are now to treat.

The essential principle on which a claim to maritime salvage rests, is confined to the sea; being, as we apprehend, wholly unknown on the land. Some intimations have been thrown out, on high authority, that one who finds property lost on land and labors to save it, may claim of the owner compensation therefor. (*e*) But we believe there is no such rule or principle known to the common law.

Not only is salvage in this sense confined to the law-merchant,

(*d*) *Plaisted v. Boston, &c. Nav. Co.*, 27 Maine, 182. See also *Steamboat New Jersey*, Olcott, Adm. 448.

(*dd*) That the necessity imposed by a State law, of taking a pilot, does not prevent the liability of the ship for his negligence. *The China*, 7 Wallace, 58. Of the behavior of ships when meeting. *The Nichols*, 7 Wallace, 666; *Baker v Steamship City of New York*, 1 Clifford, 75; *Wakefield v. The Governor*, 1 Clifford, 93; *Pope v. R. B. Forbes*, 1 Clifford, 331; *The Scotia*, 5 Blatchf. 227; *The Island City*, 5 Blatchf. 264; *The Scranton* and *Wm. F. Burden*, 5 Blatchf. 400;

Amoskeag, &c. Co. v. The John Adams, 1 Clifford, 404; *The Illinois*, 5 Blatchf. 256; *The Nellie D.* 5 Blatchf. 245; *The Chesapeake*, 1 Benedict, 23; *The Favorita*, 1 Benedict, 80; *The Empire State*, 1 Benedict, 57; *The Cayuga*, 1 Benedict, 171; *The Electra*, 1 Benedict, 282; *The Havre and The Scotland*, 1 Benedict, 295; *The Jupiter*, 1 Benedict, 536. Of the measure of damages. *The Ocean Queen*, 5 Blatchf. 493; *The Heroine*, 1 Benedict, 226. What is a proper look-out. *The Parkersburg*, 5 Blatchf. 247.

(*e*) See ante, vol. i. p. * 580.

but it is generally confined to admiralty jurisdiction. It is believed, that no action at common law would lie for maritime salvage, unless the salvor could prove a contract with the owner of the property saved. (f)

Salvors have a lien on the property saved until the case is heard and a final settlement made, and this lien does not depend on possession. (g) Sometimes the property is sold under a decree, and the proceeds held to await the decree of distribution or return. But the property is always returned to owners, if they ask for it, and give bonds, or stipulations, as they are called in admiralty, with sufficient security to abide and satisfy a final decree.

2. BY WHAT SERVICES SALVAGE IS EARNED.

The ground upon which the liberal compensation usually granted in salvage cases rests, is three-fold. First: A marine peril. Second: Voluntary service. Third: Success.

It is necessary that the property be saved from extraordinary danger. This danger or distress must have been real, or appeared to be so in the exercise of a sound discretion, though it need not

have been immediate, or certainly destructive. (h)¹ If * 316 * the master, with his crew, might have saved it, the interference of the salvors would be presumed to be unnecessary; (i) they may, however, still make out their claim by proof that the master would not have saved it. It would be equally a salvage service whether it were rendered at sea, or upon property wrecked at sea but then on the land. (j) And a salvage service may be rendered either by seamen or by landsmen. (k)

3. OF DERELICT.

The salvage service most liberally rewarded is that of saving "derelict" property. This word simply means abandoned. As a maritime term, used in salvage law, it means a vessel or cargo abandoned and deserted by the master and crew, with no purpose

(f) *Lipson v. Harrison*, 24 Eng. L. & Eq. 208.
 (g) *Box of Bullion, Sprague*, 57; *The Missouri's Cargo*, id. 272; *The American*, 20; *The Maria*, Edw. Adm. 175.
 (h) *The Charlotte*, 3 W. Rob. 71.
 (i) *Hand v. The Elvira*, Gilpin, 67.
 (j) *Stephens v. Bailes of Cotton*, Bee, 170.
 (k) *Ibid.*

¹ *The Strathnaver*, 1 App. Cas. 58.

of returning to it, and no hope of saving or recovering it themselves. (l) If the master and crew remain on board, although they give up the possession and control to the salvors, it is not derelict. (m) On the other hand, if the master and crew have left the vessel, a mere intention to send assistance to her would not prevent the ship from being derelict. (n) And if the vessel be deserted, it will be presumed to be derelict, unless an intention to return be proved on the part of those who left her, or some of them. (o) A ship or a cargo sunk, is considered derelict; but not if the owner had not lost the hope and purpose of recovering his property, and had not ceased his efforts for that purpose. (p) So are goods floating from the vessel out to sea; not, however, if the goods are on the water, and the master is endeavoring to save them. (q) At common law, a finder of property has title against all the world, except the owner. The admiralty practice, however, in one district of *this country, in respect to *317 property derelict and saved, is to keep the balance of the proceeds a year and a day, that is, more than a year, after the salvage compensation is paid out of the proceeds: and then, if no owner appears, to pay the balance to the finder. (r) But if the case appears to demand it, the court may require from the finder bonds to restore this balance to the owner, whenever he appears and claims it.

4. WHO MAY BE SALVORS.

It is a general rule, that persons who are bound by their legal duty to render salvage services, cannot claim salvage compensation therefor. (s) Therefore the master or crew of the ship in peril, cannot claim such compensation. (t) And the only excep-

(l) *The Clarisse*, 1 Swabey, Adm. 129; *The Minerva*, 1 Spinks, Adm. 271; *The Watt*, 2 W. Rob. 70: *Rowe v. Brig* —, 1 Mason, 872; *The Amethyst*, Daveis, 20; *Mason v. Ship Blaireau*, 2 Cranch, 240.

(m) *Montgomery v. The T. P. Leathers*, 1 Newb. Adm. 421.

(n) *The Coromandel*, 1 Swabey, Adm. 205.

(o) *The Barque Island City*, 1 Black, 121; *The Upnor*, 2 Hagg. Adm. 3; *The Bee*, Ware, 332; *Tyson v. Prior*, 1 Gallis. 188; *Clarke v. Brig Dodge Healy*, 4 Wash. C. C. 651; *The Sch. Emulous*, 1 Sumner, 207; *The John Perkins*, U. S. C. C., Mass., 21 Law Rep. 94.

(p) *The Barefoot*, 1 Eng. L. & Eq. 661; *Bearse v. Pigs of Copper*, 1 Story, 814.

(q) *The Samuel*, 4 Eng. L. & Eq. 581.

(r) *Marvin on Salvage*, 148, note 1. See *M'Donough v. Dannery*, 3 Dall. 188. In an early case in Massachusetts it was held, that after the salvage was paid the property belonged to the government, to be held in trust till an owner should appear. *Peabody v. Proceeds of 28 Bags of Cotton*, U. S. D. C., Mass., 1829, 2 Am. Jurist, 119.

(s) *The Neptune*, 1 Hagg. Adm. 236.

(t) *Miller v. Kelley, Abbott*, Adm. 564; *The John Perkins*, U. S. C. C. Mass. 21 Law Rep. 87; *The Steamer Acorn*,

tions to the rule appear to be where the contract of the seamen is at an end, (*u*) or where the service is so entirely out of the line of their ordinary duty, that it may be considered as not done under the contract. (*v*) It would obviously be unwise to tempt the sailors to let their ship and cargo incur extreme peril, that by extreme exertion they might recover salvage compensation.

Those who may claim salvage compensation for salvage services, may render these services against the will or even the resistance of the master or crew of the vessel in danger. But in such case it must be clearly shown, that their reluctance or resist-

ance was wrongful, and that the interference of the salvors

* 318 * was necessary. (*w*) If a part of a crew leave their own ship, and go on board another, and save it, those of the crew who remain behind share, though not equally, in the salvage claim; their share of the claim resting on the increase of their labor or exposure, by reason of the diminution of their numbers; and their share is greater if they were willing to go, than if they remained from an unwillingness to encounter efforts or perils for which others volunteered. (*x*)

A passenger on board a saving ship may render and claim for salvage services; (*y*) but it is said that the passengers, generally, at least, are so bound to render assistance to the ship they are in, that they cannot claim salvage compensation therefor. (*z*) This rule, if it be one, must be open to many exceptions. (*a*)

same court, 21 Law Rep. 99; Beane *v.* The Mayurka, 2 Curtis, C. C. 72; Meener *v.* Suffolk Bank, 1 Law Rep. 249; The Holder Borden, Sprague, 144.

(*u*) Where a ship is abandoned at sea by most of her crew, the contract of those who remain is considered at an end. Mason *v.* Ship Blaireau, 2 Cranch, 240; The Sch. Triumph, Sprague, 428; The Florence, 20 Eng. L. & Eq. 607. See Taylor *v.* Ship Cato, 1 Pet. Adm. 48. In Montgomery *v.* The T. P. Leathers, 1 Newb. Adm. 421, it was held, that where a steamboat, which was on fire, was surrendered by the captain to the master of another boat, the contract of a pilot was dissolved, and he might be a salvor.

(*v*) In The Mary Hale, Marvin on Salvage, 161, the vessel was wrecked, and the mate and four seamen crossed the Gulf Stream in an open boat, a distance of one hundred and eighty miles, to procure assistance to take off the passengers and cargo. They succeeded in ac-

complishing their purpose, and it was held that they were entitled to salvage, on the ground that their services exceeded the duty they owed to the ship.

(*w*) See The Jonge Bastiaan, 5 Rob. Adm. 322; The Bee, Ware, 332; Clarke *v.* Brig Dodge Healy, 4 Wash. C. C. 651.

(*x*) The Mountaineer, 2 W. Rob. 7; The Centurion, Ware, 488; The Baltimore, 2 Dods. 132; The Roe, 1 Swabey, Adm. 84; The Janet Mitchell, 1 Swabey, Adm. 111; The Ship Henry Ewbank, 1 Sumner, 400.

(*y*) Bond *v.* Brig Cora, 2 Wash. C. C. 80; McGinnis *v.* Steamboat Pontiac, 1 Newb. Adm. 130, 5 McLean, 359; The Hope, 8 Hagg. Adm. 428.

(*z*) The Branston, 2 Hagg. Adm. 3, note.

(*a*) See Newman *v.* Walters, 3 B. & P. 612; The Two Friends, 1 Rob. Adm. 286; Clayton *v.* Ship Harmony, 1 Pet. Adm. 70.

A pilot cannot claim as salvor, for any exertions or services rendered as pilot, and within the line of his duty. (*b*)¹

The owner of the saving vessel shares largely in the salvage claim, because his vessel usually incurs some peril by the rendering of the services, (*c*) and always by the deviation annuls its insurance, (*d*) unless that deviation be for the purpose of saving life. (*e*)

* There may be two or more different sets of salvors. * 319
But salvors of property derelict acquire, by taking possession thereof, a vested interest in the property, which is only lost by their abandonment of it. (*f*) Salvors saved by other salvors do not lose their claim; (*g*) and a second set has no right to interfere with the first set, without a belief, on reasonable grounds, that their assistance or interference is necessary to save the property from destruction. (*h*) If they render their assistance unnecessarily, and without request, their services inure to the benefit of the first salvors. (*i*) Where there are two or more sets of salvors, all having a just claim, the salvage compensation is divided among all, in such proportions as the admiralty court deems proper. (*j*)

(*b*) *The Cumberland*, 9 *Jurist*, 191; *The Johannes*, 6 *Notes of Cases*, 288; *The City of Edinburgh*, 2 *Hagg. Adm.* 333; *The Jonge Andries*, 1 *Swabey*, *Adm.* 229, 303. In England, pilotage is defined to be "the conducting a vessel into port in the ordinary and common course of navigation," and it is not simple pilotage "when a vessel from real danger, or from what may afterwards turn out to be an unfounded alarm, is seeking a port of safety, out of the course of her intended voyage." *The Elizabeth*, 8 *Jurist*, 365; *The Persia*, 1 *Spinks*, *Adm.* 168; *The Industry*, 3 *Hagg. Adm.* 203; *The Hedwig*, 1 *Spinks*, 19. The decisions in this country are conflicting. See *Sch. Wave v. Hyer*, 2 *Paine*, C. C. 131; *Dulany v. Sloop Peragio*, *Bee*, 212; *Dexter v. Bark Richmond*, 4 *Law Rep.* 20; *Callagan v. Hallett*, 1 *Caines*, 104; *Love v. Hinckley, Abbott*, *Adm.* 438; *Hand v. The Elvira, Gilpin*, 60; *The Brig Susan, Sprague, Hobart v. Drogan*, 10 *Fet.* 108; *Lea v. Ship Alexander*, 2 *Paine*, C. C. 466; *Hope v. Brig Dido*, *id.* 248.

(*c*) *The San Bernardo*, 1 *Rob. Adm.* 178; *The Roe*, 1 *Swabey*, *Adm.* 84; *Evans v. Ship Charles*, 1 *Newb. Adm.* 329; *The Nathaniel Hooper*, 8 *Sumner*, 542.

(*d*) See *Bond v. Brig Cora*, 2 *Wash. C. C.* 80; *The Nathaniel Hooper*, 3 *Sumner*, 578; *Barrels of Oil, Sprague*, 91. But in *The Deveron*, 1 *W. Rob.* 180, *Dr. Lushington held*, that in apportioning the remuneration in salvage cases every vessel was to be considered as uninsured, on account of the inconvenience of considering in each case whether a vessel had forfeited its insurance. See also *The Orbona*, 1 *Spinks*, *Adm.* 161.

(*e*) *Crocker v. Jackson, Sprague*, 141.

(*f*) *The Dantzic Packet*, 3 *Hagg. Adm.* 383; *The Glory*, 2 *Eng. L. & Eq.* 561; *The Samuel*, 4 *Eng. L. & Eq.* 581.

(*g*) *The Ship Henry Ewbank*, 1 *Sumner*, 400; *The Jonge Bastiaan*, 5 *Rob. Adm.* 322; *The Watt*, 2 *W. Rob.* 70.

(*h*) *Hand v. The Elvira, Gilpin*, 60; *The Maria, Edw. Adm.* 175; *The Samuel*, 4 *Eng. L. & Eq.* 581; *The Amethyst, Daveis*, 20.

(*i*) *The Blenden Hall*, 1 *Dods.* 414; *The Fleece*, 3 *W. Rob.* 278; *The Mary*, 2 *Wheat.* 123.

(*j*) *The Barque Island City*, 1 *Black*, 121; *The Jonge Bastiaan*, 5 *Rob. Adm.* 322; *Cowell v. The Brothers, Bee*, 186; *The Samuel*, 4 *Eng. L. & Eq.* 581.

¹ But a pilot may be remunerated for salvage services when the services were such as he was not bound to render, as where a vessel was drifting in a storm upon the

All the salvors may join in one libel. They may have separate libels if the rights of the parties are adverse to each other; (*k*) but if different libels are filed unnecessarily, the cost of such needless libels will not be charged on the proceeds. (*l*)

5. OF SALVAGE COMPENSATION.

This is never merely pay, or in the nature of wages. It is always a reward. (*m*) The amount is determined by the danger incurred, by the skill manifested, by the difficulty of the service, and by its duration. (*n*) There is for no case a fixed rule; but ad-

* 320 miralty is much influenced by the numerous precedents * in adjudged cases. (*o*) Still the court judges for itself as to the applicability of the precedents. And it has been said, that the precedents of ocean salvage are not applicable with much force to salvage claims for services rendered on our western rivers. (*p*)

In a case of unquestionable derelict, while there is no absolute rule, it may be said, that very seldom would less than one third or more than half of the property saved, be given. (*q*)

It is held, that admiralty will not decree salvage for saving life alone. (*r*) It would then indeed have no property for its decree to take effect upon. But the saving of life is always considered, if it be connected with the saving of the property for which a claim is made. (*s*)

As the whole amount of salvage compensation is subject to no absolute rule, so neither is its distribution. Generally, however,

(*k*) *The Ship Henry Ewbank*, 1 Sumner, 408.

(*l*) *The Ship Henry Ewbank*, 1 Sumner, 400; *The Sch. Boston*, 1 Sumner, 328; *Hessian v. The Edward Howard*, 1 Newb. Adm. 522.

(*m*) *The Sarah*, 1 Rob. Adm. 313, note; *The William Beckford*, 3 Rob. Adm. 365; *The Hector*, 3 Hagg. Adm. 95; *Mason v. The Blaireau*, 2 Cranch, 266.

(*n*) *The Ebenezer*, 8 Jurist, 385; *The Wm. Hannington*, 9 Jurist, 681; *The Wm. Beckford*, 3 Rob. Adm. 365; *The Brig Susan*, Sprague, 504.

(*o*) *The Thetis*, 3 Hagg. Adm. 62; *The Adventure*, 8 Cranch, 221.

(*p*) *McGinnis v. Steamboat Pontiac*, 1 Newb. Adm. 130, 5 McLean, C. C. 359.

(*q*) *Tyson v. Prior*, 1 Gallis. 196; *Post v. Jones*, 19 How. 161; *The Elwell Grove*, 3 Hagg. Adm. 221. The old rule used to be to give one half the property saved in a case of derelict; but there is now no fixed rule, although this is usually given.

The Aquila, 1 Rob. Adm. 46; *The Florence*, 20 Eng. L. & Eq. 807; *Post v. Jones*, 19 How. 161; *Rowe v. Brig _____*, 1 Mason, 377; *Barrels of Oil, Sprague*, 91.

(*r*) *The Zephyrus*, 1 W. Rob. 329.

(*s*) *The Aid*, 1 Hagg. Adm. 83; *The Emblem, Daveis*, 61; *Barrels of Oil, Sprague*, 91. See the Merchants' Shipping Act of 17 & 18 Vict. c. 104, § 459; *The Bartley*, 1 Swabey, Adm. 198; *The Coromandel*, id. 205; *The Clarisse*, id. 129.

coast, and some pilots at the peril of their lives, being unable to board her, by preceding and signalling brought her safely to anchorage. *Akerblom v. Price, &c. Co.* 7 Q. B. D. 129.

the owners of the saving ship receive one third of the amount decreed. (t) The master receives about twice as much as is given to the mates; and the mates receive more than is given to the sailors.

Salvage compensation is allowed generally on all the property saved; on the ship, the cargo, (u) and the freight. (v) Where public property is saved, there is no authority for saying that a claim would be allowed for saving a government vessel, or a libel on the vessel sustained. But if a cargo is saved, the goods of government might perhaps pay the same rate as those of individuals. (w) The exceptions to this general liability to salvage * appear to be in favor of the mails, (x) and perhaps * 821 ships of war of the government of the saving ship, (y) of clothing left by master and crew, (z) of money on the person of a dead man, (a) of bills of exchange, (b) of evidences of debt, and of documents of title.

6. OF SALVAGE BY PUBLIC ARMED SHIPS.

This is demandable of right for property saved from pirates, or from a public enemy, (c) or by a recapture. (d) In these cases the amount and the distribution are generally regulated by statute. (e) But no salvage is allowed except to a ship actually assisting in the service of salvage. (f)

7. HOW THE CLAIM FOR SALVAGE COMPENSATION MAY BE BARRED.

There may be a custom to render services gratuitously, which would bring these services under the same rule which is applied to services rendered as a legal duty. (g) Thus, it has been said,

(t) *The Henry Ewbank*, 1 Sumner, 400; *Mason v. Ship Blaireau*, 2 Cranch, 240; *The Amethyst*, Davels, 28; *Union Tow-Boat Co. v. Bark Delphos*, 1 Newb. Adm. 412. For cases where more than one third has been allowed, see 2 Parsons Mar. Law, 622, where this question is fully discussed.

(u) *The George Dean*, 1 Swabey, Adm. 290; *The Mary Pleasants*, id. 224.

(v) *The Peace*, 1 Swabey, Adm. 85.

(w) In *The Lord Nelson*, Edw. Adm. 79, a claim for salvage was maintained against a government transport. No opposition was made by government. In *The Marquis of Huntly*, 3 Hagg. Adm. 246, a salvage service was rendered to a government transport, and a quantity of government stores were saved. The gov-

ernment assented to the court's decreeing salvage.

(x) *Sch. Merchant*, cited in Marvin on Salvage, 132.

(y) *The Comus*, 2 Dods. 464.

(z) *The Rising Sun*, Ware, 378.

(a) *The Amethyst*, Davels, 29. The expense of his interment was allowed out of this money.

(b) *The Emblem*, Daveis, 61.

(c) *Talbot v. Seamen*, 1 Cranch, 1.

(d) *Sch. Adeline*, 9 Cranch, 244.

(e) Act of 1800, c. 14, 2 U. S. Stats. at Large, 16.

(f) *The Dorothy Foster*, 6 Rob. Adm. 88.

(g) *The Harriot*, 1 W. Rob. 489. See *The Swan*, id. 68; *Williamson v. Brig Alphonso*, 1 Curtiss, C. C. 376.

that it is a custom for steamers on the Mississippi to draw others off a sand-bar, without compensation. (*h*) A custom in one port is not binding on ships of other ports, which render salvage services at the port where the custom prevails. (*i*)

If ships sail as consorts under a contract to assist each other, neither can claim salvage compensation for services rendered under this contract. (*j*) The contract itself may be implied from circumstances. It may be a question, how far a claim for salvage compensation may be made, when both vessels belong to the same owner. (*k*) We see no sufficient reason, however, why the fact should bar the claim of salvage for the master and * 322 * crew, unless the vessels are consorts under a contract as above stated.

Salvage services are sometimes rendered under a special bargain made with the salvors, at the time of salvage; but admiralty would pay no great regard to such a contract, unless it were equitable, and conformed to the merits of the case, and made by parties capable of judging as to their obligations, with a clear understanding of the nature of the agreement. (*l*)¹ And the bargain must be distinct and explicit as to the amount and terms. (*m*)

By an important and established rule all salvage compensation is wholly forfeited by an embezzlement of the property saved; (*n*) but this forfeiture only extends to guilty parties, and innocent co-salvors are not affected thereby. (*o*)

On the trial of salvage cases, salvors are competent witnesses for themselves and for each other. (*p*) This competency arises

(*h*) *Montgomery v. The T. P. Leathers*, 1 Newb. Adm. 429.

(*i*) *The Red Rover*, 3 W. Rob. 150.

(*j*) *The Zephyr*, 2 Hagg. Adm. 43.

(*k*) *The Margaret*, 2 Hagg. Adm. 48, note.

(*l*) *The Mulgrave*, 2 Hagg. Adm. 77; *Bondie v. Sherwood*, 22 How. 214; *The Whitaker, Sprague*, 282; *Post v. Jones*, 19 How. 150; *Eads v. Steamboat H. D. Bacon*, 1 Newb. Adm. 280; *Williams v. Barge Jenny Lind*, id. 443.

(*m*) *The True Blue*, 2 W. Rob. 176; *The Henry*, 2 Eng. L. & Eq. 584; *The Resultatet*, 22 id. 620; *The British Empire*, 6 Jurist, 608; *The William Lushington*, 7 Notes of Cases, 361.

(*n*) *Sch. Dove*, 1 Gallis. 585; *The Bello Corrunes*, 6 Wheat. 152.

(*o*) *The Barque Island City*, 1 Black, 121; *Mason v. Ship Blaireau*, 2 Cranch, 240.

(*p*) *The Elizabeth & Jane, Ware*, 35.

¹ One put in possession by the master of a ship and cargo after the stranding of the former, with authority to act for the benefit of all concerned, has a lien on the cargo for his charges incurred for the purpose of saving it as against the owner, though incurred without his authority, the claim being analogous to general average or salvage; and the owner's agent, to whom the bills of lading have been handed for the sake of obtaining possession of the cargo, is impliedly authorized to bind the owner to pay such charges on condition of the cargo being given up. *Hingston v. Waudt*, 1 Q. B. D. 367.

from necessity. In cases of the greatest importance, as generally in cases of derelict, there are and can be no other witnesses as to the material facts of the case, but the salvors. But their interest in the result demands that their testimony should be carefully weighed, and as their competency arises from necessity, it is limited by necessity; and for independent facts, which may be proved by other testimony, such testimony should be demanded. (q)

We should also strongly insist upon another rule, grounded on the competency of the salvors, and necessary to secure or induce their veracity. It is, that positive and material falsehood should be regarded as an embezzlement of the truth; and should work a forfeiture, in the same way and to the same extent as an embezzlement of the property.

Salvage claims may undoubtedly be barred by lapse of time, *for an admiralty court, like a court of equity, does * 323 not regard or enforce stale claims. (r)

D.—*Of General Average.*

More than three thousand years ago, the commerce of the Mediterranean appears to have been governed by the laws of Rhodes; so called, because they originated in that island, then a mart of commerce. One of its rules has survived to this time, and is now a universal rule of commerce, and is likely to remain so; because it is founded equally upon justice and expediency. This rule is the rule of general average. Substantially, the rule is this; that where maritime property is in peril, and the sacrifice of a part is made for and causes the safety of the rest, that which is saved contributes to make up the loss of that which is sacrificed. (s)

The justice of this rule is obvious. And its expediency is equally certain, though it may not be so obvious. If, when a ship with its cargo were in peril, and some of the goods must be thrown over, to save the rest, and what was thus thrown over was wholly lost with no indemnity to the owner, the question would

(q) *The Boston*, 1 Sumner, 345; *The Henry Ebbank*, id. 432.

(r) *The Rapid*, 3 Hagg. Adm. 419; *The Samuel*, 4 Eng. L. & Eq. 581.

(s) This rule, as preserved in the Roman civil law (Dig. 14, 2), is as follows: "Lege Rhodia cavetur, ut si levanda navis gratia jactus mercium factus est, omnium contributione sarcitur quod pro omnibus datum est."

always arise, which of the freighters should thus suffer. Each freighter would then endeavor to protect himself, either by exerting an undue influence over the master, who should think of nothing but the safety of the whole property in his charge, or by taking care that their goods were placed in the ship beyond easy reach, or by sending some one in the ship to look after their goods, or by some other means. Whereas, in such a peril the master should be at perfect liberty to select for destruction, just that property the loss of which would best promote the safety of the rest. The law of general average, which is known to have been in force in England about six hundred years ago, (*t*) is therefore universally in force, and various subsidiary rules are generally recognized for the purpose of making this law efficient and just in its operation.

* 324 * From the reason of the rule it follows, that the owner of the goods sacrificed is not repaid their full value, because if he were he would have the advantage of being the only one that did not lose. (*u*) But the contributions are determined thus; the value of the whole property at risk is ascertained, and then the value of the property sacrificed; this last value forms a certain percentage of the larger value; and all the property saved pays that percentage of what is saved, to the owner of the property lost; and thus he loses the same percentage or proportion with the other owners.

There are three essential elements of general average. First, the sacrifice must be voluntary; second, it must be necessary; third, it must be successful. (*v*)¹

1. THE SACRIFICE MUST BE VOLUNTARY.

General average usually occurs by a jettison of the cargo, to lighten the ship; or by cutting away the masts and sails or rigging to relieve the ship, which is substantially a jettison of them. (*w*)

(*t*) Probably the earliest English reported case on this subject is *Hicks v. Pallington*, 32 Eliz. F. Moore, 297. In 1285, Edward I. sent to the Cinque Ports letters-patent, declaring what goods were liable to contribution. See 1 Rymer, Federa, 8d ed. p 240.

(*u*) *Simonds v. White*, 2 B. & C. 806; *Lee v. Grinnell*, 5 Duer, 431.

(*v*) *Barnard v. Adams*, 10 How. 803; *Sturges v. Cary*, 2 Curtis, C. C. 66; *Nimick v. Holmes*, 25 Penn. State, 866.

(*w*) *Walker v. United States Ins. Co.* 11 S. & R. 61; *Sims v. Gurney*, 4 Binn. 525; *Porter v. Providence Ins. Co.* 4 Mason, 298; *Greely v. Tremont Ins. Co.* 9 Cush. 415; *Scudder v. Bradford*, 14 Pick. 13.

¹ For a definition of "sacrifice," see *Shepherd v. Kottgen*, 2 C. P. D. 585, per *Brett, L. J.*

A principal difficulty here, is to discriminate between a voluntary sacrifice, and a loss by a peril of the sea. Supposing sails are hoisted to get a vessel off a lee-shore, which may be probably blown away, or an anchor cast on a rocky bottom likely to chafe and cut the cable, or catch and break the anchor; and there may be many such cases. The general rule must be, that nothing of this kind creates a claim of general average, unless it was not only done for the purpose of saving the ship and cargo from peril, but was done under peculiar circumstances, which made the loss of the sails or cable or other property almost certain, and unless it would not have been done but to save the rest. But even then it would be difficult to discriminate such cases, from the common effects and perils of navigation, which every ship is bound to encounter. (x)

* There is one kind of sacrifice that has raised difficult * 325 questions, which has passed repeatedly under adjudication.

This is the case of the voluntary stranding of the ship, by the master. We apprehend, however, that the difficulty which this case presents, lies not in the principle, but in the application of it. A ship is voluntarily stranded by the master, when its wreck is inevitable or nearly so, and the master seeks a favorable place, where the safety of ship, cargo, or life may be more probable. Now, if the master, having, and believing that he has at the time, a chance of saving his ship, which is real and of value, though not a probability, voluntarily casts this chance away, for the purpose of saving his cargo, the cargo saved should contribute to pay for the loss of the ship. But if the ship must be lost at any rate, the mere fact of losing it in one place rather than in another, cannot give to the ship a claim against the cargo. We confess, however, that the cases on this subject are not reconcilable with this principle, or with any principle, or with each other. (y) If in consequence of the stranding the vessel is totally lost, there is a conflict of authority whether the cargo is liable to contribute, but

(x) See *Walker v. United States Ins. Co.* 11 S. & R. 61; *Birkley v. Presgrave*, 1 East, 220; *2 Phillips Ins.* § 1285.

(y) The leading case on this point is *Barnard v. Adams*, 10 How. 270. The vessel was drifting, in a gale, towards a rocky and dangerous part of the coast, on which, if she had struck, she must inevitably have perished, together with the crew and cargo. To avoid this peril, she

was steered along the coast, and finally run on a beach, and all the cargo saved. This was held to be a case for contribution. See also *Sturgess v. Cary*, 2 Curta, C. C. 59; *Reynolds v. Ocean Ins. Co.* 22 Pick. 191; *Merithew v. Sampson*, 4 Allen, 192; *Rea v. Cutler, Sprague*, 185; *Sims v. Gurney*, 4 Binn. 518; *Meech v. Robinson*, 4 Whart. 360; *Walker v. United States Ins. Co.* 11 S. & R. 61.

the rule seems now to be settled in favor of contribution in such a case. (z)

Mere expenses often constitute an average loss. Suppose that some sea peril injures a ship, and compels her to go out of her way to a port of repair, can the ship claim indemnity for the expenses of repair, or for the wages and provisions while going to seek

repair? Here also the cases and the usages are not agreed * 326 or certain. We should say, however, if we applied * to

this question only the general principles of general average, that the ship has no such claim, unless the repairs were themselves made necessary by an injury, caused or sustained, for the purpose of saving the property; or unless the repairs were only temporary repairs, of no permanent value to the ship, and were needed and made only to enable the ship to save and transport the cargo. If repairs were made at a certain time and place for the sake of the cargo, which but for this cause would have been made elsewhere at less cost, then the difference in the cost comes within the reason and equity of general average. (a)¹

As to the expenses incurred by seeking repair, the authorities are still more conflicting. It would seem from the English cases, that wages and provisions do not come into general average, unless this expense was incurred in seeking or obtaining repairs of an injury, which was itself an average loss. Thus, whether a mast were cut away to save ship and cargo, or blown away, it would be equally necessary for the ship to seek a port of repair, and her expenses would be the same in both cases. But, in the first case, where the mast was cut away, the wages and provisions would come under general average, because the repairs would have been made necessary by a voluntary sacrifice. In the second, where

(z) *Col. Ins. Co. v. Ashby*, 18 Pet. 331; *Caze v. Reilly*, 8 Wash. C. C. 298, *nom. Caze v. Richards*, 2 S. & R. 237, note; *Gray v. Waln*, 2 S. & R. 229; *Mut. Safety Ins. Co. v. Cargo of the Brig George, Olcott*, Adm. 89; *Barnard v. Adams*, 10 How. 270; *Merithew v. Sampson*, 4 Allen, 192. The authorities against contribution in such a case are *Emerigon, c. xii. § xli.*, *Meredith's ed.* 475; *Eppes v.*

Tucker, 4 Call. 346; *Bradhurst v. Col. Ins. Co.* 9 Johns. 9; *Marshall v. Garner*, 6 Barb. 394.

(a) See *Padelford v. Boardman*, 4 Mass. 648; *Ross v. Ship Active*, 2 Wash. C. C. 226; *Jackson v. Charnock*, 8 T. R. 509; *Brooks v. Oriental Ins. Co.* 7 Pick. 259; *Hassam v. St. Louis Perpet. Ins. Co.* 7 La. An. 11; *Sparks v. Kittredge*, 9 Law Rep. 318.

¹ As to whether expenses incurred in discharging, warehousing, and reshipping cargo, pilotage, port charges, and other expenses of leaving port, where a vessel was obliged to put into port to make repairs occasioned by a general average sacrifice, are themselves a subject of general average, see *Atwood v. Sellar*, 4 Q. B. D. 342; 5 Q. B. D. 286.

the mast was blown away, the wages and provisions would not come under general average, because the repairs would not. (*b*) In this country, however, it seems to be the usage and perhaps the law, that as in both cases and equally the ship seeks repairs for the safety of the ship and cargo, the expense of seeking it falls on ship and cargo, (*c*)¹ although the cost of the repairs themselves might rest upon the ship.

All maritime property consists of the ship, the cargo, and the * freight. All, or a portion of all or of each, may * 827 have been saved by a sacrifice of some other portion ; and whatever is thus saved, contributes to whatever is thus lost. The application of this rule is indefinitely diversified, no two cases presenting precisely the same circumstances ; and we give in our notes leading cases illustrative of the principal questions which have thus arisen. (*d*)²

It may be well to add, that the law-merchant discourages the carrying of goods on deck, in part from the greater danger to goods so carried, but more from the hindrance of navigation, and

(*b*) This distinction was taken in *Power v. Whitmore*, 4 M. & S. 141 ; but it is doubtful whether it is justified by the preceding case of *Plummer v. Wildman*, 3 M. & S. 482. See also *Hallett v. Wigram*, 9 C. B. 580 ; *De Vaux v. Salvador*, 4 A. & E. 420.

(*c*) *Walden v. Le Roy*, 3 Caines, 283 ; *Thornton v. U. S. Ins. Co.* 3 Fairf. 150 ; *Padelford v. Boardman*, 4 Mass. 548 ; *Potter v. Ocean Ins. Co.* 3 Sumner, 27 ; *The Brig Mary*, Sprague, 17 ; *Bixby v. Franklin Ins. Co.* 8 Pick. 86 ; *Giles v. Eagle Ins. Co.* 2 Met. 140 ; *Greely v. Tremont Ins. Co.* 9 Cush. 421.

(*d*) Expenses of lighterage. *Heyliger v. N. Y. Ins. Co.* 11 Johns. 85 ; *Lewis v. Williams*, 1 Hall, 430. Goods lost after they are put in lighters for the common benefit, are contributed for. *Lewis v. Williams*, 1 Hall, 430. Expense of storage of cargo. *Barker v. Phoenix Ins. Co.* 8 Johns. 318 ; *Hall v. Janson*, 4 Ellis & B. 500. Damage to goods while stored. *Hennen v. Monro*, 16 Mart. La. 449. But see *The Brig Mary*,

Sprague, 17 ; *Bond v. The Superb*, 1 Wallace, Jr. 366. Pumping out a ship. *Orrok v. Commonwealth Ins. Co.* 21 Pick. 460 ; *Nelson v. Belmont*, 5 Duer, 325. Scuttling a vessel. *Nelson v. Belmont*, 5 Duer, 810 ; *Lee v. Grinnell*, id. 400. Ransom. *Maisonnaire v. Keating*, 2 Gallis. 388 ; *The Hoop*, 1 Rob. Adm. 201 ; *Ricord v. Bettenham*, 8 Burr. 1734 ; *Welles v. Gray*, 10 Mass. 42 ; *Clarkson v. Phoenix Ins. Co.* 9 Johns. 1 ; *Douglas v. Moody*, 9 Mass. 548 ; *Sansom v. Ball*, 4 Dall. 459. Delay by embargo is not a subject of average. *Da Costa v. Newnham*, 2 T. R. 407 ; *M'Bride v. Mar. Ins. Co.* 7 Johns. 431 ; *Penny v. N. Y. Ins. Co.* 8 Caines, 155. Expenses incurred after capture are a charge on the subject benefited. *Spafford v. Dodge*, 14 Mass. 66 ; *Peters v. Warren Ins. Co.* 1 Story, 469 ; *Jumel v. Marine Ins. Co.* 7 Johns. 412. If a part of a cargo is sold to raise funds for the common good, this is compensated for. *The Ship Packet*, 8 Mason, 280 ; *Giles v. Eagle Ins. Co.* 2 Met. 144 ; *The Mary*, Sprague, 51.

¹ *Barker v. Baltimore, &c. R. Co.* 22 Ohio St. 45.

² A ship's spare spars and some of the cargo burnt as fuel, after the supply of coal failed, for the donkey engine used in pumping out the ship in order to avert the loss of the ship and cargo, are a subject of general average. *Robinson v. Price*, 2 Q. B. D. 91 ; 2 Q. B. D. 295. *Backus v. Coyne*, 45 Mich. 584, decided that cargo lightered away to save a vessel and the rest of the cargo is not liable to contribute for the subsequent expenses of saving.

the consequent increase of danger. Therefore, if goods are carried on deck and jettisoned, this loss gives no claim for contribution. (e) If the owner consented to their being so carried, he bears his whole loss. (f) If, without his consent, the master so carried them, the shipper of the goods may claim his whole loss from the owner, as a loss from unsafe and improper lading by the fault of the master. (g) If the goods are carried on deck in conformity with an established and known usage, the shipper would have a claim on the vessel, and also probably on the goods on deck. (h)

* 328 Loss, by decree of salvage compensation, is always settled * on the principles of general average. (i) A loss by collision is not. (j)

2. THE SACRIFICE MUST BE NECESSARY.

It is seldom that this question occurs in practice. If the sacrifice be without necessity, he who causes it must be responsible for his folly or his wickedness.

It must be remembered, however, that the necessity for the sacrifice may be either real or apparent; for if it seemed real at the time, and existing circumstances justified a master possessed of honesty and reasonable discretion in making the sacrifice, it would be sufficient to found a general average claim, although subsequent circumstances might show that it was in fact unnecessary. (k)

Formerly, to guard against wasteful and unnecessary loss, the law-merchant required the master to consult formerly his officers and crew, and only with their consent make a jettison. But, whether because sailors have grown worse or masters better, or for some other reason, the rule is now no longer recognized, (l) and

(e) *Smith v. Wright*, 1 Caines, 43; *Lenox v. United Ins. Co.* 3 Johns. Cas. 178; *Cram v. Aiken*, 12 Maine, 229; and cases *infra*.

(f) *Lawrence v. Minturn*, 17 How. 100; *Sayward v. Stevens*, 3 Gray, 97; *Sproat v. Donnell*, 26 Maine, 186.

(g) *The Paragon, Ware*, 822; *Barber v. Brace*, 8 Conn. 9; *Creery v. Holly*, 14 Wend. 26; *Gould v. Oliver*, 2 Man. & G. 208, 4 Bing. N. C. 134.

(h) *Gould v. Oliver*, 4 Bing. N. C. 134, 2 Man. & G. 208; *Hurley v. Milward, 1 Jones & C. Irish Exch.* 224; *Harris v.*

Moody, 4 Bosw. 210; *Gillett v. Ellis*, 11 Ill. 570.

(i) *Heyliger v. N. Y. Ins. Co.* 11 Johns. 85; *Peters v. Warren Ins. Co.* 1 Story, 468; *The Mary, Sprague*, 51.

(j) *Peters v. Warren Ins. Co.* 8 Sumner, 389, 1 Story, 463.

(k) *Lawrence v. Minturn*, 17 How. 100, 110; *Dupont de Nemours v. Vance*, 13 id. 166; *Crocker v. Jackson, Sprague*, 141.

(l) *Birkley v. Presgrave*, 1 East, 220; *Sims v. Gurney*, 4 Binn. 513; *Col. Ins. Co. v. Ashby*, 18 Pet. 343; *Nimick v. Holmes*, 25 Penn. State, 372.

the practice is very unusual. Indeed a resort to it now might almost excite suspicion, for the law merchant clothes the master with absolute authority in all such cases, and lays upon him a corresponding responsibility.

3. THE SACRIFICE MUST BE SUCCESSFUL.

On this point it might be enough to say, that if the property be not saved, there is nothing for which contribution should be made. If there is nothing which is benefited by the sacrifice, the whole foundation of the claim of general average has no existence. (m)

* Questions under this principle have arisen chiefly, if not * 329 altogether, where expenses have been incurred and contribution demanded for them. It is enough to say, in regard to such questions, that where expenses are incurred for repairs, (n) or wages and provisions, (o) or to prevent condemnation in case of forfeiture or capture, (p) or to rescue and recover a ship or cargo, in all such cases, if the cargo be saved, or if the ship be enabled to resume her voyage, these expenses may be averaged; and otherwise not.

4. WHAT CONSTITUTES A SACRIFICE.

It has been said by a very high authority, that "If the master's situation were such, that, but for a voluntary destruction of a part of the vessel or her furniture, the whole would certainly and unavoidably have been lost, he could not claim a restitution; because a thing cannot be said to have been sacrificed, which had already ceased to be of any value." (q)

This cannot be true. Such a principle or rule as this would cut off precisely those cases to which the law of general average is always applied, and has been for more than three thousand years. There are always cases in which, but for the voluntary destruction of a part, the whole must be lost; and it is precisely because this voluntary destruction of a part does save the rest, which could not

(m) *Scudder v. Bradford*, 14 Pick. 13; *Bradhurst v. Col. Ins. Co.* 9 Johns. 9; *Gray v. Wain*, 2 S. & R. 255; *Sims v. Gurney*, 4 Binn. 524. In *Lee v. Grinnell*, 6 Duer, 422, the rigging and masts of a vessel which were on fire, were cut away, with the expectation that they would fall overboard, and thus save the ship and cargo. A spar fell through the deck and set fire to the cargo, whereby both it and the ship were partially consumed.

Assuming that the purpose was accomplished, the court were divided on the question whether the masts were to be contributed for.

(n) *Myers v. The Harriet*, 2 Whart. Dig. p. 48.

(o) *Nelson v. Belmont*, 5 Duer, 325.

(p) *Williams v. Suffolk Ins. Co.* 8 Sumner, 510.

(q) Benecke in *Stevens & Benecke on Average*, Phil. ed. 110.

otherwise be saved, that a claim for contribution exists. If the rest could have been saved without this loss of a part, that loss would have been unnecessary. It cannot be needed to give instances of this, for all cases of general average are such instances.

It is still true, that if the very thing lost must itself be inevitably lost, and could not be saved by the loss of anything else, then the loss of it does not come within the meaning of the word "sacrifice," as used in the law of general average.

If, for example, masts are blown over, and still hang to * 330 the vessel by the rigging, they may be said to be voluntarily lost, if the rigging be cut to let them go. But it is obvious that no claim for general average could now be made, unless, possibly, the ship was near a port of safety, and might have dragged the masts and sails in, and so saved them; but this can hardly be supposed. (r) So, too, where a vessel was laden with lime, and the lime was on fire, and the vessel was scuttled to save her, and thereby the lime was destroyed at once, the ship was not required to contribute for the loss of the lime, because that could not have been saved in any way; and the scuttling which saved the ship only hastened the inevitable destruction of the lime, but did not cause it. (s) It is, however, generally true, that if a ship be scuttled, or filled with water, to save herself, and thereby saves so much of the cargo as the fire has not reached, and the cargo which the fire does not reach, is injured by the water, the ship, if saved, contributes for the injury to the cargo. (t)¹

Nor is the effect of the sacrifice critically inquired into. Questions of this sort have arisen; but we should say, that if a sacrifice of maritime property be made to save other property, and that other property be saved in point of fact, it must contribute, although it may not be certain that it was saved directly and without the intervention of other causes, by that sacrifice. (u)

(r) *Nickerson v. Tyson*, 8 Mass. 487; *Stevens and Benecke on Average*, Phil. ed. 111.

(s) *Crockett v. Dodge*, 3 Fairf. 190. See *Col. Ins. Co. v. Ashby*, 13 Pet. 310; *Marshall v. Garner*, 6 Barb. 394. See * 328, n. (m).

(t) *Nelson v. Belmont*, 5 Duer, 828;

Lee v. Grinnell, id. 400. In *Nimick v. Holmes*, 25 Penn. State, 366, the distinction between the goods already on fire and the rest of the cargo was not noticed, and it was held that all which were damaged by water were to be contributed for.

(u) But see *Scudder v. Bradford*, 14 Pick. 18; *Stevens and Benecke on Average*, Phillips ed. 100, 105-107.

¹ The pouring of water on the cargo by the master's orders, to put out a fire in the hold, is a general average act, and if the cargo is thereby injured, the owner is entitled to contribution. *Whitecross, &c. Co. v. Savill*, 8 Q. B. D. 653. See *Stewart v. West India, &c. Co.* L. R. 8 Q. B. 88.

5. OF THE VALUE UPON WHICH CONTRIBUTION IS ASSESSED.

There is now no absolute uniformity of rule or practice on this subject; none, at least, which suffices to answer all questions. It may be said, however, generally, that the vessel contributes for her value at the time she is saved. (v) It may be difficult to determine this as a matter of fact. But there is some tendency in this country to apply a rule, which is finding * its * 331 way into the law-merchant, and which is one of those rules which, while seeming to be only arbitrary, is in fact founded upon an average of facts, and so, on the whole, works justice, while it saves questions. This rule is, that four-fifths of her value when she last sailed, constitutes her value when saved. (w) But this rule is by no means universally, nor, perhaps, even generally adopted. (x) If sold, the price she brings is more frequently the standard, and in most cases would be a safe one. (y) The only rule, however, which can be so called, is, that her value, at that time, must be determined by the best evidence available. (z)

As to the cargo the same rule must apply. And as to the value of that part of the cargo which is sacrificed, and for which contribution is claimed, the rule is, that if those goods had not been sacrificed, but others had been, and the goods in fact sacrificed had been saved and enabled to reach a port but in a damaged condition, it is only the value of the goods in that condition which should be contributed for; as otherwise the sacrifice would be a gain. (a) Government property is not now, if it ever was, exempt from contribution, either in England or in this country. (b)

Profits never contribute under that name. But if the value of the goods at the port of arrival is increased by the transportation, and that value is taken, profits do contribute in fact. (c)

Of freight, it must be remembered that no freight is earned unless the goods are delivered at the port of destination; and only the freight earned contributes; (d) and all expenses necessarily

(v) *Simonds v. White*, 2 B. & C. 806; *Gillett v. Ellis*, 11 Ill. 579.

(a) See *Rogers v. Mechanics' Ins. Co.* 1 Story, 609.

(w) *Leavenworth v. Delafield*, 1 Caines, 573; *Gray v. Waln*, 2 S. & R. 229.

(b) *Brown v. Stapleton*, 4 Bing. 119; *United States v. Wilder*, 3 Sumner, 308.

(x) See *Spafford v. Dodge*, 14 Mass. 66; *Douglas v. Moody*, 9 Mass. 548.

(c) *The Nathaniel Hooper*, 3 Sumner, 542.

(y) *Bell v. Smith*, 2 Johns. 98; *Lee v. Grinnell*, 5 Duer, 429.

(d) *Lee v. Grinnell*, 5 Duer, 431; *The Nathaniel Hooper*, 3 Sumner, 542; *Magrath v. Church*, 1 Caines, 196; *Gray v. Waln*, 2 S. & R. 229.

(z) *Mutual Safety Ins. Co. v. Cargo of the Ship George*, Olcott, Adm. 157.

incurred in earning the freight, as by transshipment or otherwise, must be deducted. (e) And if the ship loses freight by the jettison of the goods, that loss must be contributed for. (f)

It may be a general rule, that the port of destination is the proper place for a final adjustment of the average. (g) But as the master has a lien on all goods saved, for the contribution due from them in general average, he need not and would not deliver the goods at an intermediate port, although deliverable there by the bill of lading, unless this contribution were first paid or secured. But this contribution cannot be determined but by an adjustment of the general average, over all the contributory interests.

It is therefore customary and proper that such an adjustment should there be made. (h) And it is a universally recognized rule, that such an adjustment, made under the law of the port where made, is binding everywhere, upon all parties whose interests it affects, unless it can be set aside by proof of fraud, or of gross and material mistake. (i)

SECTION V.

OF PERSONS EMPLOYED IN A SHIP.

A.—*Of the Master.*

The master is appointed and employed by the owner, and the owner is bound to all other parties for the competency of the master, that being necessary to make the ship seaworthy. (j) But the master is also bound to all whose interests are under his charge. He owes to them the duty of entire integrity, and suit-

(e) *Williams v. London Ass. Co.* 1 M. & S. 818. (f) *Propeller Niagara v. Cordes*, 21 *How. 7.* (g) *Stevens & Benecke on Av. Phil.* ed. 268. (h) *2 Phillips, Ins. § 1413.* (i) *Simonds v. White*, 2 B. & C. 806; *Daglish v. Davidson*, 5 Dowl. & R. 6; *Lewis v. Williams*, 1 Hall, 480. See *Chamberlain v. Reed*, 18 Maine, 857.

able and constant care, and skill. He may become in law the agent of charterers, freighters, shippers, or insurers, when the necessity arises of acting directly for them.

His multifarious duties cannot be enumerated, nor can they * be better defined, than to say that they are all that * 333 are included in due care and skill with respect to all the interests which are placed under his charge or within his control.

Usage has much influence in determining these duties; and by usage the master has certain customary privileges. One of these is known by the name of primeage. This is a certain percentage on the freight. (k)

We have seen that he is often vested with extraordinary powers from an extraordinary necessity; and this necessity must be the greater as the power is the greater: thus, only extreme necessity gives him power to sell the ship; (l) a less necessity, but still a strong one, authorizes him to hypothecate her by bottomry; (m) and a much less necessity, being in fact only a certain expediency, authorizes him to repair or supply her, (n) and in many cases to let her by charter. But all the duties and powers of the master are connected with the use and employment of the ship; and are extended over the cargo, only from necessity. And if they spring from necessity, they do not exist if he has the means of obtaining definite instructions.

Generally, an agent cannot delegate his authority without a special authority. But a master, where a sufficient necessity exists, may appoint another in his place. (o) And the master so appointed, may appoint another, under a similar necessity; and any master so appointed, has the powers and duties of the original master. And so it is with an officer who becomes master by the death, absence, or inability of the original master. And this is equally true of a master appointed abroad, by a consul or any official person who has authority to make the appointment. (p)

(k) *Scott v. Miller*, 5 Scott, 15; *Charleton v. Cotesworth*, Ryan & M. 175; *Best v. Saunders*, Moody & M. 208; *Vose v. Morton*, 5 Gray, 594. In *Rennell v. Kimball*, 5 Allen, 356, the master was to have five per cent primeage on the gross earnings of the ship. He was paid this in a foreign port, by the ship's agent, who charged a commission on the same to the account of the ship. *Held*, that the master was personally liable for this commission.

(l) See *ante*, p. * 276.

(m) See *Pratt v. Reed*, 19 How. 361.

(n) *The Ship Fortitude*, 3 Sumner, 287; *Webster v. Seekamp*, 4 B. & Ald. 352; *Pratt v. Reed*, 19 How. 359.

(o) 1 Bell, Com. 413; *Breed v. Ship Venus*, U. S. D. C. Mass. 1806.

(p) *The Zodiac*, 1 Hagg. Adm. 320; *The Nuova Loaneze*, 22 Eng. L. & Eq. 623; *The Cynthia*, 20 Eng. L. & Eq. 623.

In England, a master has no lien on the ship, (*q*) and
 * 834 none * on the freight, for his charges or disbursements. (*r*)

The law of this country would seem to give him no lien for these upon the ship, (*s*) but would give him one upon the freight. (*t*)

The general principles of the law of agency apply in all their force to the relations between the master and all of those of whom he is the agent, whether by original appointment or by necessity; nor do we deem it necessary to present in detail the various qualifications of these principles, which grow out of the nature of the agency.

The liability of the owner for the torts of the master, as his servant, is governed in general by these principles. (*u*)¹ But the law-merchant has, for a long time, limited the responsibility of the owners for the tortious acts of the master and the mariners, to the value of the ship or freight; and if the owner abandon them to the injured party, or if they are lost before the termination of the voyage, all the liability of the owner ceases. (*v*)

In France, (*w*) in England, (*x*) in some of our States, (*y*) and

(*q*) *Wilkins v. Carmichael*, 1 Doug. 101; *Hussey v. Christie*, 9 East, 426; *The Johannes Christoph*, 38 Eng. L. & Eq. 600.

(*r*) *Smith v. Plummer*, 1 B. & Ald. 576; *Atkinson v. Cotesworth*, 3 B. & C. 647; *Gibson v. Ingo*, 6 Hare, 112; *Bristol v. Whitmore*, 4 De Gex & J. 325, overruling s. c. 1 H. R. V. Johns. Ch. 96.

(*s*) *The Ship Grand Turk*, 1 Paine, C. C. 73; *Revens v. Lewis*, 2 Paine, C. C. 202; *Willard v. Dorr*, 3 Mason, 91; *Hopkins v. Forsyth*, 14 Penn. St. 34; *The Larch*, 2 Curtis, C. C. 427; *Ex parte Clark*, Sprague, 69.

(*t*) *Lane v. Penniman*, 4 Mass. 91; *Lewis v. Hancock*, 11 Mass. 72; *The Ship Packet*, 3 Mason, 255; *Richardson v. Whiting*, 18 Pick. 530.

(*u*) *Stinson v. Wyman*, Daveis, 172; *The Waldo*, id. 161; *Dusar v. Murgatroyd*, 1 Wash. C. C. 17; *The Zenobia*, Abbott, Adm. 93; *The Aberfoyle*, id. 242, 1 Blatchf. C. C. 860; *Boucher v. Lawson*, Cas. temp. Hardw. 78, 188; *Dias v. Privateer Revenge*, 3 Wash. C. C. 262; *Weed v. Panama Railroad Co.* 6 Duer, 198, 17 N. Y. 362; *The Hibernia*, Sprague, 78.

(*v*) *Emerigon, Contrats à la Grosse*, c. 4, § 11; *The Rebecca*, Ware, 198; *The Phebe*, id. 268, 271.

(*w*) *Ord. de la Mar.* liv. 2, tit. 8, art. 2.

(*x*) *Stats.* 7 Geo. 2, c. 15; 26 Geo. 3, c. 86; 58 Geo. 3, c. 159; 17 & 18 Vict. c. 104, § 503, et seq. For the construction of these statutes, see *Wilson v. Dickson*, 2 B. & Ald. 2; *Cannan v. Meaburn*, 1 Bing. 465; *Brown v. Wilkinson*, 15 M. & W. 391; *The Mary Caroline*, 3 W. Rob. 101; *Leycester v. Logan*, 3 Kay & J. 446; *Dobree v. Schroder*, 6 Sim. 291, 2 Mylne & C. 489; *African Steamship Co. v. Swanzey*, 2 Kay & J. 660; *The Dundee*, 1 Hagg. Adm. 109; *Gale v. Laurie*, 5 B. & C. 156; *The Carl Johan*, cited 1 Hagg. Adm. 118; *The Beuares*, 1 Eng. L. & Eq. 637; *The Volant*, 1 W. Rob. 385; *Hill v. Andrus*, 1 Kay & J. 263; *The Duchesse de Brabant*, 21 Law Rep. 248; *Gibbs v. Potter*, 10 M. & W. 70.

(*y*) *Mass. Stat.* 1818, c. 122, Rev. Stat. c. 32; *Gen. Stats.* c. 52, § 18; *Maine Rev. Stats.* 1841, c. 47, § 8; 1857, c. 36, § 5. See *Stinson v. Wyman*, Daveis, 172; *Pope v. Nickerson*, 8 Story, 466.

¹ The *Woodland*, 104 U. S. 180, decided that where a master issued fraudulent drafts on the owners, *bond fide* holders could claim no lien on the vessel, although the drafts were in terms "recoverable against the vessel, freight, and cargo."

by the Congress of the United States, (z)¹ various statutes have been passed respecting this liability of the owner or owners for the embezzlement, loss, or destruction, by the master or mariners. * These statutes conform to the general principle of the law-merchant as above stated; but qualify or limit the liability of the owner in various ways. Important questions have arisen under the provisions of these statutes, and have been passed upon by various courts, as will be seen in our notes. (a)

OF THE POWER OF THE MASTER OVER THE CARGO.

We have seen, when treating of transfer by bottomry, that the master has power in certain cases to hypothecate the ship. A similar necessity may give him a similar power with respect to the cargo. His relation to the cargo, and his power in respect to it, differ from those which he holds in relation to the ship. This difference arises from the fact, that his relations to the ship are primary, and his relations to the cargo are derived from his relations to the ship. He may be himself consignee or supercargo; and then has all the powers and duties of these several officers, but even then, on the voyage, he is only master, and perhaps to some extent supercargo; and only when the ship reaches its destination, is he consignee; and then also the principal duties of a supercargo begin. (b) He may sell the * whole cargo, * 336

(z) 1851, c. 43, 9 U. S. Stats. at Large, 635.

(a) In a case in Massachusetts, it has been held, that the owners of a ship are liable in case of collision to the extent of the value of their interest in the vessel and freight just before the collision, and that the clause relative to an abandonment does not apply to a case of collision. *Walker v. Boston Ins. Co.* 14 Gray, 288. And that the part-owners of a ship are jointly liable to the extent of their joint interest in the ship, and not merely each to the extent of his own interest, for the embezzlement or loss of goods, and that the value of the interest in such a case is that existing just before the tort complained of, that the liability is not lessened by the ship being mortgaged, and that the clause relative to abandonment only applies in case an abandonment is actually made, and is of no effect if the vessel is totally lost before reaching her

port of final destination. *Spring v. Haskell*, 14 Gray, 309. This case is opposed to *Watson v. Marks*, 2 Am. Law Reg. 157. See *In re Sinclair*, 8 Am. Law Reg. 206. "Freight pending," includes the earnings of the vessel in transporting the goods of the owners. *Allen v. Mackay, Sprague*, 219. The act does not apply to vessels engaged in "inland navigation." A vessel on Lake Erie bound from Buffalo to Detroit, enrolled and licensed for the coasting trade, and engaged in commerce between ports of different States, is not a vessel engaged in inland navigation, within the meaning of the act. *Moore v. American Transp. Co.* 5 Mich. 368, affirmed, 24 How. 1.

(b) In some places it is the custom to consign goods to the master for sale and returns. In such a case he is a carrier while transporting the goods, a factor while selling, and a carrier while bringing back the proceeds. *Stone v.*

¹ See *The Scotland*, 105 U. S. 24, as to the effect of this statute on foreign vessels.

if he can neither carry it forward, nor send it forward, nor retain it without its destruction, or important diminution in value, before he can receive instructions from the owner, or from the shipper. (c)¹ If he needs funds to pursue the voyage, and cannot raise them by using the ship, or the property or the credit of the owner, he may then for this purpose sell a part of the cargo. But he does not possess this power unless the necessity for exercising it be as urgent and as certain as the necessity must be which justifies his sale of the ship. And for this purpose, he can sell only a part of the cargo; for his power to sell this, is derived from the necessity of selling it for the benefit of the remainder; and if he sells the whole to raise funds, they can thus be raised only for the benefit of the ship, as there is no cargo left to be benefited. (d) But if the cargo belongs to the owner of the ship, he may sell the whole in case of necessity, for the benefit of the ship. (e) And if in a foreign port he needs funds to pay the officers and crew, he may pledge the credit of the owners therefor if he has no other means; but the lender must use due diligence to ascertain the necessity; and whether he does so is a question for the jury. (ee)

Waitt, 81 Maine, 409; The Waldo, Davis, 161. See Moseley v. Lord, 2 Conn. 388; Emery v. Hersey, 4 Greenl. 407; Kemp v. Coughtry, 11 Johns. 107; Williams v. Nichols, 18 Wend. 58; Day v. Noble, 2 Pick. 615; Smith v. Davenport, 34 Maine, 520. Generally the master is a stranger to the cargo between the lading and the unlading; but in case of necessity, he is clothed with whatever power is needed to protect the property and interests intrusted to him. The Gratitudine, 8 Rob. Adm. 257; Vlierboom v. Chapman, 18 M. & W. 289; Douglas v. Moody, 9 Mass. 548; Gillett v. Ellis, 11 Ill. 579.

(c) But if the voyage is broken up, he cannot sell the cargo at the intermediate port to pay for advances to him to repair the vessel for a new voyage, or to pay

seamen's wages. Watt v. Potter, 2 Mason, 77. A sale without necessity is invalid, and conveys no rights to the purchaser. Freeman v. East India Co. 5 B. & Ald. 617; Morris v. Robinson, 8 B. & C. 196; Ewbank v. Nutting, 7 C. B. 797; Arthur v. Sch. Cassius, 2 Story, 81; Pope v. Nickerson, 8 Story, 504; Dodge v. Union Ins. Co. 17 Mass. 478; Post v. Jones, 19 How. 150; Peters v. Ballistier, 8 Pick. 495.

(d) The Gratitudine, 8 Rob. Adm. 268; Pope v. Nickerson, 8 Story, 491; The Packet, 8 Mason, 266; The Joshua Barker, Abbott, Adm. 215; United Ins. Co. v. Scott, 1 Johns. 106; Fontaine v. Col. Ins. Co. 9 Johns. 29.

(e) Ross v. Ship Active, 2 Wash. C. 228.

(ee) Stearns v. Doe, 12 Gray, 482.

¹ Acatos v. Burns, 3 Ex. D. 282, decided that a shipmaster cannot, at an intermediate port, sell goods which are damaged and cannot be carried to the port of discharge, without communicating with their owner; and if there landed and sold without the owner's assent, the shipowner is not entitled to freight *pro rata tineris*.

B.—*Of the Seamen.*

1. OF THE SHIPPING ARTICLES.

The United States statutes require every vessel bound from a home port to a foreign port, (*f*) or, if it be of fifty tons or more, bound from a port in one State to a port in any other than an adjoining State, to have on board shipping articles; they must be signed by every seaman on board, under a penalty of twenty dollars for every one who does not sign, and they must describe accurately the voyage for which the seaman ships, and the * terms on which he ships. (*g*)

* 837

This is one of the many provisions which, together with many usages, indicate that the law-merchant regards seamen as needing and entitled to far more care and protection than persons generally employed to render services to others.

It is one of the effects of this protection, that, in construing these articles, the seaman has the benefit of any doubt as to their meaning or obligation (*h*); and, what is more, if they contain indefinite language, or unusual, or oppressive stipulations, the seaman is protected against them, (*i*) even to the extent of annulling them.

A question has arisen, whether the seamen of a ship in a foreign port, will be there protected by the courts, against oppressive or illegal shipping articles made in their home port. The answer may not be certain. We apprehend, however, that the law-merchant permits this, and that any court having cognizance of the case, might, and would give this relief, if a sufficient case were clearly made out. It might be, however, that an admiralty court, which is in some respects a kind of international court, would be

(*f*) A seaman shipping in a foreign port is not required by statute to sign articles. *Gladding v. Constant*, Sprague, 73.

(*g*) Act 1790, c. 29, 1 U. S. Stats. at Large, 181. See *The Crusader*, Ware, 437; *Wolverton v. Lacey*, 18 Law Rep. 672; *The Brig Osceola*, Olcott, Adm. 459; *Piehl v. Balchen*, id. 24.

(*h*) *The Minerva*, 1 Hagg. Adm. 355; *Wape v. Hemenway*, 18 Law Rep. 390.

(*i*) *The Juliana*, 2 Dods. 504; *Brown v. Lull*, 2 Sumner, 443; *Matern v. Gibbs*, Sprague, 168. In *The Highlander*,

Sprague, 510, it is said: "Whenever an unusual clause is introduced into the shipping articles, impairing the rights of seamen, or imposing any additional duties or obligations on them, two conditions are required: 1st, That the seaman had the agreement so explained to him that he fully understood its meaning; and, 2d, That a reasonable compensation was given him for the renunciation of the right, or for the new obligation assumed." See also *Heard v. Rogers*, Sprague, 558; *Mayhew v. Terry*, Sprague, 584.

restrained by the comity of nations, unless requested to interfere by the resident authority of the foreign nation. (j)

By the law-merchant, seamen have certain rights and liens with respect to their wages; and if the shipping articles derogate from these, common-law courts do not generally allow

* 388 * much force to the articles, (k) and admiralty courts none. (l) We say this, although an authority as high as Lord *Lyndhurst*, declared that he knew no principle by which a contract entered into by mariners, is to be construed differently from that made among other persons. (m)

A master may, for sufficient reasons, promote a seaman, or degrade an officer or seaman. If a seaman be promoted, he has the wages of his new office; (n) but if afterwards degraded for incapacity, he can recover only his wages as a seaman during the period of his advancement. (o)

If seamen sail without any shipping articles, they are entitled by statute to the highest rate of wages paid at the place at which they ship, within the preceding six months, for the same voyage. (p) And while the usual rules of evidence and construction apply to shipping articles, a seaman may show by parol any wrongful inducements, or false representations, by which he was persuaded to sign them, and he will be relieved as justice may require. (q)

(j) As to the assent of the consul of the government to which the vessel belongs being required, see *Davis v. Leslie*, Abbott, Adm. 184; *The Infanta*, id. 288; *Gonzales v. Minor*, 2 Wallace, C. C. 348; *Hay v. Brig Bloomer*, U. S. D. C. Mass. 1869; *Lynch v. Crowder*, 12 Law Rep. 356. Generally jurisdiction will be exercised when the voyage is broken up at a port of this country: *The Gazelle*, Sprague, 378; *The Barque Havana*, id. 402; or where the seaman is compelled to desert on account of cruel treatment: *Weisberg v. Brig St. Oloff*, 2 Pet. Adm. 428. So in case of a deviation. *Moran v. Baudin*, 2 Pet. Adm. 415.

(k) See *Buck v. Rawlinson*, 1 Bro. P. C. 137; *Edwards v. Child*, 2 Vern. 727; *Millot v. Lovett*, 2 Dane, Abr. 461; *Swift v. Clark*, 15 Mass. 173.

(l) *The Juliana*, 2 Dods. 504; *Johnson*

v. *Sims*, 1 Pet. Adm. 215; *Brown v. Lull*, 2 Sumner, 448; *The Cypress*, 1 Blatchf. & H. Adm. 83.

(m) *Jesse v. Roy*, 4 Tyrw. 628, 1 Cromp. M. & R. 316. See also *Cutter v. Powell*, 6 T. R. 320; *Appleby v. Dods*, 8 East, 300; *Webb v. Duckingsfield*, 13 Johns. 890.

(n) *The Providence*, 1 Hagg. Adm. 391; *The Gondolier*, 3 id. 190; *Hicks v. Walker*, 37 Eng. L. & Eq. 542.

(o) *Wood v. The Nimrod*, Gilpin, 83.

(p) Stat. 1790, c. 29, § 1, 1 U. S. Stats. at Large, 131; Stat. 1840, c. 48, § 10, 5 U. S. Stats. at Large, 394. See *Milligan v. The B. F. Bruce*, 1 Newb. Adm. 538.

(q) *Baker v. Corey*, 29 Pick. 496; *The Enterprise*, 2 Curtis, C. C. 320; *The Cypress*, 1 Blatchf. & H. Adm. 83; *Page v. Sheffield*, 2 Curtis, C. C. 377, Sprague, 286.

2. OF THE WAGES OF SEAMEN.

Seamen have a lien for their wages¹ which attaches in admiralty to the ship and the freight, and to all the proceeds thereof, wherever they are, if within the reach of the court; (*r*) and whether the fund is entire or broken, or partially lost. (*s*)

This * lien is not lost by the receipt of an order from the * 839 master for wages, (*t*) or of a promissory note, (*u*) unless the seaman takes it with notice of its effect. This lien belongs to fishermen on shares, (*v*) and to all persons serving in the navigation of a ship, as pursers, (*w*) stewards, (*x*) cooks, (*y*) ship-carpenters, (*z*) deck hands, pilots, engineers, and firemen of a steamboat, (*a*) or even a woman, if she renders maritime services; (*b*) and to all officers except the master. (*c*) Also to persons hired principally for their skill as wreckers, who are also required to aid in the management of the vessel. (*d*) But mere landsmen on board have no lien, as barbers, servants, (*e*) musicians, (*f*) or a watchman, or keeper in port. (*g*)

This lien exists against the government, when the seamen are employed in civil purposes. (*h*) It prevails even over a bottomry

(*r*) *Brown v. Lull*, 2 Sumner, 443, and cases *passim*. In *The Steamer May Queen*, Sprague, 588, a boiler was put into a steamer by the makers, under an agreement that it should continue their property until paid for, with a right to remove it should any instalments be overdue. It was held, that the seamen had a lien on the boiler, although instalments were unpaid and overdue.

(*s*) *Pitman v. Hooper*, 3 Sumner, 50, 286.

(*t*) *The Eastern Star*, Ware, 185.
(*u*) *The Betsey & Rhoda*, Daveis, 112.

(*v*) 1813, c. 2, § 2, 3 U. S. Stats. at Large, 2.

(*w*) *Alleson v. Marsh*, 2 Vent. 181; *The Prince George*, 3 Hagg. Adm. 376.

(*x*) *Black v. Ship Louisiana*, 2 Pet. Adm. 208; *Smith v. Sloop Pekin*, Gilpin, 203.

(*y*) *Turner's case*, Ware, 83. See *Allen v. Hallet*, Abbott, Adm. 573.

(*z*) *Wheeler v. Thompson*, 2 Stra. 707; *Creed v. Mallet*, Fortea, 231.

(*a*) *Wilson v. The Ohio*, Gilpin, 505; *The Steamer May Queen*, Sprague, 588.

(*b*) *The Jane & Matilda*, 1 Hagg. Adm. 187; *Wolverton v. Lacey*, 18 Law Reporter, 672; *Sageman v. Sch. Brandywine*, 1 Newb. Adm. 5.

(*c*) As the mate: *The Steamer May Queen*, Sprague, 588; *Bayly v. Grant*, 1 Salk. 38; *Hook v. Moreton*, 1 Ld. Raym. 397; and the boatswain: *Alleson v. Marsh*, 2 Vent. 181; *Ragg v. King*, 2 Stra. 688.

(*d*) *The Sch. Highlander*, Sprague, 510.

(*e*) *Thackarey v. The Farmer Gilpin*, 584, per *Hopkinson*, J.

(*f*) *Trainer v. The Superior*, Gilpin, 514.

(*g*) *Phillips v. The Thomas Scattergood*, Gilpin, 1; *Graham v. Hoskins*, Olcott, Adm. 224.

(*h*) See *The St. Jago De Cuba*, 9 Wheat. 409; *United States v. Wilder*, 8 Sumner, 308.

¹ "A seaman has a threefold remedy for his wages against the master, the owner, or the ship, and may proceed at his election against either of the three in the admiralty, or against the master or the owner at common law." *Gray*, C. J., in *Temple v. Turner*, 123 Mass. 125, citing *The Jack Park*, 4 C. Rob. 308, and *Aspinwall v. Bartlet*, 8 Mass. 483. A shipmaster who has been habitually drunk during his employment cannot maintain an action for his wages. *The Macleod*, 5 P. D. 254.

bond, because it is the services of the seamen, which, by bringing the vessel into port, give to the bottomry bond any value. (i)

If the ship is lost before the completion of the voyage, wages are due to the last port of delivery, or to the last port of arrival, and for half the time she lies in that port. (j)

Seamen are not permitted to insure their wages, (k) or to derive any benefit from an insurance by the owners, either on

* 340 freight or ship. (l) But advanced wages belong to the seamen,* whether they are earned by subsequent services or not. (m)

It is a maxim of the law-merchant, that freight is the mother of wages. (n) This rule probably meant, originally, that the freight which the ship earned is the fund from which the owners pay their seamen. It is now, however, a rule of some importance in determining whether the seamen have

earned their wages for a voyage.

While seamen are, as we have seen, regarded very kindly by the law-merchant, and are protected by a lien which overrides all others, the necessity of stimulating the sailors to every effort which may make the voyage successful, has made it a rule of the law-merchant that wages are earned only when the freight is earned. It is, however, true, that wages are earned if the freight either is or might be earned; for no special contract between the owner and the freighter, in respect to the obligation to pay freight, has any effect whatever on the earning of wages. (o)

As to the voyage and its completion, we have seen that wages are earned to every port of delivery or arrival, although it be not the port of ultimate destination. A voyage may, however, be so far an entire voyage outward and homeward, as that wages are not earned until the end of the whole. (p)

If a ship be wrecked, and the seamen stay by her until the last moment, and make every effort for her safety, and enough is

(i) See *ante*, p. *283, note (a).

(j) *Hooper v. Perley*, 11 Mass. 545; *Pitman v. Hooper*, 3 Sumner, 286.

(k) *The Juliania*, 2 Dods. 509; *Lucena v. Craufurd*, 5 B. & P. 294; *Webster v. De Tastet*, 7 T. R. 157; *The Neptune*, 1 Hagg. Adm. 239.

(l) *The Lady Durham*, 3 Hagg. Adm. 196; *M'Quirk v. Ship Penelope*, 2 Pet. Adm. 276; *Icard v. Goold*, 11 Johns. 279.

(m) *The Mentor*, 4 Mason, 102.

(n) See the learned argument of counsel in the case of *The Niphon*, U. S. D. C. Mass. 18 Law Reporter, 266.

(o) *Anonymous*, 1 Pet. Adm. 191, note; *Pitman v. Hooper*, 3 Sumner, 50, 286; *Blanchard v. Bucknam*, 3 Greenl. 1.

(p) *The Lady Durham*, 3 Hagg. Adm. 196; *Hernaman v. Bawden*, 3 Burr. 1844; *Giles v. Brig Cynthia*, 1 Pet. Adm. 205; *Anonymous*, 1 Pet. Adm. 205.

saved to pay their wages or any part thereof, those wages are earned. (q) Where nothing of the cargo is saved, this would be in contradiction of the rule that freight is the mother of wages. To avoid this, it has been said that they are now earned by way of salvage. (r) But this again would contradict the more important rule, * that all possible efforts for the safety of the ship and cargo are demanded of the seamen by their legal duty ; and therefore they cannot earn salvage. We prefer to say, that what is then paid them is paid as wages. (s)

At common law it has been said, that if the ship be abandoned for an original unseaworthiness before any freight is earned, no wages are due. (t) This conclusion springs also from the rule that freight is the mother of wages. But admiralty would not permit the sailors to lose their wages for the fault of the owner, without fault on their part, and we doubt whether common law would do so now. (u)

3. Of Provisions.

Not only does the common law, by the general principles of contract, require the owner to supply the ship with provisions of due quality and in due quantity, (v) but statutes of the United States (w) intervene, securing this supply by a penalty of a day's wages extra to every seaman, for every day on which he is on short allowance. (x) But for this purpose, the necessity of short

(q) *The Two Catherines*, 2 Mason, 319; *Cartwell v. Ship John Taylor*, 1 Newb. Adm. 341; *The Niphon*, U. S. C. C. Mass. 18 Law Rep. 286. The better opinion seems to be that the right of the seaman in such a case rests upon his contract, and not upon salvage, or a *quantum meruit*. *The Neptune*, 1 Hagg. Adm. 227; *The Massasoit*, Sprague, 97.

(r) *The Two Catherines*, 2 Mason, 319; *Adams v. Brig Sophia*, Gilpin, 77; *Jurgenson v. The Snow Catharina Maria*, 2 Pet. Adm. 424; *The Dawn*, Davis, 121; *Taylor v. Ship Cato*, 1 Pet. Adm. 48; *Brackett v. The Hercules*, Gilpin, 184; *Lewis v. The Elizabeth & Jane*, Ware, 41.

(s) *The Massasoit*, Sprague, 97; *The Reliance*, 2 W. Rob. 119; *The Lady Durham*, 8 Hagg. Adm. 196. The law seems now to be settled by the authorities that a seaman cannot be a salvor unless his contract as a seaman can be considered as at an end. See *ante*, p. * 817, n. (t). The practical distinctions

between compensating a seaman as such or as a salvor are these. If as a salvor, he must aid in preserving the property, and is entitled to compensation from the proceeds of the cargo as well as from the ship and freight. If as a seaman, he has no claim on the cargo for wages, and is not entitled to compensation although he saves some of it. But he is entitled to compensation if any part of the ship and freight is preserved, although he took no part in the preservation, if he was not in fault. See *ante*, note (q).

(t) *Eaken v. Thom*, 5 Esp. 6. See the remarks of *Kent*, C. J., on this case in *Hoyt v. Wildfire*, 8 Johns. 518.

(u) See *Hindman v. Shaw*, 2 Pet. Adm. 264, 266.

(v) *The Madonna D'Idra*, 1 Dods. 37; *Dixon v. The Cyrus*, 2 Pet. Adm. 407, 411.

(w) Act of 1790, c. 29, § 9, 1 U. S. Stats. at Large, 181, 185. See *Gardner v. The New Jersey*, 1 Pet. Adm. 228.

(x) It has been held, that if less than

allowance must spring from an insufficiency of the original supply, and not from any accident of the voyage, or its extraordinary length, or the delivery of part of the provisions to another vessel in greater want. (y)

* 342 * The statute also prescribes the quantity. Every vessel bound on a voyage across the Atlantic Ocean, must at the time of leaving the last port from which she sails, (z) have on board, well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship bread, for every person on board, and in like proportion for shorter or longer voyages. (a) It has been determined by admiralty, that a deficiency in any one kind of provisions is not compensated by an excess in any other, (b) nor is it any defence for a deficiency in bread that flour is given. (c) Perhaps the master has in every port, a certain discretion in substituting for the provisions required by law, where they cannot be obtained by reasonable exertions, or at reasonable cost, other wholesome and abundant food, fully equivalent in quantity and in quality to that which the law requires. (d) But this is not certain; and it may even be doubtful whether it is any excuse for the want of the provisions required by the statute that the article in which the deficiency occurred could not be procured. (e) What is a proper allowance is determined by the navy ration. (f)

4. CARE OF SEAMEN IN SICKNESS.

It is provided by statute that the ship shall be provided with a suitable chest of medicines, in good condition, put up by some

the statute quantity of all the three articles be put on board, and there be a short allowance of all, triple extra wages are to be given for each day. *Collins v. Wheeler, Sprague, 188.*

(y) This follows from the rule that the seaman must show not only that he was put on short allowance, but also that the vessel sailed without having on board the stores prescribed in the act. *The Ship Elizabeth v. Rickers, 2 Paine, C. C. 291; Ferrara v. The Barque Talent, Crabbe, 216; The Barque Childe Harold, Olcott, Adm. 276, 279; Piehi v. Balchen, Olcott, Adm. 24.*

(z) See *The Mary Paulina, Sprague, 45.*

(a) See *ante*, p. * 341, n. (w).

(b) *The Mary Paulina, Sprague, 45; Coleman v. Brig Harriet, Bee, Adm. 80.*

(c) *Foster v. Sampson, Sprague, 182.*

(d) If this be the law the article substituted must be a full equivalent both in quantity and quality. *The Mary, Ware, 464.*

(e) This was held a defence in *Mariners v. Ship Washington, 1 Pet. Adm. 219.* But not in *Coleman v. Brig Harriet, Bee, Adm. 80.* See also *Foster v. Sampson, Sprague, 182.*

(f) *Mariners v. Ship Washington, 1 Pet. Adm. 219; The Mary, Ware, 460; The Mary Paulina, Sprague, 45; Ship Elizabeth v. Rickers, 2 Paine, C. C. 298.*

apothecary of known reputation, and accompanied by directions for administering the same. (g) But it seems now to be well settled, that this requirement of a medicine-chest is no substitution (h) for the general requirement of the law-merchant, * which obliges every master or owner to provide suitable care, medicines, and medical treatment, for any seaman who becomes sick or injured in the discharge of his duty, at home or abroad, at sea or on land; (i) unless the sickness or injury be caused only by the fault of the sailor. (j)

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5. OF THE RETURN OF THE SEAMEN TO THIS COUNTRY.

Our laws carefully guard the right of the sailor to be brought back to his home, and protect this right by minute precautions. The master must, when requested, present to the Consul or Commercial Agent of the United States, at every foreign port, (k) shipping articles, and a shipping list verified by his oath; and must produce before the boarding officer who boards his ship, at the first home port at which he arrives, all the persons named therein, or account for their absence. (l) If he discharges any seaman abroad, with his or their own consent, he must pay to our consul or agent, in addition to the wages due, three months' wages; two to be paid to the seaman, and one remitted to the treasury of the United States, to form a fund for the maintenance of American seamen abroad, and for bringing them home. (m)¹

(g) Act of 1790, c. 20, § 8, 1 U. S. Stats. at Large, 184; Act of 1805, c. 28, 2 U. S. Stats. at Large, 380.

(k) Act of 1840, c. 48, § 3, 5 U. S. Stats. at Large, 395.

(h) The Forrest, Ware, 420; Lamson v. Westcott, 1 Sumner, 695, Appen.; Reed v. Canfield, 1 Sumner, 196; Harden v. Gordon, 2 Mason, 541.

(l) Act of 1803, c. 9, 2 U. S. Stats. at Large, 208. See United States v. Hatch, 1 Paine, C. C. 386.

(i) Harden v. Gordon, 2 Mason, 541; Walton v. Ship Neptune, 1 Pet. Adm. 142; The Forrest, Ware, 420; The Brig George, 1 Sumner, 151; Reed v. Canfield, id. 197; Crapo v. Allen, Sprague, 184; Knight v. Parsons, id. 279; Croucher v. Oakman, 8 Allen, 185; Brown v. Overton, Sprague, 462; Freeman v. Baker, 1 Blatchf. & H. Adm. 882.

(m) Act of 1803, c. 9, § 3, 2 U. S. Stats. at Large, 208. See Nevitt v.

(j) Johnson v. Huckins, Sprague, 67.

Clarke, Olcott, Adm. 316. The Act of 1840, c. 48, § 5, 5 U. S. Stats. at Large, 395, allows a consul, upon the application of both the master and the mariner, to discharge such mariner, if he thinks it expedient, without requiring the payment of the three months' wages. See Lamb v. Briard, Abbott, Adm. 367; The Atlantic, id. 461; Miner v. Harbeck, id. 546. The Act of 1856, c. 127, § 26, 11 U. S. Stats. at Large, 62, makes it obli-

¹ A seaman discharged in a foreign port without having such a sum paid to the consul for him, if prevented by the master from seeing the consul, may, on his return home, recover such sum in an action against the master. Wilson v. Borstel, 73 Me. 273.

But this requirement does not apply, when the voyage is
*** 344** broken up by disaster. (*n*) The ship however must be * repaired, (*o*) or if captured, proper efforts must be made to obtain restoration, and the seamen may hold on a reasonable time for this purpose, and if discharged before this time expires, they may claim their extra wages. (*p*) If the seaman is discharged abroad, without his consent, and without adequate cause, on his return home he recovers full indemnity for his time lost or expenses incurred by reason of such discharge. (*q*) But our consuls and commercial agents may authorize the discharge of a seaman, for disobedience or other misconduct, or for disability by his own fault, all of an extreme degree, (*r*) and then the seaman forfeits all future wages. If he leaves or even deserts the ship from the actual cruelty of the master, or his violation of the articles, or the unseaworthiness of the ship, the consul or agent may discharge him, and allow him his three months' wages. (*s*) They may also send our seamen home in other ships, which are bound to take them, and to demand therefor not more than ten dollars for each man; and the sailor so sent must work and obey as if originally shipped in that vessel. (*t*) If a master discharges a seaman without his consent, or without good cause, in a foreign port, he is liable to a fine of five hundred dollars, or six months

gatory upon the consul, upon the application of any seaman for a discharge, if he is entitled to it, to discharge him, and to require the three months' extra wages, as provided in the Act of 1808, c. 9, unless the consul is satisfied that the contract has expired, or the voyage been protracted by circumstances beyond the control of the master, without any design to violate the articles of shipment, in which case he may discharge the seaman without exacting the additional pay.

(*n*) *The Dawn*, Ware, 485; *Davels*, 121; *Henop v. Tucker*, 2 Paine, C. C. 151; *The Saratoga*, 2 Gallis, 181. See *Dodge v. Union Ins. Co.* 17 Mass. 471; *Brown v. The Independence*, Crabbe, 54. This is now so provided by statute in the case of wrecked or stranded vessels, or where they are condemned as unfit for service. Act of 1866, c. 127, § 26, 11 U. S. Stats. at Large 62.

(*o*) *Poor v. Welsh*, Gilpin, 193; *The Dawn*, Ware, 485; *Wells v. Meldrum*, 1 Blatchf. & H. Adm. 342.

(*p*) *The Saratoga*, 2 Gallis, 164; *Emerson v. Howland*, 1 Mason, 45.

(*q*) In some cases wages up to the

successful termination of the voyage have been allowed, in others wages up to the return of the seaman to the country where he originally shipped, without reference to the termination of the voyage. In every case a compensation is intended to be made, which shall be a complete indemnity for the wrong done. *Emerson v. Howland*, 1 Mason, 58, and cases cited; *The Union*, 1 Blatchf. & H. Adm. 545; *Farrell v. French*, id. 275; *The Maria*, id. 381; *The Hibernia*, Sprague, 78; *Sheffield v. Page*, id. 286; *Crapo v. Allen*, id. 184.

(*r*) Act of 1808, c. 9, § 1, 2 U. S. Stats. at Large, 203. See *Hutchinson v. Coombs*, Ware, 70; *Thorne v. White*, 1 Pet. Adm. 176; *Relf v. The Maria*, id. 186; *Black v. The Louisiana*, 2 id. 208; *Orne v. Townsend*, 4 Mason, 548; *Whitton v. Brig Commerce*, 1 Pet. Adm. 164; *Atkyns v. Burrows*, id. 248; *The Nimrod*, Ware, 9.

(*s*) Act of 1840, c. 48, 5 U. S. Stats. at Large, 396.

(*t*) Act of 1808, c. 9, § 4, 2 U. S. Stats. at Large, 204. See *Matthews v. Offley*, 8 Sumner, 116.

imprisonment; (*u*) and the seaman may recover full indemnity for his time lost and expenses incurred. (*v*)

* 6. OF THE PUNISHMENT OF SEAMEN.

* 345

The disobedience or misconduct of seamen must be punishable by the master or officers with great severity if need be, from the necessity of preserving discipline, on which the safety of life and property depend. (*w*) Mere incompetency is no justification for the infliction of punishment. (*x*) Formerly there was no limit, either to the necessity or severity of punishment, except the responsibility of the person inflicting it, criminally, (*y*) and in damages to the seamen. (*z*) Now, however, flogging is prohibited by law. (*a*) But this has been held by the courts not to apply to such immediate punishment, as is inflicted upon an emergency, by a blow with the hand, or with a stick, or a rope, to produce immediate obedience; the statute being intended to apply only to deliberate flogging by way of punishment. (*b*)

The punishments now usually resorted to, are forfeiture of wages, (*c*) irons, (*d*) confinement on board, (*e*) imprisonment on shore, (*f*) hard labor, or those of a similar description.

(*u*) Stat. 1825, c. 65, § 10, 4 U. S. Stats. at Large, 117. See *United States v. Netcher*, 1 Story, 307; *United States v. Ruggles*, 5 Mason, 192; *United States v. Coffin*, 1 Sumner, 394; *United States v. Lunt*, Sprague, 311.

(*v*) See *ante*, note (*q*).

(*w*) *Thorne v. White*, 1 Pet. Adm. 168; *Gardner v. Bibbins*, 1 Blatchf. & H. Adm. 866; *United States v. Freeman*, 4 Mason, 512; *United States v. Borden*, Sprague, 374.

(*x*) *Payne v. Allen*, Sprague, 304.

(*y*) Act of 1825, c. 65, § 22, 4 U. S. Stats. at Large, 122; Act of 1835, c. 40, § 3, 4 U. S. Stats. at Large, 776. See *United States v. Grush*, 5 Mason, 290; *United States v. Hunt*, 2 Story, 120; *United States v. Cutler*, 1 Curtis, C. C. 501; *United States v. Alden*, Sprague, 95; *United States v. Winn*, 3 Sumner, 209; *United States v. Small*, 2 Curtis, C. C. 241.

(*z*) *Shorey v. Rennell*, Sprague, 407; *Forbes v. Parsons*, Crabb, 282; *Sampson v. Smith*, 15 Mass. 365; *Jenks v. Lewis*, Ware, 51, 3 Mason, 603; *Thomas v. Lane*, 2 Sumner, 1; *Morris v. Cornell*, Sprague, 63.

(*a*) Act of 1850, c. 80, 9 U. S. Stats. at Large, 515. See *United States v. Cut-*

ler, 1 Curtis, C. C. 501; *Payne v. Allen*, Sprague, 304. The Act of 1850 is not a penal law, and no indictment can be framed upon it. But it has an important bearing upon the Act of 1835, in regard to the question of justifiable cause and malice. *United States v. Cutler*, *supra*. Although flogging is now abolished, it is not a cruel and unusual punishment within the meaning of the third section of the Act of 1835. *United States v. Collins*, 2 Curtis, C. C. 194.

(*b*) Charge to the Grand Jury, 1 Curtis, C. C. 509; *United States v. Cutler*, 1 Curtis, C. C. 501; *Shorey v. Rennell*, Sprague, 407.

(*c*) *Relf v. Ship Maria*, 1 Pet. Adm. 186; *Buck v. Lane*, 12 S. & R. 286.

(*d*) *Turner's case*, Ware, 88; *Macomber v. Thompson*, 1 Sumner, 389; *Sampson v. Smith*, 15 Mass. 369; *Shorey v. Rennell*, Sprague, 407.

(*e*) U. S. v. Alden, Sprague, 95.

(*f*) In *Wilson v. The Mary Gilpin*, 32, the legality of imprisoning seamen in foreign jails was doubted, unless the necessity for it was very strong. See also *United States v. Ruggles*, 5 Mason, 192; *The Nimrod*, Ware, 18; *Jay v. Almy*, 1 Woodb. & M. 282; *Wope v. Hemensway*, Sprague, 300, affirmed, *Snow v.*

Desertion is an offence which must be prevented if possible, for the obvious reason that it might leave the ship and cargo abandoned, and given up to destruction, at any place or time. (g) It is distinguished by the law-merchant from mere absence without leave, by the intention not to return. (h) Nor is such absence without intent to return desertion, in the sense in which that crime subjects to punishment, when the vessel is left for a fully sufficient cause; (i) and this may be cruelty, (j) unseaworthiness of the ship (k) in respect to provisions, (l) or otherwise, or a change of the voyage without the consent of the seamen. (m)

By the statute, desertion is absence from the ship for * 347 more * than forty-eight hours without leave. (n) But un-

Wope, 2 Curtis, C. C. 301; Gardner v. Bibbins, 1 Blatchf. & H. Adm. 356. "Whenever a master of a ship thinks it necessary to cause any of his crew to be confined in a foreign jail, he ought to pay some regard to their condition and treatment there, and should, from personal examination, or, at least, through a reliable agent, see that they are such as humanity requires." *Shorey v. Rennell, Sprague, 411.* The eleventh section of the Act of 1840, c. 48, 5 U. S. Stats. at Large, 396, makes it "the duty of consuls and commercial agents to reclaim deserters and discountenance insubordination by every means within their power; and where the local authorities can be usefully employed for that purpose, to lend their aid and use their exertions to that end in the most effectual manner." This act has been construed as relieving the master from the consequences of an imprisonment by the consul. *Jordan v. Williams, 1 Curtis, C. C. 69, 80; Tingle v. Tucker, Abbott, Adm. 519.* If the consul is absent, his clerk or assistant has no power to procure the interposition of the local authorities. *Snow v. Wope, 2 Curtis, C. C. 301.*

(g) The master may inflict reasonable punishment for the offence of desertion. *Per Sprague, J., in the United States v. Alden, Sprague, 96, 98.*

(h) *Cloutman v. Tunison, 1 Sumner, 375; Coffin v. Jenkins, 3 Story, 108; Spencer v. Eustis, 21 Maine, 519; Brig Cadmus v. Mathews, 2 Paine, C. C. 229; Ship Union v. Jansen, 2 Paine, C. C. 277.* Going on shore at a foreign port, against orders, to see the consul to complain of ill treatment is not desertion. *Freeman v. Baker, Blatchf. & H. Adm. 372; Hart*

v. Brig Otis, Crabbe, 52. See the Act of 1840, c. 48, § 16, 5 U. S. Stats. at Large, 396, and the following cases decided under it. *Morris v. Cornell, Sprague, 65; Knowlton v. Boss, id. 168; Jordan v. Williams, 1 Curtis, C. C. 69.*

(i) If, during a collision between two vessels, a seaman, under the impression that his own vessel is sinking, jumps on board the other, he is not guilty of desertion. *Hanson v. Rowell, Sprague, 117.*

(j) *The Minerva, 1 Hagg. Adm. 368; Prince Edward v. Trevellick, 4 Ellis & B. 59; Ward v. Ames, 9 Johns. 188; Relf v. Ship Maria, 1 Pet. Adm. 193; Steele v. Thatcher, Ware, 94.*

(k) *Savary v. Clements, 8 Gray, 155; Bray v. Ship Atlanta, Bee, Adm. 48; Bucker v. Kierketer, Abbott, Adm. 402.*

(l) If no provisions are furnished, a desertion is justifiable. *The Castalia, 1 Hagg. Adm. 68; Dixon v. Ship Cyrus, 2 Pet. Adm. 407.* To justify a desertion on account of bad provisions, it must be shown that the food is not merely not of the best, but positively bad, and unfit for the support of the crew. *Ulary v. Ship Washington, Crabbe, 204.*

(m) *The Cambridge, 2 Hagg. Adm. 243; Moran v. Baudin, 2 Pet. Adm. 416; Ingraham v. Albee, Blatchf. & H. Adm. 289; United States v. Matthews, 2 Sumner, 470; The Mary Ann, Abbott, Adm. 270.*

(n) Act of 1790, c. 29, § 5, 1 U. S. Stats. at Large, 188. This section provides, that if the seaman absents himself without permission, and an entry thereof is made in the log-book, if he returns to duty within forty-eight hours, he forfeits three days' pay for every day he is absent, and if absent for a longer time,

der the statute of 1790, it must be a continued absence for forty-eight successive hours; and there must be an exact entry of the facts and circumstances, made in the log-book at the time. (o) Although there may not be a statutory desertion, still there may be a desertion according to the maritime law. (p) And although by this law desertion generally works a forfeiture of wages, (q) yet the court is not obliged to pronounce an entire forfeiture in all cases, but may take into consideration palliating circumstances not amounting to an excuse. (r) A desertion of a part of the crew must make the duties of the remainder more burdensome; but it does not diminish their duty to perform their obligations to the extent of their ability. (s)

It may be added, that officers, or mates, as they are commonly called, although distinguished from the seamen in important respects, not only by usage, but by the statutes, are for the most part regarded as seamen.

* C.—*Of Pilots.*

The office of a pilot is one of so much importance, that his appointment, his duties, and his rights, are now regulated by law in most civilized countries. With us, an act of Congress authorizes the several States to make their own pilotage laws. (t)

he forfeits all wages due, all his property on board, or lodged in any store at the time of the desertion, to the use of the owners of the ship, and pays them all damages they may sustain by being obliged to hire other seamen. This has been materially changed by the 25th section of the Act of 1856, c. 127, 11 U. S. Stats. at Large, 62, which provides, that in the case of a desertion in a foreign country, the fact and date thereof shall be noted by the commander on the list of the crew, and the same shall be officially authenticated at the first port or place of consulate, or commercial agency, visited after such desertion; and if no such place is visited, or if the desertion occurred in this country, the time and place shall be officially authenticated before a notary-public immediately at the first port or place where such vessel shall arrive after such desertion. The wages of the seaman, and his interest in the cargo, are forfeited to the use of the United States, and are to be paid over to the collector of the port where the crew are to be accounted for. The owners of the vessel may deduct any

expenses they have necessarily incurred in consequence of such desertion, and money actually paid, or goods at a fair price supplied, or expenses incurred to or for such seamen.

(o) *Cloutman v. Tunison*, 1 Sumner, 381; *The Hercules*, Sprague, 634; *Ulary v. Ship Washington*, Crabbe, 204; *The Rovena, Ware*, 318; *Spencer v. Eustis*, 21 Maine, 619; *The Cadmus*, Blatchf. & H. Adm. 139.

(p) *Cloutman v. Tunison*, 1 Sumner, 380; *Coffin v. Jenkins*, 8 Story, 108; *Ship Union v. Jansen*, 2 Paine, C. C. 277; *The Rovena, Ware*, 309.

(q) *Cloutman v. Tunison*, 1 Sumner, 373; *Coffin v. Jenkins*, 8 Story, 108; *Spencer v. Eustis*, 21 Maine, 619; *The Brig Cadmus v. Matthews*, 2 Paine, C. C. 229.

(r) *Lovrein v. Thompson*, Sprague, 355; *Swain v. Howland*, id. 424; *Gifford v. Kolloch*, 19 Law Reporter, 21.

(s) *Harris v. Watson*, Peake, Cas. 72; *Harris v. Carter*, 3 Ellis & B. 559; *The Araminta*, 1 Spinks, Adm. 224.

(t) Act of 1789, c. 9, § 4, 1 U. S. Stats. at Large, 64. By the Act of 1837, c. 22,

Any person may undertake to guide either his own or any other vessel anywhere, and may make a valid contract for that purpose. But one who renders such services without a commission, or, as it is technically termed, "a branch," cannot claim the compensation provided by law for pilotage. And if he falsely pretends to have such commission or branch, he is liable criminally; and also in damages, for losses or injuries resulting from his falsehood. If a regular pilot offers, and is ready to pilot a vessel into or out of a harbor, the ship may refuse; but must then pay the pilotage fees due by law in that case, (*u*) which are usually half the regular pilotage fees.

By the general law-merchant, a commissioned pilot, as soon as he stands on the deck, has the control of the ship; nor is the master responsible for an accident which then happens. (*v*) But his powers do not wholly supersede the master's; for the master not only may, but should, observe the pilot, and if he be obviously incompetent, disregard his commands, and dispossess him of his authority. (*w*)

The pilot is always in law the servant of the owner, and * 349 the * owner is, in general, responsible for injuries resulting from the pilot's default. (*x*) This, however, would not be the case if the owner were obliged by the law of the place to take the pilot on board; and although the law seems settled in England, (*y*) yet

5 U. S. Stats. at Large, 153, the master of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, may employ a pilot duly licensed by either State. The United States Courts have concurrent jurisdiction with the State Courts over pilotage suits. Hobart *v.* Drogan, 10 Pet. 108. The grant to Congress of the power to regulate commerce did not deprive the States of the power to regulate pilots. Cooley *v.* The Board of Wardens, 12 How. 299.

(*u*) Nickerson *v.* Mason, 18 Wend. 64; Commonwealth *v.* Ricketson, 5 Met. 412; Smith *v.* Swift, 8 id. 329; Hunt *v.* Carllie, 1 Gray, 257.

(*v*) See Snell *v.* Rich, 1 Johns. 306; Aldrich *v.* Simmons, 1 Stark. 214; Bowcher *v.* Noidstrom, 1 Taunt. 568; Yates *v.* Brown, 8 Pick. 24; Denison *v.* Seymour, 9 Wend. 9.

(*w*) The Duke of Manchester, 2 W. Rob. 480, affirmed on appeal. Shersby *v.* Hibbert, 6 Moore, P. C. 90; The Christiana, 7 Notes of Cases, 2; Hammond *v.* Rogers, 7 Moore, P. C. 160; The Joseph

Harvey, 1 Rob. Adm. 311. See 1 Parsons' Mar. Law, 483, n. 1, for a full consideration of the question of the respective rights and duties of the pilot and master.

(*x*) Attorney-General *v.* Case, 3 Price, 302; The Neptune, 1 Dods. 467; The Carolus, 3 Curtis, C. C. 69; The Bark Lotty, Olcott, Adm. 329; The Julia M. Hallock, Sprague, 539; Smith *v.* The Creole, 2 Wallace, C. C. 485.

(*y*) By statute in England no owner or master is liable for any loss or damage which shall happen by reason of any neglect, incompetency, or incapacity of any licensed pilot, in charge of the vessel in pursuance of the provisions of the act. But this act does not extend to ports in relation to which special provisions have been made in any particular act or acts of parliament. This would exclude the ports of Liverpool and Newcastle, the acts relating to which provide, as do ours, that a master shall take a pilot on board, or pay pilotage. This is construed in England to be such compulsion as to exonerate the owner or master

it is uncertain, in this country, (*z*) whether the pilotage statutes create such a compulsion as to exonerate the owner.

If a ship neglects or refuses to take a pilot, when it may and should, and the cargo is injured thereby, the owners are responsible to the shippers; (*a*) and pilots are always answerable personally for their own negligence or default. (*b*)

for the acts of the pilot. *Carruthers v. Sydebotham*, 4 M. & S. 77; *Rodrigues v. Melhuish*, 10 Exch. 110; *The Montreal*, 24 Eng. L. & Eq. 580; *The Maria*, 1 W. Rob. 95; *The Agricola*, 2 W. Rob. 10.

(*z*) In *The Carolus*, 2 Curtis, C. C. 69, Mr. Justice *Curtis* said, if the vessel had been homeward bound, so that the master would have been obliged to have taken the first pilot that offered, or have paid full pilotage, that the owners would not be liable for a collision. This is opposed to the opinion of Mr. Justice *Story*, *Story on Agency*, § 456 a, note 1, and to a *dictum* of *Grier*, J., in *Smith v.*

The Creole, 2 Wallace, C. C. 485. The point has not yet been decided. In the Bark *Lotty*, Olcott, Adm. 329, it was contended, that the exemption from liability continued after the vessel was moored to the wharf by the pilot. But the court decided otherwise.

(*a*) *M'Millan v. Union Ins. Co.* 1 Rice, 248; *Keeler v. Fireman's Ins. Co.* 8 Hill, 250; *The William*, 6 Rob. Adm. 816.

(*b*) *Yates v. Brown*, 8 Pick. 24; *Herdia v. Ayres*, 12 id. 334; *Lawson v. Dumblin*, 9 C. B. 54.

OF THE LAW OF MARINE INSURANCE.

SECTION I.

OF THE CONTRACT.

A. — *What this Contract is.*

By this contract the insurer undertakes to indemnify the insured against loss on maritime property, arising from maritime perils, on a certain voyage, or during a certain period; the property, the perils, and the period, all being defined, in part by the instrument of agreement, and in part by the law. The language of policies and the statements and answers to questions are construed in the usual and popular sense of the words used. (a)¹ If there be an ambiguity in restrictions or permissions, they are to be construed favorably to the insured. (aa) And accompanying circumstances, and the usage of the business in which a ship is employed, may help to construe ambiguous words. (ab)

This agreement is generally in writing; and the written instrument is called "a Policy of Insurance." But it need not be in writing, (ac)² unless the act of incorporation of the insurers re-

(a) *Ripley v. Aetna Ins. Co.* 30 N. Y. 136.

(aa) *Hoffman v. Aetna Ins. Co.* 32 N. Y. 405.

(ab) *New York Belting Co. v. Washington Ins. Co.* 10 Bosw. 428. See the same principle applied to insurance on a building. *New York, &c. v. Hamilton Ins. Co.* 10 Bosw. 587.

(ac) *Union Ins. Co. v. Commercial*

Ins. Co. 2 *Curtis, C. C.* 524, affirmed, *Commercial Ins. Co. v. Union Ins. Co.* 19 How. 818; *Baptist Church v. Brooklyn F. Ins. Co.* 18 Barb. 69; 19 N. Y. 306; *Sanborn v. Fireman's Ins. Co.* 16 Gray, 448; *Smith v. Odlin*, 4 Yeates, 468; *Hamilton v. Lycoming Ins. Co.* 6 Barr, 339. But see *Real Estate Ins. Co. v. Roessle*, 1 Gray, 336.

¹ It was declared in *Rodocanachi v. Elliott*, L. R. 8 C. P. 649, that a marine policy may cover the risks during a portion of the transit to be performed overland, provided apt language be employed to express that intention.—A contract of marine insurance is a maritime contract within the admiralty jurisdiction of the United States courts. *Insurance Co. v. Dunham*, 11 Wall. 1, affirming *De Lovio v. Boit*, 2 Gall. 398.—An application for insurance may be drawn with a lead pencil. *City Ins. Co. v. Bricker*, 91 Penn. St. 488.

² In *Relief Ins. Co. v. Shaw*, 94 U. S. 574, it was stated that a valid contract of insurance can be made by parol, unless prohibited by statute or positive regulation; and

quires it to be so. (b)¹ It may be oral only, or it may be made by an agreement to insure, entered and subscribed on the books of the insurers, in any manner usual in that office. (c)² Such an agreement is valid before a policy issues. But as such an agreement would imply that a policy should be issued, that agreement would effect such insurance as would the policy itself which was commonly used by the same insurers. (d)³ The stamp act now requires a stamp on contracts to insure. As a stamp can be put only on a written instrument, it has been held, although only *obiter*, that a merely oral contract to insure is not now valid. (dd)

Formerly insurance was generally effected in this country by individuals subscribing a policy or insurance sheet; but now, *insurance is effected always or nearly so by incorporated companies. * 351

The insurance may be effected by letter in the same manner as any other contract. The rules and principles of law which govern an agreement of this kind have been already stated. (e)

It is also a universal principle of the law of contracts, that there is no contract unless the parties agree together, about the same thing, in the same sense. If therefore an offer is made by either party, there is no contract unless that offer be accepted without any variation of its terms. (f) If, however, certain things

(b) Cockerill v. Cincinnati Ins. Co. 16 Ohio, 148; Courtney v. Miss. Ins. Co. 12 La. 233; Berthoud v. Atlantic Ins. Co. 13 La. 589; Flint v. Ohio Ins. Co. 8 Ohio, 501; Spitzer v. St. Marks Ins. Co. 6 Duer, 8.

(c) Loring v. Proctor, 26 Maine, 18; Blanchard v. Waite, 28 id. 51; Woodruff v. Columbus Ins. Co. 5 La. An. 697; Perkins v. Washington Ins. Co. 4 Cowen, 645.

(d) Oliver v. Commercial Ins. Co. 2 Curtis, C. C. 291; Franklin Ins. Co. v.

Hewitt, 3 B. Mon. 239; Kelly v. Commonwealth Ins. Co. 10 Bosw. 82; Xenos v. Wickham, Law Rep. 2 H. L. 296.

(dd) West Mass. Ins. Co. v. Duffey, 2 Kansas, 347.

(e) See ante, vol. i. * 406-* 408.

(f) Routledge v. Grant, 3 Car. & P. 267, 4 Bing. 668; Ocean Ins. Co. v. Carrington, 8 Conn. 857; Eliason v. Henshaw, 4 Wheat. 225; Hutchison v. Bowker, 5 M. & W. 585; Myers v. Keystone Ins. Co. 27 Penn. State, 268.

in Westchester Ins. Co. v. Earle, 33 Mich. 143, an oral agreement extending the terms of subsisting policy was declared to be valid. See Taylor v. Germania Ins. Co. 2 Dillon, 282; Hartford Ins. Co. v. Farrish, 73 Ill. 166; Northrup v. Mississippi Valley Ins. Co. 47 Mo. 435; Franklin Ins. Co. v. Taylor, 52 Miss. 441. That outside of the statute of frauds there is no rule of law which prevents written policies from being changed by parol, see Roger Williams Ins. Co. v. Carrington, 43 Mich. 253.

¹ Ins. Co. v. Colt, 20 Wall. 560; Hening v. United States Ins. Co. 2 Dillon, 26.

² Or it may be entered by an agent in his "binding book," so called, Putnam v. Home Ins. Co. 123 Mass. 324.

³ Where the agreement for insurance is complete, a policy must issue although a loss has meanwhile occurred. Ins. Co. v. Colt, 20 Wall. 560; Excelsior Ins. Co. v. Royal Ins. Co. 55 N. Y. 343; Marx v. National Ins. Co. 25 La. An. 39; Baldwin v. Chouteau Ins. Co. 56 Mo. 151.

are still to be done before the contract is complete, and a subsequent policy is issued and accepted before they are done, this would amount to or imply a waiver of these things. (g)

In many of our States, there is a statute requirement that the policies shall be signed by certain officers. But a distinction has been taken between the *policies* and the *contracts*, and it is held that under such a statute the *contract* of insurance may be made as at common law, by parol. (gg)

B.—*Of the Policy.*

This ancient instrument has remained unchanged, in most of its peculiar phraseology, for a long period, and is everywhere substantially the same; and a long and varied litigation has affixed a definite legal meaning to its forms and phrases. Still it varies in different States, and from time to time in every State; neither law nor usage limiting the power of the parties to make what bargain they please.

The consideration for the promise of insurance is the premium paid by the insured. And although the contract is subscribed only by the insurers, it binds both parties; the insured as to the premium, as well as the insurers as to their undertaking. (h) There is, however, this difference between them; the insured has always his option whether he will put his property under the risks insured against. If he does not do so in any measure, the bar-

gain is wholly void; (i) if he does so altogether, it passes * 852 wholly into effect; if he does so partially, the *bargain takes effect only upon that part, and the premium, as we shall see in a subsequent section, is proportionately reduced. The stipulations of the insured are only conditions, which he must comply with to bring the insurers under their obligations. But they can bring no action against him if he chooses to annul the bargain by putting no property at risk.

Nothing is assumed to be a part of the policy which may have been added to it, hence a paper is not made a part of a policy by

(g) *Hall v. People's Ins. Co.* 6 Gray, 186; *Liberty Hall Association v. Housatonic Ins. Co.* 7 Gray, 281.

(gg) *Walker v. Metropolitan Ins. Co.* 56 Me. 871.

(h) *Ins. Co. of Penn. v. Smith*, 3 Whart. 529; *Patapsco Ins. Co. v. Smith*, 6 Harris & J. 166.

(i) *Tyrie v. Fletcher*, Cowp. 666; *Taylor v. Lowell*, 3 Mass. 331.

merely being folded up with it (*j*) or even wafered to it. (*k*) But whatever is written either upon the face or the margin, (*l*) or the back of a policy, (*m*) or on the same sheet, (*n*) or even on a wholly separate paper, (*o*) becomes a part of the policy if referred to as such in the body of the instrument, or signed as such by the party upon whom it imposes an obligation, and in some cases this rule has received a wide construction. Things said or written by either party, or by both, while negotiating for the policy, whatever may be their importance, form no part of the policy, unless written therein, or specifically referred to. (*p*)

C.—*Of Insurance through an Agent.*

The general principles of authority, of adoption and ratification, apply to contracts of insurance.

An agent who causes an insurance to be made must have full power to do so. This power may be given him expressly, or may be derived from the circumstances of the case, or from usage; (*q*)¹ but a mere general authority, though it be to act in relation to the ship or cargo, is not sufficient. (*r*)

* If a policy be made by one who purports to make it * 358 as agent, his principal, although unknown at the time, is bound when afterwards discovered. If the agent has no previous authority, the party in interest may make it his contract by subsequent ratification; and he may make this ratification even after a loss has occurred under the policy; (*s*)² and the bringing of an

(*j*) *Pawson v. Barneveldt*, 1 Doug. 18, note.

v. St. Lawrence Co. Ins. Co. 10 Barb. 285; *Brown v. People's Ins. Co.* 11 Cush. 280. But see *Williams v. New England Ins. Co.* 31 Maine, 219.

(*k*) *Bize v. Fletcher*, 1 Doug. 18, note. (*l*) *Dennis v. Ludlow*, 2 Caines, 111; *Bean v. Stupart*, 1 Doug. 11; *De Hahn v. Hartley*, 1 T. R. 343; *Guerlain v. Col. Ins. Co.* 7 Johns. 527; *Ewer v. Washington Ins. Co.* 16 Pick. 502.

(*m*) *Warwick v. Scott*, 4 Camp. 62; *Harris v. Eagle Ins. Co.* 5 Johns. 368.

(*n*) *Murdock v. Chenango Co. Ins. Co.* 2 Comst. 210; *Roberts v. Chenango Co. Ins. Co.* 3 Hill, 501.

(*o*) *Routledge v. Burrell*, 1 H. Bl. 254; *Worsley v. Wood*, 6 T. R. 710; *Clark v. Manuf. Ins. Co.* 8 How. 235; *Kennedy*

v. St. Lawrence Co. Ins. Co. 10 Barb. 285; *Brown v. People's Ins. Co.* 11 Cush. 280. But see *Williams v. New England Ins. Co.* 31 Maine, 219.

(*p*) *Higginson v. Dall*, 13 Mass. 96; *Western v. Ernes*, 1 Taunt. 115; *New York Ins. Co. v. Thomas*, 8 Johns. Cas. 1; *Lee v. Howard Ins. Co.* 8 Gray, 588; *Lamatt v. Hudson River Ins. Co.* 17 N. Y. 190, note.

(*q*) *Barlow v. Leckie*, 4 J. B. Moore, 8.

(*r*) *French v. Backhouse*, 5 Burr. 2727; *Foster v. U. S. Ins. Co.* 11 Pick. 85; *Finney v. Warren Ins. Co.* 1 Met. 16.

(*s*) *Lucena v. Craufurd*, 1 Taunt. 825;

¹ See *Putnam v. Home Ins. Co.* 123 Mass. 324; *Wass v. Maine Ins. Co.* 61 Me. 537; *Lycoming Ins. Co. v. Woodworth*, 83 Penn. St. 223; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345.

² *Williams v. No. China Ins. Co.* 1 C. P. D. 757.

action on the policy by such principal, in his own name, has been said to be sufficient ratification. (*t*) If, however, the agent brings the action in his own name, and no ratification is proved, he recovers only to the extent of his own interest. (*u*)

If the goods are insured by a bailee having a lien on them for charges, commissions, &c., and are described as goods held by him in trust, in an action brought by him in his own name he recovers the whole value of the goods, and after deducting his lien, he holds the balance in trust for the owner. (*v*) But, as between the insured and the owner of the goods held by him in trust, the latter cannot recover unless it appears that he had elected to adopt the policy, before its force as an insurance upon his goods has been in any degree impaired by any act of the insured, or that the latter has actually received money from the insurance company, on account of goods other than his own. (*w*)¹ If an agent effects insurance "for account of whom it may concern," he then recovers the whole amount insured in an action brought in his own name, (*x*) unless his authority be disavowed by the party in interest; who can, however, disavow it, only to the extent of his own interest, and not for the lien or other interest of the agent. (*y*)

Alterations may be made by both parties, or by either party, with the consent of the other. Such alterations should be and usually are indorsed upon the policy. (*z*) If the insured

* 354 makes, * or procures, or consents to the making of a material alteration, this has the effect of cancelling the policy, (*a*) even though he make it in good faith; unless the insurers

Routh v. Thompson, 13 East, 274; *Hagedorn v. Oliverson*, 2 M. & S. 485; *Steinbeck v. Rhinelander*, 3 Johns. Cas. 281; *Loring v. Proctor*, 26 Maine, 80.

(*t*) *Finney v. Fairhaven Ins. Co.* 5 Met. 192; *Oliver v. Commercial Ins. Co.* 2 Curtis, C. C. 296; *Blanchard v. Waite*, 28 Maine, 51.

(*u*) *Foster v. U. S. Ins. Co.* 11 Pick. 85.

(*v*) *Waters v. Monarch Ins. Co.* 5 Ellis & B. 870, 34 Eng. L. & Eq. 116; *De Forest v. Fulton Ins. Co.* 1 Hall, 100.

(*w*) *Stillwell v. Staples*, 19 N. Y. 401.

(*x*) *Davis v. Boardman*, 12 Mass. 80; *Ward v. Wood*, 13 Mass. 589; *Copeland v. Mercantile Ins. Co.* 6 Pick. 198.

(*y*) *Reed v. Pacific Ins. Co.* 1 Met.

186; *Copeland v. Mercantile Ins. Co.* 6 Pick. 198; *Cranston v. Philadelphia Ins. Co.* 5 Binn. 538.

(*z*) *Laird v. Robertson*, 4 Brown, P. C. 488; *Robinson v. Tobin*, 1 Stark. 336; *Merry v. Prince*, 2 Mass. 176. An alteration inserted in the policy by consent of both parties, although not signed, is binding. *Warren v. Ocean Ins. Co.* 18 Maine, 439. A policy may be altered by parol. *Kennebec Co. v. Augusta Ins. Co.* 6 Gray, 204.

(*a*) *Langhorn v. Cologan*, 4 Taunt. 330; *Farlie v. Christie*, 7 id. 416; *Forshaw v. Chabert*, 3 Brod. & B. 158. See *Entwistle v. Ellis*, 2 H. & N. 649. The alteration must be material; *Sanderson v. McCullom*, 4 J. B. Moore, 5; *Sander-*

¹ See *Martineau v. Kitching*, L. R. 7 Q. B. 436, 462, where *Quain, J.*, cites the text with approval.

assent to it. An alteration by the insurers, without the consent of the insured, has no effect whatever. (b)

If there be a material error in a policy, a court of law cannot correct the mistake. (c) But a court of equity may and will correct it, or treat the policy as reformed. (d)

D.—Of the Transfer of the Policy or of the Property.

There is an important difference between the transfer of a policy and the transfer of the property insured by the policy. Policies of insurance are not negotiable, (e) but may be assigned, and the assignment vests an equitable interest in the assignee, (f) and the assignee may bring an action in the name of the assignor. (g) Such assignment may be valid without the consent of the insurers.

If the insured assign the policy with the consent of the insurers, there seems to be an exception to the general rule that the assignor cannot after an assignment affect the rights of the assignee. For any act of his which would render the policy void, had it not been assigned, will, it is held, still have that *effect; (h)¹ unless the terms of the assent of the insurers are such as to make or imply a new contract with the assignee. (i)²

son *v.* Symonds, 1 Brod. & B. 426, and made by the insured, or by his procurement or consent. Nichols *v.* Johnson, 10 Conn. 192.

(b) Kennebec Co. *v.* Augusta Ins. Co. 6 Gray, 204.

(c) Constable *v.* Noble, 2 Taunt. 403; Kaines *v.* Knightly, Skin. 54; Ewer *v.* Washington Ins. Co. 16 Pick. 503; Chamberlain *v.* Harrod, 5 Greenl. 420.

(d) Collett *v.* Morrison, 9 Hare, 162, 12 Eng. L. & Eq. 171; Hogan *v.* Delaware Ins. Co. 1 Wash. C. C. 419; Oliver *v.* Commercial Ins. Co. 2 Curtis, C. C. 277. The evidence of the mistake must be clear and satisfactory. Henckle *v.* Royal Exch. As. Ins. Co. 1 Ves. Sen. 317; Graves *v.* Boston Ins. Co. 2 Cranch, 441; Lyman *v.* United Ins. Co. 2 Johns. Ch. 630.

(e) Fogg *v.* Middlesex Ins. Co. 10 Cush. 345; Folsom *v.* Belknap Co. Ins.

Co. 10 Foster, 231; Hobbe *v.* Memphis Ins. Co. 1 Sneed, 450.

(f) Wakefield *v.* Martin, 3 Mass. 558; Spring *v.* South Carolina Ins. Co. 8 Wheat. 268.

(g) Earl *v.* Shaw, 1 Johns. Cas. 313; Gourdon *v.* Ins. Co. 3 Yeates, 327; Folsom *v.* Belknap Co. Ins. Co. 10 Foster, 231; Pollard *v.* Somerset Ins. Co. 42 Maine, 221.

(h) Hale *v.* Mechanics Ins. Co. 6 Gray, 169; State Ins. Co. *v.* Roberts, 7 Am. Law Reg. 229; Bidwell *v.* Northwestern Ins. Co. 19 N. Y. 179; Grosvenor *v.* Atlantic F. Ins. Co. 17 N. Y. 391; Buffalo Steam-Engine Works *v.* Sun Ins. Co. 17 N. Y. 401. But see Pollard *v.* Somerset Ins. Co. 42 Maine, 221.

(i) Foster *v.* Equitable Ins. Co. 2 Gray, 216. See Boynton *v.* Clinton Ins. Co. 16 Barb. 264.

¹ Warbasse *v.* Sussex Ins. Co. 18 Vroom, 203.

² See McCluskey *v.* Providence Ins. Co. 126 Mass. 306; Fitchburg Sav. Bank *v.*

certain from the authorities ; (*ss*)¹ it must often depend upon the exact words which prohibit the sale or transfer.

E.— *Of Requirements in the Policy.*

If a policy provide that not only a change of the owners, but a change of masters if not notified to the insurers, shall avoid the policy, the insured cannot recover for a loss occurring while the ship is under the charge of a new master, of whose appointment the insurers had not been notified. (*t*)

Usage has great weight in the construction of policies and their language ; but to have this effect it must be reasonable in it-

* 357 of * the plain and positive language of the policy. (*w*)

Where the usage of the place in which a letter proposing insurance is written, differs from that of the place to which the letter is sent, and in which the insurance is effected, the first usage prevails. (*x*) It may be added as a general remark, that while it seems to have been thought, at some times and by some courts, that a policy should be construed favorably for the insured, and at other times and by other courts, favorably for the insurers, we hold it to be both the just rule and the expedient rule, that it should be construed accurately, and without favor to either party ; and this rule seems now to prevail in the courts. (*y*)

A policy takes effect from its date. But "date," which is only

(*ss*) *Held*, that the sale or transfer does not avoid the policy unless made to third parties, in *Hoffman v. Aetna Ins. Co.* 32 N. Y. 405. *Held*, otherwise, in *Hartford Ins. Co. v. Ross*, 23 Ind. 170 ; and in *Keeler v. Niagara Ins. Co.* 16 Wis. 523.

(*t*) *Tennessee Ins. Co. v. Scott*, 14 Miss. 46.

(*u*) *Macy v. Whaling Ins. Co.* 9 Met. 363; *Ougier v. Jennings*, cited 1 Camp. 505; *Barney v. Coffin*, 3 Pick. 115.

(*v*) A usage to sell a cargo without necessity is invalid: *Bryant v. Commonwealth Ins. Co.* 6 Pick. 131; or for the owner to purchase it when sold by the master through necessity : *Robertson v. Western Ins. Co.* 19 La. 227. See also *Hone v. Mutual Safety Ins. Co.* 1 Sandf. 137, 2 Comst. 235; *Turner v. Burrows*, 6

Wend. 541, 8 id. 144; *Wise v. St. Louis Mar. Ins. Co.* 23 Misso. 80.

(*w*) *M'Gregor v. Ins. Co.* 1 Wash. C. 39; *Hone v. Mutual Safety Ins. Co.* 1 Sandf. 137, 2 Comst. 235; *Blackett v. Royal Exch. Ass. Co.* 2 Cromp. & J. 244; *Mercantile Ins. Co. v. State Ins. Co.* 26 Barb. 319; *Rankin v. Am. Ins. Co.* 1 Hall, 619; *Bentallow v. Pratt, Wallace*, 58; *Bargett v. Orient Ins. Co.* 3 Bosw. 886.

(*x*) *Hazard v. New England Ins. Co.* 8 Pet. 567, overruling the decision of Mr. Justice Story in the same case, 1 Sumner, 218.

(*y*) *Hood v. Manhattan Ins. Co.* 1 Kern, 582; *Robertson v. French*, 4 East, 135; *Aguilar v. Rodgers*, 7 T. R. 421; *Mumford v. Hallett*, 1 Johns. 438; *Graves v. Boston Ins. Co.* 2 Cranch, 418; *Honnick v. Phoenix Ins. Co.* 22 Misso. 82.

¹ That it does not, see *Pierce v. Nashua Ins. Co.* 50 N. H. 297.

a shortened form of *datum* (given), means delivery; and the presumption that a contract is written or delivered at its date, may be rebutted by proof of actual making and delivery at another time. (s)

F.—*Of the Premium.*

The premium, which is the consideration for the promise of the insurers, is equally valid for that purpose, whether it is paid in money when the policy is delivered, or by a promissory note, or remains only as the debt of the insured. In this country the usual payment is by a promissory note, which is called a premium note.

The premium is not due, or, to speak more accurately, is not earned, unless the risk is incurred for insurance against which * the premium is given. But it is wholly earned if * 358 the whole property insured is for any time, however brief, under such risk. If no part of the risk attaches for any reason whatever, no part of the premium is earned, and the whole if paid is returnable. This rule applies equally, whether the cause of the non-attachment of the risk was, that no part of the voyage took place, (a) or that no part of the goods were shipped, (b) or that the insured had no interest in the property, (c) or that the vessel was unseaworthy, (d) or that any other breach of warranty occurred, which avoided the policy before the risk attached. (e) By a common clause, insurance companies retain one-half of one per cent. on the return of the premium.

If the policy is a valued one, and the valuation is not diminished during the voyage by a withdrawal of any part of the subject insured, there is no return of premium. (f) And if the policy be entire, whether for a period of time, or for a voyage, no

(z) *Earl v. Shaw*, 1 Johns. Cas. 313; *Jackson v. Schoonmaker*, 2 Johns. 234. See *United States v. Le Baron*, 19 How. 78.

(a) *Forbes v. Church*, 8 Johns. Cas. 160; *Murray v. Col. Ins. Co.* 4 Johns. 443.

(b) *Martin v. Sitwell*, 1 Show. 156; *Graves v. Marine Ins. Co.* 2 Caines, 389; *Waddington v. United Ins. Co.* 17 Johns. 23; *Toppan v. Atkinson*, 2 Mass. 365; *Bermon v. Woodbridge*, 2 Doug. 781; *Murray v. Col. Ins. Co.* 4 Johns. 443.

(c) *Routh v. Thompson*, 11 East, 428. But see *M'Culloch v. Royal Exch. Ass. Co.* 3 Camp. 406.

(d) *Porter v. Bussey*, 1 Mass. 436; *Penniman v. Tucker*, 11 Mass. 66; *Russell v. De Grand*, 16 Mass. 38; *Commonwealth Ins. Co. v. Whitney*, 1 Met. 23.

(e) *Murray v. United Ins. Co.* 3 Johns. Cas. 168; *Elbers v. United Ins. Co.* 16 Johns. 128; *Duguet v. Rhinelander*, 1 Johns. Cas. 360.

(f) *Mutual Ins. Co. v. Swift*, 7 Gray, 256.

premium is returnable if the risk attached for any portion of the time or the voyage. (g) Hence, if the insurance be "at and from" a place, no premium is returnable, if the premium attach at and never from; (h) as would be the case if the ship were seaworthy at the place, but unseaworthy for the voyage. (i) So, it would not be returnable if the insured had an interest in the property at any moment during the time or the voyage. (j) But if the voyage were composed of severable passages, for which the risk was severable, and some of those passages were prevented,

the premium for those passages may be returnable. (k) If * 359 the insurance be on two subject-matters, * as on ship and

cargo, and the ship goes, but without the cargo, the premium on the ship is earned, but the premium on the cargo will be returnable. (l) The much more usual case of part return of premium, occurs when only a part of the goods insured is shipped; for then the proportion of the premium which belongs to the part not shipped is returnable. (m)

The rules as to proportional or *pro rata* return of premium may not be quite settled, in all their applications. The main difficulty in the application, springs from the difficulty of determining whether the risks, and with them the premium, are entire or separable. (n) Clauses are sometimes inserted in policies making the premium returnable, in part or in whole, on certain contingencies. (o)

(g) *Tyrie v. Fletcher*, 2 Cowp. 636.

(h) *Col. Ins. Co. v. Lynch*, 11 Johns. 283; *Marine Ins. Co. of Alexandria v. Tucker*, 3 Cranch, 357.

(i) *Annen v. Woodman*, 3 Taunt. 299; *Taylor v. Lowell*, 3 Mass. 331; *Merchants Ins. Co. v. Clapp*, 11 Pick. 56.

(j) *Howland v. Comm. Ins. Co. Anthorn*, N. P. 23.

(k) *Donath v. N. A. Ins. Co.* 4 Dall. 471; *Waters v. Allen*, 5 Hill, 421. But generally, if the premium is entire, the risk is not severable, although the voyage consists of several passages. *Bermon v. Woodbridge*, 2 Doug. 781; *Moses v. Pratt*, 4 Camp. 297; *Tait v. Levi*, 14 East, 481; *Homer v. Dorr*, 10 Mass. 26.

(l) *Amery v. Rogers*, 1 Esp. 207; *Horney v. Lushington*, 15 East, 46.

(m) *Holmes v. United Ins. Co.* 2 Johns. Cas. 329; *Pollock v. Donaldson*, 3 Dallas, 510; *Forbes v. Aspinall*, 18 East, 323; *Foster v. U. S. Ins. Co.* 11 Pick. 86; *Eyre v. Glover*, 16 East, 218.

(n) If the subject-matter is so errone-

ously described that the policy does not attach, the premium is returnable. *Roberts v. United Ins. Co.* 2 Johns. Cas. 250. So if the policy is issued by a person who had no authority to issue it. *Lynn v. Burgoyne*, 13 B. Mon. 400. See also *Hagedorn v. Oliverson*, 2 M. & S. 485; *Finney v. Fairhaven Ins. Co.* 5 Met. 192; *Routh v. Thompson*, 13 East, 289; *Steinbach v. Rhinelander*, 8 Johns. Cas. 269; *Foster v. United States Ins. Co.* 11 Pick. 85; *New York Ins. Co. v. Roberts*, 4 Duer, 141; *Fisk v. Masterman*, 8 M. & W. 165.

(o) A if the vessel sails with convoy and arrives; in which case, although a large part of the cargo insured is lost, if the vessel sails with convoy and arrives, the underwriters are liable. *Simond v. Boydell*, 1 Doug. 268; *Aguilar v. Rodgers*, 7 T. R. 421; *Horncastle v. Haworth, Marsh. Ins.* 674; *Castelli v. Boddington*, 1 Ellis & B. 66, 16 Eng. L. & Eq. 127. "If the risk ends in safety at —." *Ogden v. New York Ins. Co.* 12 Johns. 114;

If the insurance were illegal and therefore void, and the illegality was not known to either party when it was effected, the premium is returnable. (*p*) If it was known to both, it is not returnable, because both were equally in the wrong. (*q*) If known to the insurer only, or if he made the policy fraudulently, as if he knew when he made it, that the risk had terminated * safely, the premium is returnable. (*r*) If made through the fraud of the insured, the premium is not returnable; (*s*) but it has been held, that it would be returnable, although the policy were avoided by misrepresentation or concealment on the part of the insured, if he had committed no fraud. (*t*)

SECTION II.

OF THE PARTIES TO THE CONTRACT.

Any parties who are competent to make any contract, may make the contract of insurance. The principal exception in practice, to the general rule, is this: an insurance for the benefit of an alien enemy is void. (*u*) But a trade or a transaction, which would otherwise be made unlawful by war, may be made legal by a special license to a party, (*v*) and we know not why the subjects of such a trade might not be legally insured. Aliens who are not enemies may make contracts of insurance as fully, to all intents and purposes, as citizens or subjects of the country in

Robertson v. Columbian Ins. Co. 8 Johns. 491. "The arrival of the vessel." *Kellner v. Le Mesurier*, 4 East, 396. See also *Dalgleish v. Brooke*, 15 East, 296. "If sold or laid up, for every uncommenced month." *Hunter v. Wright*, 10 B. & C. 714. "In case no act of war takes place" between two countries. *Poutz v. La. Ins. Co.* 16 Mart. La. 80.

(*p*) *Oom v. Bruce*, 12 East, 225; *Henry v. Staniforth*, 4 Camp. 270; *Henning v. Staniforth*, 5 M. & S. 122.

(*q*) *Lowry v. Bourdieu*, 2 Doug. 468; *Andree v. Fletcher*, 3 T R 266; *Vandyck v. Howitt*, 1 East, 96; *Juhel v. Church*, 2 Johns. Cas. 833; *Russell v. De Grand*, 15 Mass. 35.

(*r*) *Carter v. Boehm*, 3 Burr. 1909; *Duffell v. Wilson*, 1 Camp. 401.

(*s*) *Tyler v. Horne, Park, Ins.* 285; *Schwartz v. U. S. Ins. Co.* 8 Wash. C. C. 170; *Langhorn v. Cologan*, 4 Taunt. 329.

(*t*) *Anderson v. Thornton*, 8 Exch.

425, 20 Eng. L. & Eq. 339; *Feise v. Parkinson*, 4 Taunt. 640.

(*u*) *Brandon v. Neubert*, 6 T. R. 23; *Furtado v. Rodgers*, 3 B. & P. 191; *Brandon v. Curling*, 4 East, 410. If the insured becomes an alien enemy after the happening of a loss, the remedy is merely suspended, during the existence of the war, and his right may be enforced upon the return of peace. *Flindt v. Waters*, 16 East, 260.

(*v*) *The Cosmopolite*, 4 Rob. Adm. 11; *The Juno*, 2 Rob. Adm. 116; *The Goede Hoop*, Edw. Adm. 328.

which the policy is made. And an alien enemy in a country at war with his own, may have rights and privileges which the courts of that country may enforce. (*w*) The government of every country has the power exclusively of making war, of determining with whom it is at war, and what states or powers are neutral; and the courts of that country are bound by that determination. (*x*)

The parties insured are of course always named in a policy, and some one must be named as the insured; but the * 361 interest * in the policy often extends beyond the parties named, and various phraseology is used to produce this effect. If A is insured "for whom it may concern," it is much the same thing as if he be insured as agent, (*y*) and if he be insured as agent, it is as if he were insured for whom it may concern; and in either case the insurance applies to any one who was an owner of the property insured, and was within the intention of the party effecting the insurance. (*z*) Such an insurance may be made by a mutual, as well as a stock company. (*a*) If the phrase be "on account of those whom it may concern at the time of loss," it covers one who owns the property at that time, whatever may have been the intermediate ownership or transfers. (*b*) An insurance of a person named "for _____" is an insurance for all persons interested in the property whose names the insured intended to insert in this blank. (*c*)

(*w*) *Society, &c. v. Wheeler*, 2 Gallis. 185; *Wells v. Williams*, 1 Salk. 46.

(*x*) *Blackburne v. Thompson*, 15 East, 81; *Hagedorn v. Bell*, 1 M. & S. 450.

(*y*) *De Forest v. Fulton Ins. Co.* 1 Hall, 84; *Waters v. Monarch Ins. Co.* 5 Ellis & B. 870; *Sunderland Ins. Co. v. Kearney*, 16 Q. B. 925; *Duncan v. Sun Ins. Co.* 12 La. An. 486.

(*z*) *Routh v. Thompson*, 11 East, 428; *Bauduy v. Union Ins. Co.* 2 Wash. C. C.

391; *Haynes v. Rowe*, 40 Maine, 181; *Protection Ins. Co. v. Wilson*, 6 Ohio State, 553; *Lambeth v. Western Ins. Co.* 11 Rob. La. 82.

(*a*) *Cobb v. New England Ins. Co.* 6 Gray, 192.

(*b*) *Rogers v. Traders Ins. Co.* 6 Paige, 588.

(*c*) *Turner v. Burrows*, 8 Wend. 150, 24 id. 276.

SECTION III.

OF THE PROPERTY OR INTEREST INSURED.

All maritime property consists of either the ship and its appurtenances, (*d*) or of the cargo which the ship carries, (*e*) or of the freight which the ship earns by carrying the cargo, (*f*)¹

* or of the profits arising from an increase of the value of * 862 the cargo, caused by the transportation. Either or all of these may be and often are insured, and profits are often insured either under that name, or by a valuation of the cargo; (*g*) but in either case profits may be regarded as only an incident to the cargo.

The property insured should be set forth in the policy with sufficient distinctness. The rules on this subject are not capable of exact definition; but the principle which runs through them is, that the subject-matter of the insurance must be distinctly identified, either by actual description, or by reference to other means of knowledge. And where there is no fraud or concealment on the part of the insured, his interest, which he intended to bring within the terms of the policy, will be brought within it, even by a liberal construction; and a mistake in the description will seldom prevent this construction. (*h*)²

(*d*) *Mason v. Franklin Ins. Co.* 12 Gill & J. 468; *Hood v. Manhattan Ins. Co.* 1 Kern. 532. Provisions on board for use of crew are covered by insurance on ship and furniture. *Brough v. Whitmore*, 4 T. R. 206. The outfits of a whaling voyage are not covered by a policy on the ship. *Hoskins v. Pickersgill*, 8 Doug. 222; *Gale v. Laurie*, 5 B. & C. 164. As to boats, see *Hoskins v. Pickersgill, supra*; *Hall v. Ocean Ins. Co.* 21 Pick. 472; *Blackett v. Royal Exch. Ass. Co.* 2 Cromp. & J. 244.

(*e*) See *infra*.

(*f*) *Taylor v. Wilson*, 15 East, 324; *Bell v. Bell*, 2 Camp. 475; *Barclay v. Stirling*, 5 M. & S. 6; *Adams v. Warren Ins. Co.* 22 Pick. 163; *Paradise v. Sun Ins. Co.* 6 La. An. 506. Freight may

mean the profit derived by the owner of a ship from carrying his own goods. *Flint v. Flemyn*, 1 B. & Ad. 45; *Devaux v. I'Anson*, 5 Bing. N. C. 519; *Wolcott v. Eagle Ins. Co.* 4 Pick. 429. If a shipper of goods pays freight in advance, there is a conflict of authority whether he can insure the risk which he runs, under the term freight. *Minturn v. Warren Ins. Co.* 2 Allen, 86; *Kathman v. Gen. Mut. Ins. Co.* 12 La. An. 35.

(*g*) *Mumford v. Hallett*, 1 Johns. 433; *Patapsco Ins. Co. v. Coulter*, 8 Pet. 222; *Alsop v. Com. Ins. Co.* 1 Sumner, 461; *Halhead v. Young*, 6 Ellis & B. 812; *Barclay v. Cousins*, 2 East, 544; *Eyre v. Glover*, 16 East, 218.

(*h*) In *Ruan v. Gardner*, 1 Wash. C. C. 145, the agent of the insured, by mis-

¹ See *Denoon v. Home, &c. Ass. Co.* L. R. 7 C. P. 341, for a discussion by *Willes*, J., of the term "freight," and as to whether it includes "passage money."

² See *Ionides v. Pacific Ins. Co.*, L. R. 6 Q. B. 674; 7 Q. B. 517.

The means of knowledge by which the description may be supplemented, may be the name of the consignee, (*i*) or the voyage, or the time, (*j*) or the port of shipment; (*k*)¹ and it seems, that if the description may attach equally to different shipments, the insured may attach the policy to either, even after the loss has occurred, if the terms of the policy do not exclude it, and if the declaration is honest and conforms to the intention of the parties. (*l*)² If the policy be in the alternative, and the insured is interested in both the alternatives, as ship or cargo, and both have been at risk, (*m*) the policy attaches to both; but if he is interested in only one, he may attach the policy wholly to that. There are many cases illustrative of the effect of the phrases commonly used in the description. (*n*)

* 363 The amount of the interest of the assured, as whether it be one-

take, described the goods as marked (D) on board the Brothers. The goods were on board the vessel named, but not marked as described. Held, that the insured was entitled to recover, as the risk undertaken by the underwriters was neither changed nor increased. Policies usually contain the clause, after mentioning the name of the vessel, "or by whatsoever other name or names the said vessel shall be named." Under this clause it is only necessary to prove the identity of the ship. Hall v. Molineaux, cited 6 East, 386. See also, Le Mesurier v. Vaughan, 6 East, 382; Clapham v. Cologan, 8 Camp. 382; Sea Ins. Co. v. Fowler, 21 Wend. 600.

(i) Ballard v. Merchants Ins. Co. 9 La. 258.

(j) Sorbe v. Merch. Ins. Co. 6 La. 185.

(k) Murray v. Col. Ins. Co. 11 Johns. 302; Rickman v. Carstairs, 5 B. & Ad. 661; Hunter v. Leathley, 10 B. & C. 358; Grant v. Paxton, 1 Taun. 483.

(l) Harman v. Kingston, 3 Camp. 150; Craufurd v. Hunter, 8 T. R. 16, note; Henczman v. Offley, 2 H. Bl. 345, n.; Kewley v. Ryan, 2 H. Bl. 343. See New York Ins. Co. v. Roberts, 4 Duer, 141.

(m) Faris v. Newburyport Ins. Co. 3 Mass. 476.

(n) Merchandise, or any equivalent word, does not apply to ornaments or

clothing owned by persons on board, and not intended for sale. Ross v. Thwaite, Park, Ins. 25. Bullion on board not intended for the expenses of the master, crew, or passengers, is covered by the words "goods and merchandise;" Da Costa v. Firth, 4 Burr. 1968; or "cargo;" Wolcott v. Eagle Ins. Co. 4 Pick. 429. "Goods and merchandise," will cover specie dollars. Am. Ins. Co. v. Griswold, 14 Wend. 899. "Cargo" has been held not to cover live stock, or hay, corn, &c., put on board mainly for the use of the stock, although it was expected that a considerable quantity of it would remain unconsumed, and would be sold as cargo at the port of destination. Wolcott v. Eagle Ins. Co. *supra*. Live stock is generally insured *ad nomine*. Lawrence v. Aberdeen, 5 B. & Ald. 107; Coit v. Smith, 3 Johns. Cas. 16. But under some circumstances "cargo" would cover live stock. Allegre v. Maryland Ins. Co. 2 Gill & J. 136; Chesapeake Ins. Co. v. Allegre, 2 Gill & J. 184. For other examples see Hill v. Patten, 8 East, 373; Paddock v. Franklin Ins. Co. 11 Pick. 227; Rogers v. Mechanics Ins. Co. 1 Story, 603; Pritchett v. Ins. Co. of N. A. 3 Yeates, 458; Hunter v. Prinsep, 10 East, 378; Marsh. Ins. 316; Duplanty v. Commercial Ins. Co. Anthon, N. P. 114; Palmer v. Pratt, 2 Bing. 185.

¹ See Joyce v. Realm Ins. Co. L. R. 7 Q. B. 580; Jones v. Neptune Ins. Co. L. R. 7 Q. B. 702.

² See Ionides v. Pacific Ins. Co. L. R. 6 Q. B. 674; L. R. 7 Q. B. 517; Stephens v. Australasian Ins. Co. L. R. 8 C. P. 20; Imperial Marine Ins. Co. v. Fire Ins. Corporation, 4 C. P. D. 166, in which last case a fire company had re-insured a marine risk against fire.

half or any other proportion of the property, and its character, as whether he is interested as mortgagor or mortgagee, or as charterer or trustee or bailee, or whether his interest be legal or equitable, need not be specified ; an insurance of property or interest generally covering all these. (o)

We have seen, in the chapter on shipping, that public policy disapproves the carrying goods on deck, although the owner and shipper may agree to it, if they choose. For the same reason, a general policy on cargo does not cover goods on deck, without express provision to that effect. (p) But an exceptional usage may, if known and established, affect the policy on this point. There are numerous cases referring to this question. (q) It has been intimated, that a usage to carry such goods on such a vessel and on such a voyage, is not sufficient to bring the goods within the policy, unless there be * also evidence of a usage by insurers of paying for the loss of such goods. (r)

SECTION IV.

OF THE BEGINNING AND THE END OF THE RISK.

A policy of insurance should define, with great precision, the time when the risk insured against begins, and when it terminates. This definition may be, either by referring to a moment of time, or to some fact, or to some place. That is, the insurance may be from a certain hour to a certain hour, or it may begin when certain goods are laden on board, or as soon as the ship reaches a certain place. In some way these *termini* must be sufficiently defined. A policy from — to —, or from — to A, or from A to —, has no effect. (s)

(o) *Oliver v. Greene*, 3 Mass. 188; *Finney v. Warren Ins. Co.* 1 Met. 16; *Russel v. Union Ins. Co.* 1 Wash. C. C. 409; *Stetson v. Mass. Ins. Co.* 4 Mass. 330; *Higginson v. Dall*, 18 Mass. 96; *Wells v. Phil. Ins. Co.* 9 S. & R. 108; *Crowely v. Cohen*, 3 B. & Ad. 478; *Chase v. Wash. Ins. Co.* 12 Barb. 595.

(p) *Wolcott v. Eagle Ins. Co.* 4 Pick. 429; *Adams v. Warren Ins. Co.* 22 Pick. 163; *Taunton Copper Co. v. Merchants Ins. Co.* id. 108; *Milward v. Hibbert*, 3 Q. B. 120.

(q) *Milward v. Hibbert*, 3 Q. B. 120; *Da Costa v. Edmunds*, 4 Camp. 142; *Rogers v. Mechanics Ins. Co.* 1 Story, 608; *Cunard v. Hyde*, 2 Ellis & E. 1; *Merchants Ins. Co. v. Shillito*, 13 Ohio, 559.

(r) *Taunton Copper Co. v. Merchants Ins. Co.* 22 Pick. 108.

(s) *Molloy*, book 2, c. 7, § 14. See also, *Manly v. United Ins. Co.* 9 Mass. 89; *Folsom v. Merchants Ins. Co.* 38 Maine, 414; *Cleveland v. Union Ins. Co.* 8 Mass. 808.

We have seen that actual delivery may be proved in contradiction of the date, when the policy is to take effect from the time of delivery. But a policy may be made and delivered much later than the date, with the intention that it shall take effect from the prior date, or be retrospective. It may also be intended that the insurance shall attach, although the property has ceased to exist before the making and delivery of the policy. This is usually effected by the words in common use, "lost or not lost;" (t) but any other equivalent language would have the same effect. (u)

An insurance beginning "on" a certain day covers the whole of that day. If it begins "from" a certain day, the word "from" has the effect of "after," and the day is excluded. (v)

* 365 * This, at least, is the general rule, although it might be varied by other language in the policy, or by circumstances. (w)

Where the insurance is on goods, we know no better rule for determining when the policy attaches to them, than that it so attaches when it would attach to the vessel carrying them, were she insured.

If the insurance is made "at and from" a certain place, the risk begins as soon as the vessel is at that place, and continues while she is there, and also when she leaves that place. The question has arisen, What must be the condition of the vessel on her arrival, for the policy to attach? It has been said, that she must then be in safety from the perils insured against. And as an insurance to a place does not cease until she has arrived there, and been there moored twenty-four hours in safety (and our policies usually contain a clause to that effect), it has been held, that a policy "at" did not attach on the arrival of a ship, until after the twenty-four hours of safety had expired. (x) But it is obvious that the terms of the policy and the circumstances of the case must have much effect in the application of these rules.

So if the insurance is to take effect "at and from a certain port,"

(t) *Paddock v. Franklin Ins. Co.* 11 Pick. 227; *Hucks v. Thornton, Holt, N. P.* 30; *Mead v. Davison,* 3 A. & E. 303; *Sutherland v. Prati,* 11 M. & W. 296; *Cobb v. New England Ins. Co.* 6 Gray, 192.

(u) *Hammond v. Allen,* 2 Sumner, 396, per *Story, J.* See also *March v. Pigot,* 5 Burr. 2802.

(v) *Chiles v. Smith,* 18 B. Mon. 400;

Lorent v. South Carolina Ins. Co. 1 Nott & McC. 505.

(w) See *Howard's Case,* 2 Salk. 625; *Pugh v. Leeds, Cowp.* 714; *Fuller v. Russell,* 6 Gray, 128.

(x) See *Garrigues v. Coxe,* 1 Binn. 592; *Patrick v. Ludlow,* 8 Johns. Cas. 14; *Motteux v. London Ass. Co.* 1 Atk. 548; *Parmenter v. Cousins,* 2 Camp. 235; *Bell v. Bell,* 2 Camp. 478.

it may be difficult to determine what is that port, or what places are comprehended within it. And this question of mixed law and fact can only be determined by usage, or other evidence. (y) Insurance "from" a place begins only when a vessel casts off her moorings, or weighs her anchor, and moves, with the intention of sailing. (z) Goods insured "at and *from" a place, do not, unless it is expressly so provided in the policy, (a) come under the policy until laden on board the vessel, or on board a boat or lighter to be carried to the vessel in conformity with the usage of that place. (b) But they would be covered by such a policy, if brought there in a vessel from another place. (c) If the insurance be to a port of discharge, it continues at and from such ports as the vessel may touch at for inquiry, advice, or repair, without discharging any part of her cargo. (d) Any such expression as "final port," or "ports of discharge," would continue the insurance on so much of the cargo as is not there discharged. (e) And if the insurance be to a port of discharge, the insurance ceases when the cargo is actually unladen at any port, whether it be the port originally intended or another. (f)

Sometimes it is provided that the insurance is for a definite period, and if the vessel is "at sea" at the end of the time, the risk is to continue until her arrival at port, or the port of destination. The meaning of the phrase "at sea," or the equivalent phrase "on her passage," (g) seems to have been somewhat controverted; but we consider the rule as now well settled. If a

(y) *De Longuemere v. Firem. Ins. Co.* 10 Johns. 126; *Higgins v. Aguilar*, cited 2 Taunt. 406; *McCargo v. Merchants Ins. Co.* 10 Rob. La. 384; *Moxon v. Atkins*, 3 Camp. 200; *Bell v. Mar. Ins. Co.* 8 S. & R. 98; *Hull Dock Co. v. Browne*, 2 B. & Ad. 43; *Stockton R. Co. v. Barrett*, 7 Man. & G. 870; *Payne v. Hutchinson*, 2 Taunt. 405; *Constable v. Noble*, 2 Taunt. 408; *Brown v. Tayleur*, 4 A. & E. 241.

(z) *Mey v. South Carolina Ins. Co.* 3 Brev. 829. If a vessel is insured at and from A to B, from thence to C and back to A, a loss at B will be covered. *Bradley v. Nashville Ins. Co.* 8 La. An. 708; *Bell v. Marine Ins. Co.* 8 S. & R. 98.

(a) See *Kennebec Co. v. Augusta Ins. Co.* 6 Gray, 204.

(b) *Coggeshall v. Am. Ins. Co.* 3 Wend. 283; *Parsons v. Mass. Ins. Co.* 6 Mass. 208.

(c) *Gardner v. Col. Ins. Co.* 2 Cranch, C. C. 478.

(d) *Coolidge v. Gray*, 8 Mass. 527; *Lapham v. Atlas Ins. Co.* 24 Pick. 1; *King v. Hartford Ins. Co.* 1 Conn. 338; *Clark v. United Ins. Co.* 7 Mass. 365.

(e) *Inglis v. Vaux*, 3 Camp. 497; *Preston r. Greenwood*, 4 Doug. 28; *Moore v. Taylor*, 1 A. & E. 25; *Upton v. Salem Ins. Co.* 8 Met. 606; *Brown v. Vigne*, 12 East, 283; *Oliverson v. Brightman*, 8 Q. B. 781.

(f) *Moffat v. Ward*, 4 Doug. 31, note; *Shapley v. Tappan*, 9 Mass. 20.

(g) In *Bowen v. Hope Ins. Co.* 20 Pick. 275, insurance was effected for one year, and if "at sea" when the year expired, then until the arrival of the vessel at port. In *Bowen v. Merchants Ins. Co.* 20 Pick. 276, the insurance was the same, except that the phrase in the latter case was "if on her passage." The two expressions were considered as synonymous.

vessel is in a port at the expiration of the time, she cannot be said to be at sea, (*h*) unless she is in that port by restraint and against her will. (*i*) If a vessel has set sail before the expiration * of the time, although not fairly at sea, the underwriters are liable for a subsequent loss. (*j*)

The clause terminating the insurance only when the vessel has been moored twenty-four hours in safety at the port of arrival, has received judicial construction. If the vessel be ordered off or into quarantine before the twenty-four hours have passed, the policy does not cease to attach; (*k*) but if she be safely moored, and continue safe through a storm or other peril, which begins either before or within the twenty-four hours, and is afterwards lost through the same storm or peril, she is not lost within the policy. (*l*)

If goods are usually landed from a ship in a certain port by boats or lighters, they are not landed and are under the policy while on board the lighters. And this would be true if this mode of landing the goods was unusual, but justified by the necessity of the case. (*m*) It has, however, been held, that if a consignee sends his own lighter to receive the goods, they are delivered to him when put on board his lighter, and the insurance ceases. (*n*)

Whenever the voyage insured is abandoned or broken up, by a peril not insured against, the insurance ceases. (*o*)

Because the insurers are liable for the direct, immediate, and inevitable consequences of a peril insured against, we should say

(*A*) It was said by *Parker*, C. J., in *Wood v. New England Ins. Co.* 14 Mass. 81, that "A vessel is considered in that condition ('at sea'), while on her voyage, and pursuing the business of it, although during part of the time, she is necessarily within some port, in the prosecution of her voyage." This *dictum* has however been pronounced to be incorrect. *Gookin v. New England Ins. Co.* 8 Am. Law Reg. 362; *Am. Ins. Co. v. Hutton*, 24 Wend. 330, 7 Hill, 321. See *Eyre v. Marine Ins. Co.* 6 Whart. 247, 5 Watts & S. 116.

(*i*) *Wood v. New England Ins. Co.* 14 Mass. 81.

(*j*) *Bowen v. Hope Ins. Co.* 20 Pick. 275; *Union Ins. Co. v. Tysen*, 3 Hill, 118.

(*k*) *Waples v. Eames*, 2 Stra. 1248.

(*l*) *Bill v. Mason*, 6 Mass. 313. By arrival is meant the reaching the usual place of unloading. *Samuel v. Royal Exch Ass. Co.* 8 B. & C. 119; *Anger-*

stein v. Bell, Park, Ins. 45; *Meigs v. Mutual Ins. Co.* 2 Cush. 439; *Whitwell v. Harrison*, 2 Exch. 127; *Dickey v. United Ins. Co.* 11 Johns. 358; *Zacharie v. Orleans Ins. Co.* 17 Mart. La. 687; *Gray v. Gardner*, 17 Mass. 188. If a vessel arrives a mere wreck, she cannot be said to have been in safety a moment. *Shawe v. Felton*, 2 East, 109.

(*m*) *Matthie v. Potts*, 3 B. & P. 23; *Stewart v. Bell*, 5 B. & Ald. 238; *Wadsworth v. Pacific Ins. Co.* 4 Wend. 33; *Osacar v. Louisiana State Ins. Co.* 17 Mart. La. 386.

(*n*) *Sparrow v. Caruthers*, 2 Stra. 1236. But see *Langlois v. Brant*, cited 2 B. & P. 434, note. If he merely hires a lighter and pays for it himself, the risk continues till the goods are landed. *Rucker v. London Ass. Co.* 2 B. & P. 432, note; *Hurry v. Royal Exch. Ass. Co.* 2 B. & P. 430. See *Strong v. Natally*, 4 B. & P. 16; *Low v. Davy*, 5 Binn. 595.

(*o*) *Brown v. Vigne*, 12 East, 283.

that they were thus liable for those consequences, although they occur after the insurance has ceased, provided the injury took place while the property was covered by the policy. (*p*)

* SECTION V.

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OF OPEN AND OF VALUED POLICIES.

A.—*Of Open Policies.*

As wager policies are now void both in England and in this country, the insured must have at risk some interest in the subject of insurance. (*q*) This may be any legal or equitable interest whatever, if it be such that the peril against which the insurance is made, would cause a pecuniary loss to the insured by its immediate and direct effect. (*r*)

If the policy does not state the value of the property insured, as agreed upon by both parties, this value must be proved by evidence after the loss occurs. Such a policy is called an OPEN POLICY.

A policy may be made and delivered which as yet covers no property; because it may provide that the property to be insured under it shall be defined and ascertained by statements to be subsequently and at various times indorsed upon the policy. (*s*)¹ These policies always provide for the manner in which ships or cargo or any maritime interest shall be indorsed upon the policy, or entered in a designated book so as to come under insurance;

(*p*) *Knight v. Faith*, 15 Q. B. 649. 302; *Craufurd v. Hunter*, 8 T. R. 13; See *Meretony v. Dunlope*, cited 1 T. R. 200; *Furneaux v. Bradley*, 2 Marsh. Ins. 584.

(*q*) *Amory v. Gilman*, 2 Mass. 13; *Stetson v. Mass. Ins. Co.* 4 Mass. 386; *Lord v. Dall*, 12 Mass. 118; *King v. State Ins. Co.* 7 Cush. 10; *Alsop v. Commercial Ins. Co.* 1 Sumner, 464. By statute, 19 Geo. II, c. 37, wager policies are made illegal.

(*r*) *Lucena v. Craufurd*, 5 B. & P.

302; *Stirling v. Vaughan*, 11 East, 619; *Hancock v. Fishing Ins. Co.* 3 Sumner, 140; *Fireman's Ins. Co. v. Powell*, 18 B. Mon. 311; *Waters v. Monarch Ins. Co.* 5 Ellis & B. 870; *Wilson v. Martin*, 11 Exch. 684; *Rice v. Tower*, 1 Gray, 426.

(*s*) *Langhorn v. Cologan*, 4 Taunt. 330; *Neville v. Merch. Ins. Co.* 17 Ohio, 192; *Newlin v. Ins. Co.* 20 Penn. State, 312; *Ralli v. Janson*, 6 Ellis & B. 422, 36 Eng. L. & Eq. 198.

¹ Under a "floating" marine policy for "goods" contracted for, there is no insurable interest in goods not specifically appropriated to the insured prior to the loss. *Stock v. Inglis*, 9 Q. B. D. 708.

and these provisions are strictly enforced. (*ss*) Such a policy is sometimes called an "open policy," and sometimes a "running policy." The insured by such a policy has no right to make an indorsement which conflicts with the body of the policy. (*t*) It has been held, that these indorsements are to be regarded * 369 as so many contracts of insurance; * and, generally speaking, the insurers, by an open policy on merchandise to be shipped by a certain route, are obliged to insure all shipments made to the insured by that route, if duly indorsed, with due information to the insurers of the circumstances they are entitled to know. But it is also true, that the language of the policy may show that the contract is not an absolute one, but that the underwriters can elect in each case whether to take the risk or not. (*u*)

B.—*Of Valued Policies.*

Where the value of the property insured is agreed upon by the parties, and this value is stated in the policy, usually or always by the phrase "valued at \$—," such a policy is called a **VALUED POLICY**.

This valuation is final and conclusive upon both parties. (*v*)¹ It must not, however, make the policy a wager policy, which it would do if the property so valued had no real value. (*w*) But all maritime property—and merchandise far more than the ship—may have very wide limits, within which a valuation may be honest and valid. And after much adjudication on the subject of

(*ss*) *Piahto v. Merchants Ins. Co.* 38 Mo. 248; *Hartshorn v. Shoe, &c. Ins. Co.* 15 Gray, 240.

(*t*) *Entwistle v. Ellis*, 2 H. & N. 549. But the insurers may agree to alter the terms of the contract by the indorsement. *Kennebec Co. v. Augusta Ins. Co.* 8 Gray, 204. Though it seems that if the indorsement alters the policy, the fact that the underwriters place their initials to the indorsement is not conclusive evidence of their assent to the alteration. *Entwistle v. Ellis, supra*. The policy and the indorsement should be construed together, unless they cannot be reconciled, in which case the indorsement should govern. *Protection Ins. Co. v. Wilson*, 6 Ohio State, 553.

(*u*) *New York Ins. Co. v. Roberts*, 4 Duer, 141; *E. Carver Co. v. Manuf. Ins. Co.* 6 Gray, 214; *Hartshorn v. Shoe & L. Dealers Ins. Co.* 15 Gray, 240; *Orient Ins. Co. v. Wright*, 23 How. 401; *Sun Ins. Co. v. Wright*, id. 412; *Edward v. St. Louis Ins. Co.* 7 Mo. 382; *Douville v. Sun Ins. Co.* 12 La. An. 259.

(*v*) *Hodgson v. Mar. Ins. Co.* 5 Cranch, 100, 8 Cranch, 206; *Miner v. Tagert*, 8 Binn. 204; *Coolidge v. Gloucester Ins. Co.* 15 Mass. 341; *Feise v. Aguilar*, 3 Taunt. 508.

(*w*) *Lewis v. Rucker*, 2 Burr. 1171; *Clark v. Ocean Ins. Co.* 16 Pick. 295; *Wolcott v. Eagle Ins. Co.* 4 Pick. 438.

¹ *Providence, &c. Co. v. Phoenix Ins. Co.* 89 N. Y. 559.

valued policies, it may be said, that a mere exaggeration of a real and an actual value, if it was not enormous and out of all proportion to the fact, would not avoid the valuation. (x) It is, however, certain that a valuation intended to cover an illegal interest, or to insure illegally in respect to the peril, (y) or made fraudulently, would be void; (z) and an excessive over-valuation might be evidence of fraud. (a)

* A valuation in one policy has no influence in determining the value of the same thing, as it is insured by other insurers. (b)

If an insured owns only a certain proportion or share of the property insured, a general valuation will be held to be a valuation of that share, (c) unless otherwise stated or implied in the policy. (d) But if the valuation be of goods, all of which are included in the valuation, and a part only is put on board and at risk, the valuation applies to that part only *pro rata*. (e)¹ The policy may provide for any of these cases; but, without such provision, a valuation of the whole subject-matter will be regarded as a valuation of the insured's whole interest in it, including the premium he pays. (f)

The valuation is often applied to a ship, and not unfrequently to the freight, or to the cargo; and sometimes to an insurance of profits under that name, although more frequently the profits are included in a valuation of the goods. (g) If freight be valued, the valuation is held as that of the freight of a full cargo; and where a part only is at risk, the valuation applies only *pro rata*. (h) If profits are valued, and the goods are lost, the English courts seem to require proof that there would have been

(x) *Alsop v. Commercial Ins. Co.* 1 Sumner, 473; *Robinson v. Manuf. Ins. Co.* 1 Met. 148; *Irving v. Manning*, 1 H. L. Cas. 304, 6 C. B. 419; *Phenix Ins. Co. v. M'Loon*, 100 Mass. 475.

(y) See *supra*.

(z) *Gardner v. Col. Ins. Co.* 2 Cranch, C. C. 550; *Ocean Ins. Co. v. Fields*, 2 Story, 77; *Hersey v. Merrimack Co. Ins. Co.* 7 Foster, 156; *Protection Ins. Co. v. Hall*, 15 B. Mon. 411; *Catron v. Tenn. Ins. Co.* 6 Humph. 185; *Haigh v. De La Cour*, 8 Camp. 319.

(a) See cases in note, *supra*.

(b) *Higginson v. Dall*, 13 Mass. 96.

(c) *Feise v. Aguilar*, 3 Taunt. 406.

(d) *Dumas v. Jones*, 4 Mass. 647; *Mayo v. Maine Ins. Co.* 12 Mass. 259; *Murray v. Columbian Ins. Co.* 11 Johns. 302.

(e) *Forbes v. Aspinall*, 13 East, 323; *Wolcott v. Eagle Ins. Co.* 4 Pick. 429; *Clark v. Ocean Ins. Co.* 16 Pick. 296; *Mutual Ins. Co. v. Munro*, 7 Gray, 249.

(f) *Brooks v. Oriental Ins. Co.* 7 Pick. 259; *Mayo v. Maine Ins. Co.* 12 Mass. 259; *Minturn v. Columbian Ins. Co.* 10 Johns. 75.

(g) See cases *supra*, p. * 362, note (g).

(h) *Forbes v. Aspinall*, 13 East, 323;

Wolcott v. Eagle Ins. Co. 4 Pick. 429.

¹ See *Denoon v. Home, &c. Ass. Co.* L. R. 7 C. P. 341.

some profit, had they arrived safely, and then the valuation comes in. (i) Our courts, however, hold, that the loss of goods carries necessarily a loss of profits, and the valuation of profits then takes effect, without any evidence that there would have been any profits. (j)

OF DOUBLE INSURANCE.

That is a double insurance, where, by different policies, the same interest of the same parties in the same subject-matter, is insured against the same risks; and it is over-insurance if the whole amount insured by all the policies exceeds the whole value of the property insured.

The marine policies of this country usually contain a clause which, however varied, has, and is intended to have, this effect; that if there be any prior insurance, the insurer shall be liable only for so much of the property as the prior insurance leaves uninsured. (k) Possibly the law might now so construe successive policies without this clause; but the clause was introduced because it seemed then to be law, that all the policies attached to all the property *pro rata*. And if either insurer paid the whole loss, or more than his proportion, he might recover from the other insurers the share they were bound to pay.

If policies are simultaneous, they certainly attach to the whole property all at once, and all alike; (l) and they are sometimes expressly declared to be simultaneous that they may so attach. But if this be not expressly declared, and the policies bear date on the same day, the court will inquire into fractions of the day, in order to ascertain which is prior and which is subsequent; and only when this cannot be ascertained would they be held to be simultaneous. (m)

Priority under this clause, means priority in effecting the insur-

(i) *Hodgeon v. Glover*, 6 East, 816.
(j) *Patapeco Ins. Co. v. Coulter*, 3 Pet. 222.

(k) *Whiting v. Independent Ins. Co.* 15 Md. 297; *Peters v. Delaware Ins. Co.* 5 S. & R. 473; *American Ins. Co. v. Griswold*, 14 Wend. 399.

(l) *Potter v. Mar. Ins. Co.* 2 Mason, 475; *Wiggin v. Suffolk Ins. Co.* 18 Pick. 145.

(m) Cases in preceding note, and *Brown v. Hartford Ins. Co.* 3 Day, 58.

ance, and not priority in the beginning of the risk; and for this purpose, the contract may be shown to have been made at another time than its written date. (n)

* If the first policy covers the whole property for a part * 372 of the time during which the second policy should attach, the first policy is suspended until the second policy ceases to attach, and then the first policy attaches. (o)

If many policies attach to property when they are made, and the property is afterwards diminished in value below the amount of them all, the weight of authority seems to be in favor of discharging the latest policy, then the one next before it, and so on as the property lessens. (p) But doubts have been expressed on good reasons, whether, if there be a diminution in the property after all the policies have attached, this diminution should not be distributed among them all, *pro rata*. (q)

If policies provide, as they sometimes do, that they shall be null and void, if any other insurance on the same property be made, unless notice thereof is given to the company, and the same is mentioned or indorsed upon the policy, (r) and such other insurance is made, and not notified, this clause will not take effect if this other insurance be void from any cause. (s)¹ And although there is not in general any double insurance, if the insurances are made by different parties on different interests, in the same subject-matter, (t) yet if two or more persons are insured jointly on the same property, and the policy provides that it shall be void in case of subsequent over-insurance, this clause takes effect if either of the insured makes this over-insurance. (u)

Policies sometimes contain special clauses and provisions in respect to the effect of double insurance or over-insurance. (v)

(n) *Lee v. Mass. Ins. Co.* 6 Mass. 208.

Gray, 52; *Stacey v. Franklin Ins. Co.* 2 *Watts & S.* 506. But see *Carpenter v. Providence Ins. Co.* 16 Pet. 495.

(o) *Kent v. Manuf. Ins. Co.* 18 Pick. 19. *Wend. 399.*

(t) *Godin v. Royal Exch. Ass. Co.* 1 *Burr. 489;* *Warder v. Horton*, 4 *Binn. 529.*

(p) *Am. Ins. Co. v. Griswold*, 14 *Wend. 399*, per *Tracy, Senator*; 2 *Phillips, Ins.* § 1261. See *2 Parsons, Mar. Law*, 98, where this question is discussed at length.

(u) *Mussey v. Atlas Ins. Co.* 4 *Kern.* 79. (v) As that the policy is void in case

(q) *Pendar v. Am. Mut. Ins. Co.* 12 *Cush. 489.*

of a subsequent insurance unless the insurers are notified of it with all reasonable diligence. *Mellen v. Hamilton Ins. Co.* 5 *Duer*, 101, 17 *N. Y.* 608. Or, unless such insurance is assented to by the underwriter. *Hale v. Mechanics Ins. Co.* 6 *Gray*, 169.

¹ *Lindley v. Union Ins. Co.* 65 *Mass.* 368; *Gee v. Cheshire Ins. Co.* 55 *N. H.* 65; *Fireman's Ins. Co. v. Holt*, 35 *Ohio St.* 189.

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• SECTION VII.

OF RE-INSURANCE.

Any person who is an insurer of property, and therefore liable for its loss, whether as the insurer under a policy, or as common carrier, or in any other way, has an interest in the policy for which he may cause himself to be insured.

This is sometimes done by insurers who wish to divide their risks, or for any reason to be rid of a risk. It is most commonly done by insurance companies who wish to wind up their affairs, and for this purpose to cast off all their responsibilities. (w)

Re-insurers may make any defence in a suit on the policy, which the original insurers could have made in such a suit; (x)¹ and it has been held, that if an insurer defends against an action on the policy brought by the original insured, he may recover from the re-insurer, not only the loss he has to pay, but the costs and expenses of his defence, unless the re-insurer neither expressly nor impliedly authorized the defence, or unless he can show that there was no ground for it whatever. (y)²

SECTION VIII.

OF THE RISKS INSURED AGAINST.

A. — *General Rules.*

The marine policies used in the United States, enumerate the perils against which they insure. These are usually perils

(w) Reed *v.* Cole, 3 Burr. 1512; Union Ins. Co. *v.* Commercial Ins. Co. 2 Curtis, C. C. 524, 19 How. 818; Mercantile Ins. Co. *v.* State Ins. Co. 25 Barb. 819; New York Bowery Ins. Co. *v.* New York F. Ins. Co. 17 Wend. 359.

(x) New York Ins. Co. *v.* Protection Ins. Co. 1 Story, 458; Yonkers, &c. Ins. Co. *v.* Hoffman, &c. Ins. Co. 6 Rob. 816. (y) New York Ins. Co. *v.* Protection Ins. Co. 1 Story, 458; Hastie *v.* De Peyster, 8 Caines, 190.

¹ That if the re-insurer becomes liable *pro rata* the contract is one of indemnity, see Blackstone *v.* Alemania Ins. Co. 56 N. Y. 104; Illinois Ins. Co. *v.* Andes Ins. Co. 67 Ill. 342; Consolidated Ins. Co. *v.* Cashaw, 41 Md. 59; Cashaw *v.* North Western Ins. Co. 5 Bissell, 476. See also Glen *v.* Hope Ins. Co. 56 N. Y. 379.

² Strong *v.* Phoenix Ins. Co. 62 Mo. 289. A policy of re-insurance need not state that the interest insured is an insurer's interest. Mackenzie *v.* Whitworth, 1 Ex. D. 36.

* of the sea, fire, barratry, theft, robbery, piracy, capture, * 374 arrests, and detentions. Before considering them specifically, some remarks should be made of the general responsibility of insurers, and the limits to this responsibility.

The insured has no claim for any loss directly caused by his own personal wrong-doing; for, as Pothier expresses it, "I cannot validly agree with any one that he should charge himself with the faults that I shall commit." (z) Some question may arise when the wrong-doing is that of the agents of the insured. It is quite certain that insurers would not be, on general principles, liable for a loss which was caused by the wrong-doing, or by the mistake, incapacity, or negligence of the master or crew employed by the insured. (a)¹ It is, however, equally certain, that many if not most maritime losses are caused, in a greater or less degree, by the ignorance or carelessness of the master or crew, and that the insurers are held in such cases. It seems now to be generally considered, in England and in this country, that where the loss is caused by a peril insured against, the negligence of the master or crew which exposes the property to this peril, was only the remote cause of the loss, and therefore does not destroy the liability of the insurers. (aa) But questions on this subject are difficult, and the cases are very numerous and irreconcilable. (b) Undoubtedly the general principle, that a principal is answer-

(z) See *Emerigon*, c. xii. s. 11, § 1, *Meredith* ed. 290; *Skidmore v. Desdoity*, 2 Johns. Cas. 77; *Goix v. Knox*, 1 id. 337; *Chandler v. Worcester Ins. Co.* 3 Cush. 328. But see *Thompson v. Hopper*, 6 *Ellis & B.* 937, *Ellis, B. & E.* 1028.

(a) *Rosetto v. Gurney*, 11 C. B. 176; *Himley v. Stewart*, 1 Brev. 209; *Vos v. United Ins. Co.* 2 Johns. Cas. 187; *Goix v. Low*, 1 Johns. Cas. 341; *Andrews v. Essex Ins. Co.* 3 Mason, 6.

(aa) *Phoenix Ins. Co. v. Cochran*, 51 *Penn.* 143.

(b) The earlier cases leave the question in some doubt, but the principle seems well settled by the later authorities, that if the loss is caused by a peril insured against, the underwriters are liable, although the remote cause is the negligence of the master and crew, whether barratry be insured against or not. *Walker v. Maitland*, 6 B. & Ald. 171; *Shore v. Ben-*

tall, 7 B. & C. 798, n.; *Dixon v. Sadler*, 5 M. & W. 415, 8 M. & W. 895; *Redman v. Wilson*, 14 M. & W. 476; *Waters v. Merchants Ins. Co.* 11 Pet. 213; *Williams v. Suffolk Ins. Co.* 8 Sumner, 276; *Nelson v. Suffolk Ins. Co.* 8 Cush. 496; *Perrin v. Protection Ins. Co.* 11 Ohio, 147. The difficulty arises in determining which is the proximate cause, and the case of *Waters v. Merchants Ins. Co.* *supra*, shows the difficulty of rightly determining this question. In that case two questions were raised, first, whether the underwriters were liable for a loss occasioned by the barratry of the master and crew; and, second, whether they were liable for a loss occasioned by the negligence of the same persons. There seems to be no reason why the same rule should not apply to both classes of cases, but the court held that it did not.

¹ A master of a vessel who takes passengers on board without a certificate, thereby incurring a statutory penalty, does not make the voyage illegal, so as to vitiate a policy effected by her innocent owner. *Dudgeon v. Pembroke*, L. R. 9 Q. B. 581.

* 875 able * for the acts of his agent, or a master for the acts of his servant, only where the acts are done in the actual exercise of the agency or service, would have some application to contracts of insurance. Therefore the owner would not be responsible for any personal crime or wrong-doing committed by an agent outside of his agency, nor lose his claim on the insurers for a loss arising from it.

It is another universal rule that insurers are not responsible for losses which are not caused by extraordinary risks; for a vessel is not seaworthy which cannot safely encounter ordinary maritime risks. (c) So also insurers are not liable for ordinary leakage or breakage, (d) or wear and tear. (e)

It is another rule, that insurers are not liable for property destroyed by the effect of its own inherent deficiencies or tendencies, (f) unless these tendencies are made active and destructive by a peril insured against. Thus, if hemp, which was dry when laden, be afterwards wet by a peril of the sea, and by reason of such wet ferments, or rots, or burns, the insurers would be liable, not only for the hemp, (g) but for the ship or cargo, if destroyed by the burning hemp.

It is another rule, that insurers are not liable for a loss caused by a violation of the laws of the country where the insurance was made, even if they expressly agree to be thus liable; because such a contract would be void for illegality. (h) Nor are they liable for violation of the laws of a foreign country respecting revenue and trade, unless there be evidence from the policy itself, or from notice to them, or knowledge by them, that it was the intention of the insured to incur this peril. Then they are liable, because they can lawfully make such a contract, if they choose to do so. (i) Policies often contain a warranty against prohibited trade. (j)

* 876 * If there be an actual violation of a foreign law without the knowledge or the fault, either of the owner or his

(c) Crofts v. Marshall, 7 Car. & P. 597; Barnewell v. Church, 1 Caines, 284; Coles v. Mar. Ins. Co. 8 Wash. C. C. 159.

(h) See Gray v. Sims, 3 Wash. C. C. 276; Farmer v. Legg, 7 T. R. 186.

(d) Benecke, Phil. ed. 448.

(i) Pollock v. Babcock, 6 Mass. 234; Lever v. Fletcher, Park, Ins. 313; Andrews v. Essex Ins. Co. 3 Mason, 18.

(e) Fisk v. Commercial Ins. Co. 18 La. 77; Coles v. Marine Ins. Co. 8 Wash. C. C. 159; Dupeyre v. Western Ins. Co. 2 Rob. La. 457.

(j) Andrews v. Essex Ins. Co. 3 Ma-

(f) Emerigon, c. 12, § 9, Meredith ed. 811.

son, 17; Richardson v. Maine Ins. Co. 6 Mass. 102; Parker v. Jones, 18 id. 173;

(g) Boyd v. Dubois, 8 Camp. 188.

Church v. Hubbard, 2 Cranch, 232; Hig-

ginson v. Pomeroy, 11 Mass. 104.

agents, the insurers may still be responsible. As if the master and crew did not know, and had no sufficient means of knowing, that a blockade existed, or that laws or orders had been made, of which their ignorant violation had subjected the ship to seizure and condemnation. (k)

The general clause, "all other perils" is added in our American policies, but it is restricted in its extent and operation to perils of a like kind with those which are enumerated. (l)¹ If goods are damaged by actual contact with sea-water, the underwriters are certainly liable; (m) and we think that they are equally liable, if a part is damaged by sea-water, and the vapor and gases arising from it injure another portion, (n)² unless the policy contains the clause that the underwriters shall be exempt from loss of this kind. (o) If a vessel is stranded and injury is done thereby, this is a loss within the policy, unless it happens in the usual course of navigation, as where a vessel is destined to a tide harbor, where she expects to take the ground when the tide ebbs. (p) Here as well as elsewhere the rule of *causa proxima non remota* comes in and causes difficulty. Thus, an English vessel bound to a Confederate port in the late war, was insured, but warranted against "all consequences from hostilities." When she reached the coast, the lights had been extinguished by the Confederate authorities, and the ship stranded on the coast and

(l) See *Wood v. New England Ins. Co.* 14 Mass. 31; *Archibald v. Mercantile Ins. Co.* 8 Pick. 70; *Parker v. Jones*, 18 Mass. 173.

(l) *Cullen v. Butler*, 5 M. & S. 461; *Phillips v. Barber*, 5 B. & Ald. 161; *Perrin v. Protection Ins. Co.* 11 Ohio, 147; *Ellery v. New England Ins. Co.* 8 Pick. 14; *Devaux v. J'Ans*, 5 Bing. N. C. 519; *Butler v. Wildman*, 8 B. & Ald. 396; *Jones v. Nicholson*, 10 Exch. 28; *Moses v. Sun Ins. Co.* 1 Duer, 159; *Caldwell v. St. Louis Ins. Co.* 1 La. An. 86; *Perkins v. New England Ins. Co.* 12 Mass. 214; *Fritchette v. State Ins. Co.* 3 Bowe. 190; *De Peau v. Russell*, 1 Brev. 441; *Goix v. Knox*, 1 Johns. 837; *Skidmore v. Desodt*, 2 Johns. Cas. 77; *Marcy v. Sun Ins. Co.* 11 La. An. 748.

(m) *Baker v. Manuf. Ins. Co.* 12 Gray, 608; 14 Law Reporter, 208; *Cogswell v. Ocean Ins. Co.* 18 La. 84.

(n) *Montoya v. London Ass. Co.* 6 Exch. 451, 4 Eng. L. & Eq. 500; *Rankin v. Am. Ins. Co.* 1 Hall, 619. But see *contra*, *Baker v. Manuf. Ins. Co.* 12 Gray, 608; 14 Law Rep. 208. An examination of the papers in this case makes it questionable whether the court decided this point.

(o) *Leftwitch v. St. Louis Ins. Co.* 5 La. An. 706.

(p) *Magnus v. Buttemer*, 11 C. B. 876; *Potter v. Suffolk Ins. Co.* 2 Sumner, 197. And even then if the injury is caused by unusual sea, or whether the underwriters are liable. *Fletcher v. Inglis*, 2 B. & Ald. 816.

¹ A sudden explosion of a steamer's boiler, in ordinary weather, under ordinary pressure, is a peril insured against by a marine policy in the ordinary form. *West India, &c. Co. v. Home, &c. Ins. Co.* 6 Q. B. D. 51.

² But not for a loss of reputation to one part, whereby a less price is obtained, caused by a damage by sea-water to another part, giving rise to a suspicion in the trade that all was injured. *Cator v. Great Western Ins. Co.* L. R. 8 C. P. 552. See *Cory v. Boylston Ins. Co.* 107 Mass. 140.

was lost. Nevertheless the insurers were held, on the ground that the stranding was the proximate cause of the loss. (*pp*)¹

If a ship is not heard from, it will be presumed after a reasonable time that she has perished by a peril of the seas. (*q*)

Fire is generally mentioned in our printed policies among the risks insured against. If stricken out, as is sometimes done; or, we think, if only omitted, it is not a peril within the policy. (*r*) If the ship is insured against fire, and is burned purposely by the master, as the only means of saving her from capture by a public enemy, the insurers are responsible. It would be his duty to the State to burn her under such circumstances, nor are the insurers damaged thereby if they insure against capture. (*s*) If they do not insure against capture, it may not be certain that the insurers would be responsible.

C.—*Of Collision.*

Injury by collision has given rise to a peculiar question in the law of insurance. We have seen in the chapter on the Law of Shipping, that if a vessel colliding with another is in fault, she is obliged to pay for the damage done to the other vessel; and that where the two colliding are equally and wholly without fault, the loss rests where it falls. But that exceptional laws in some ports divide the loss between the vessels. If a vessel thus innocent is but slightly injured, but is obliged to pay a heavy sum by reason of this rule of division, are the insurers liable for the amount thus

(*pp*) *Ionides v. Universal, &c. Ins. Co.* v. Reed, 6 B. & C. 19; *Green v. Brown*, 2 14 C. B. (n. s.) 250.

(*q*) *Gordon v. Bowne*, 2 Johns. 150; (*r*) See *ante*, p. *307. *Brown v. Neilson*, 1 Caines, 525; *Patterson v. Black*, 2 Marsh. Ins. 781; *Koster* (*s*) *Gordon v. Rimmington*, 1 Camp. 123; *Emerigon*, Ins. Meredith ed. 850.

¹ In *Dudgeon v. Pembroke*, 2 App. Cas. 284, it was held, that if a vessel is lost by reason of unseaworthiness during a storm, the proximate cause of the loss was the perils of the sea. But in *Inman Steamship Co. v. Bischoff*, 7 App. Cas. 670, where an ordinary marine policy of insurance was effected by a shipowner "on freight outstanding," and, the ship becoming inefficient through perils of the sea, the charterers refused to pay freight thereafter, under a provision allowing them so to act in such case, it was held, that the underwriters were not liable for the pecuniary loss, as the perils of the sea were not the proximate cause of such loss.

paid, as for a loss by a peril of the sea? It has been held in this country, that they were so liable; (*t*) but English adjudication, (*u*) and recent decisions in this country, would lead to the conclusion that the insurers are only liable for the damage done to the vessel insured. (*v*)

D.—*Of Theft or Robbery.*

By the usual phraseology of our policies, insurers are liable for losses arising from all acts which amount to piracy or robbery, (*w*) * whether insurance against theft would make * 378 the insurers liable for a loss by larceny may not be certain; but by the weight of American authority they would be liable. (*x*) But they would not be liable for loss by theft or robbery without violence from others than the crew, if the phrase "assailing thieves" is used, and that is now not uncommon. (*y*)

E.—*Of Barratry.*

As to the meaning of this word, or of what constitutes this offence, the cases are in conflict. On the whole, however, we are satisfied that three essentials are necessary to constitute barratry. It must be a wrongful act wrongfully intended; (*z*) it must be done by the master or officers or crew; and it must be done against the owner. (*a*)

(*t*) *Hale v. Washington Ins. Co.* 2 Story, 176; *Peters v. Warren Ins. Co.* 3 Sumner, 389, 14 Pet. 99; *Nelson v. Suffolk Ins. Co.* 8 C. 477; *Matthews v. Howard Ins. Co.* 18 Barb. 234; *Sherwood v. Gen. Mut. Ins. Co.* 1 Blatchf. C. C. 251.

(*u*) *De Vaux v. Salvador*, 4 A. & E. 420. See *Thompson v. Reynolds*, 7 Ellis & B. 172.

(*v*) *Matthews v. Howard Ins. Co.* 1 Kern. 9; *Gen. Mut. Ins. Co. v. Sherwood*, 14 How. 351.

(*w*) See *Naylor v. Palmer*, 8 Exch. 739; *Palmer v. Naylor*, 10 Exch. 382; *Nesbitt v. Lushington*, 4 T. R. 783; *Dean v. Hornby*, 3 Ellis & B. 180; *McCargo v. New Orleans Ins. Co.* 10 Rob. La. 202.

(*x*) *Atlantic Ins. Co. v. Storrow*, 5 Paige, 286; *Am. Ins. Co. v. Bryan*, 1 Hill, 25, 26 Wend. 568. See also *De Rothschild v. Royal Mail S. P. Co.* 7 Exch.

734. Kent, 3 Comm. 308, states the law to be, that an insurer is not liable for a theft by a person on board the vessel and belonging to it; and he has been followed by *Marshall v. Nashville Ins. Co.* 1 Humph. 99.

(*y*) The tortious conversion and sale of insured property by a United States consul at a foreign port, under color of legal proceedings and claim of right, are not a loss within this phrase. *Paddock v. Commercial Ins. Co.* 2 Allen, 93.

(*z*) See *post*, n. (*b*).

(*a*) In many cases barratry is defined to be a fraud, cheat, or trick on the part of the captain against the interest of the owners. See *Knight v. Cambridge*, 1 Stra. 581; *Phyn v. Royal Exch. Ass. Co.* 7 T. R. 605; *Lockyer v. Offley*, 1 T. R. 252; *Wilcocke v. Union Ins. Co.* 2 Binn. 574; *Stone v. National Ins. Co.* 19 Pick.

If done by the command or connivance of the owner, (b) or even *quasi* owner, who has the vessel for the time under his control and government, (c) or by a master who is sole owner of the ship, (d) or has an equitable title to her, it is not barratry. (e)

Nor is it so, if done by the master in any other capacity, * 379 as that * of supercargo, consignee, or factor. (f) But an illegal act done for the intended benefit of the master, without his desire or assent, may be barratry, because they who do it have no right to presume his assent to a violation of law. (g)

Policies frequently provide that the insurers do not insure against barratry, if the insured be owner of the ship. (h)¹. The reason of the provision is this. The master is appointed and employed by the owner and is his agent; and the crew are appointed by him and are his servants. An insurance against barratry, therefore, where the insured is owner of the ship, would insure him against the acts of his own agent or servants. Such a provision, therefore, limits the insurance against barratry, to a loss or injury of a cargo which is not owned by the owner of the ship. (i)

The policy of the law and obvious justice demand, that the owner and his master shall use care and diligence to prevent any misconduct of the crew; and if due care was wanting and might have prevented that misconduct, insurers are not liable for a loss caused by it. (j)

34. In Patapsco Ins. Co. v. Coulter, 3 Pet. 222, many of these cases were examined by Mr. Justice Johnson, and the points on which they turned were shown not to warrant the language used. The learned judge seemed to prefer Emerigon's definition, "acting without due fidelity to the owners."

(b) Nutt v. Bourdieu, 1 T. R. 323; Thurston v. Col. Ins. Co. 8 Caines, 89; Ward v. Wood, 13 Mass. 539; Everth v. Hannum, 6 Taunt. 375.

(c) Pipon v. Cope, 1 Camp. 434.

(d) Taggard v. Loring, 16 Mass. 336; Barry v. La. Ins. Co. 11 Mart. La. 630; Marcardier v. Chesapeake Ins. Co. 8 Cranch, 39. But it seems, that a captain who is a part-owner may commit barratry against his other part-owners, and also

against a charterer. Jones v. Nicholson, 10 Exch. 28; Strong v. Martin, 1 Duni. Bell & M. 1245. But see *contra*, Wilson v. Gen. Ins. Co. 12 Cush. 360.

(e) Barry v. La. Ins. Co. 11 Mart. La. 630.

(f) Emerigon, c. 12, s. 3, Meredith ed. 296. But if the act is done in his capacity of master, it is barratrous, although he may fill other offices. Kendrick v. Delafield, 2 Caines, 67; Cook v. Comm. Ins. Co. 11 Johns. 40; Earle v. Rowcroft, 8 East, 140.

(g) Earle v. Rowcroft, 8 East, 126.

(h) Paradise v. Sun Ins. Co. 6 La. An. 596.

(i) Brown v. Union Ins. Co. 5 Day, 1.

(j) Pipon v. Cope, 1 Camp. 434. See Elton v. Brogden, 2 Stra. 1284.

¹ That the offence of barratry may properly be insured against, see Atkinson v. Great Western Ins. Co. 65 N. Y. 533, in which the authorities upon the question as to what constitutes barratry are collated and discussed.

F.—*Of Capture.*

The usual phrase is "against all captures at sea, or arrests, restraints or detentions of all kings, princes, and people."(k)¹ The word "illegal" or "unlawful" is sometimes inserted before captures. "Capture" is distinguished from "arrest" or "detention;" capture being a seizure with intent to keep, (?) while arrest or detention is a taking with intent to return what is taken, (m) as by an embargo, (n) or blockade, (o) or a * 380 stopping for search. (p)² "People" means the supreme power of a country, whatever that may be. (q)

If the legality of the seizure determines the liability of the insurers, this legality must be determined by the government of the country to which the vessel belongs, because it may recognize or not recognize the right of the seizing power to make the seizure. (r)

G.—*Of General Average.*

What constitutes a claim of general average has been fully considered in the chapter on contracts of shipping. But this claim may be placed among the risks against which insurance is made, because if the property insured be itself uninjured, but owes its safety to the sacrifice of other property for which it makes contribution by way of general average, this contribution is unquestionably a loss within the policy.

So if insurers pay for a loss on the sacrificed property, they

(k) *Levy v. Merrill*, 4 Greenl. 180; *Lee v. Boardman*, 3 Mass. 238; *Rhinelander v. Ins. Co. of Penn.* 4 Cranch, 29; *Powell v. Hyde*, 5 Ellis & B. 607; *Olivera v. Union Ins. Co.* 3 Wheat. 188; *Rotch v. Edie*, 6 T. R. 413; *Odlin v. Ins. Co. of Penn.* 2 Wash. C. C. 312; *Ogden v. N. Y. Ins. Co.* 10 Johns. 177.

(l) *Emerigon, Meredith* ed. 420; *Powell v. Hyde*, 5 Ellis & B. 607; *Black v. Marine Ins. Co.* 11 Johns. 287.

(m) See *Olivera v. Union Ins. Co.* 3 Wheat. 188; *Green v. Young*, 2 Salk.

444; *Mumford v. Phoenix Ins. Co.* 7 Johns. 449.

(n) *Rotch v. Edie*, 6 T. R. 418.

(o) *Olivera v. Union Ins. Co.* 3 Wheat. 188; *Wilson v. United Ins. Co.* 14 Johns. 227; *Richardson v. Maine Ins. Co.* 6 Mass. 102.

(p) 1 *Magens*, 67.

(q) *Simpson v. Charleston Ins. Co. Dudley, S. C.* 280; *Nesbitt v. Lushington*, 4 T. R. 783.

(r) *Williams v. Suffolk Ins. Co.* 8 Sumner, 270, 18 Pet. 415.

¹ If a policy excepts capture and seizure, and the vessel is seized in smuggling goods into a foreign port because of the master's barratry, the loss is due to the seizure, and not to the barratry, and the insurer is not liable for expenses incurred in recovering the vessel. *Cory v. Burr*, 8 Q. B. D. 313; 9 Q. B. D. 463.

² Or a siege. *Rodocanachi v. Elliott*, L. R. 8 C. P. 649; 9 C. P. 518.

acquire by this payment all the right which the owner of the property sacrificed has to claim contribution. Usually, in practice, the insured whose property is sacrificed, claims and receives the contribution to which he is entitled, and then claims of the insurers only the balance. But it seems now to be settled, that the insured may claim of the insurers his whole loss by sacrifice, and transfer to them his claim for contribution; and the right to do this might be important to the insured, if the contributors were insolvent or inaccessible. (s)

Insurers are liable for a general average, when they insure against that peril or loss to avert which the sacrifice was made;

for a loss by contribution is regarded as a loss by that
 * 381 very * peril. Thus, if a cargo be insured with the exception of war risks, and the ship and cargo are captured and liberated by expense or payment, the cargo pays its share; but the insurers are not liable, because the loss thus sustained is a loss by the excepted war risk. So it would be if the contribution were for a loss caused by fire, or any other risk, and this were an excepted risk.

In the section upon total loss, we shall see, that in this country a loss of more than fifty per cent. of value makes a constructive total loss. If the insured loses by a sacrifice more than fifty per cent., and has a claim for contribution which would reduce his loss below fifty per cent., he may still make this a constructive total loss, transferring to the insurers by abandonment his claim for contribution. (t)

These rules would not apply to an insured who owned the property lost, and also other property, which, because saved, must contribute to himself for the loss, for he must first allow for this contribution from himself, and claim of the insured only for the balance. (u)

H.—*Of Salvage.*

Of the general law of maritime salvage we have fully treated in the Law of Shipping. It does not seem necessary to add more in

(s) *Maggrath v. Church*, 1 Caines, 871. See *contra*, *Lapseley v. Pleasants*, 196; *Watson v. Marine Ins. Co.* 7 Johns. 4 Binn. 502.

62; *Lord v. Neptune Ins. Co.* 10 Gray, 126; *Amory v. Jones*, 6 Mass. 318.

(t) *Moses v. Col. Ins. Co.* 6 Johns. 219; *Forbes v. Manuf. Ins. Co.* 1 Gray,

4 Binn. 502. (u) *Potter v. Providence Ins. Co.* 4 Mason, 298; *Jumel v. Marine Ins. Co.* 7 Johns. 412.

this place, than that salvage claims are among the risks which insurers cover by insurance. For if property which is wholly uninjured, was liable to destruction by a maritime peril, and was saved by salvors who are paid for their service out of the proceeds, the insurers are liable to the owners for such payment.

• SECTION IX.

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OF TOTAL LOSS.

A.—Of Actual Total Loss.

The property insured may be totally lost, in fact. This happens only when a ship is never heard from, or is wholly destroyed by fire, or submerged beneath the water. Even in these cases, it is not uncommon for parts which may have an actual value, to be cast on shore or found floating. Such a case, however, would be called a case of actual total loss, with salvage. (v)

If a vessel be abandoned by her officers and crew on the ocean, without sufficient cause, which, in such case the assured must prove, it might be a total loss to him, but the insurers would not be responsible for it. But if a vessel was so wrecked or injured that it could not have been brought into port, the insurers are liable as for a total loss, although she continued to float, and the master and crew abandoned her without any immediate danger or necessity. (w)

B.—Of Constructive Total Loss, and of Abandonment.

Where the vessel or cargo is lost, but a valuable part remains in the owner's hands, or comes to him afterwards, either by salvors, or by a restoration of seized property, this cannot be called

(v) See *Roux v. Salvador*, 3 Bing. N. C. 266; *Hugg v. Augusta Ins. Co.* 7 How. 605; *Murray v. Hatch*, 6 Mass. 466; *Tudor v. New England Ins. Co.* 12 Cush. 554. The word salvage has been defined to mean "a part or remnant of the subject insured which survives a total loss."

The insurers are not, therefore, entitled to property as salvage, which was severed from the voyage by their consent, before the loss took place. *Mutual Ins. Co. v. Munro*, 7 Gray, 246.

(w) *Walker v. Protection Ins. Co.* 29 Maine, 317.

an actual total loss. Formerly, it was the practice to adjust it as a partial loss, the insured giving the insurers credit for whatever thus came into their possession. It was found, however, to * 383 be more convenient, and on the whole more just to * treat it as a total loss; and to consider all the property recovered as belonging to the insurers. (x) This is now the usual practice. Such a loss is called a constructive total loss, or a technical total loss.

The property saved does not, however, belong to the insurers, unless they pay for a total loss, or unless the owner transferred it to them. (y) This transfer the owner makes, by what is called in insurance law an Abandonment. And when he has a right to make this abandonment, and makes it at the right time and in the right way, he thereby changes an actual partial loss into a constructive total loss.

No one topic of the law of insurance has been more fertile of difficult questions, than the law of abandonment. These questions are, in general, When has the insured the right of abandonment? In what way must he exercise this right? What is the effect of abandonment? and What is the effect of withholding abandonment?

The policy sometimes provides that there shall be no abandonment. This would be intended, undoubtedly, to prevent a partial loss from being made a constructive total loss, and would probably have the same effect as if the policy expressly provided that there should be no constructive total loss. (z)¹

Much more frequently the phrase is "against total loss only." This, or any equivalent language, would, of course, exclude all liability for a partial loss. The question still remains, however, whether the phrase "total loss," thus used, means only actual total loss, or includes constructive total loss. We are disposed to think that the better reasons and the weight of authority would

(x) There is a difference of opinion as to the expediency of extending the right of abandonment. Some authorities are in favor of restraining the right. See *Mitchell v. Edie*, 1 T. R. 615; *Deblois v. Ocean Ins. Co.* 16 Pick. 303; *Bainbridge v. Neilson*, 10 East, 343. But see the remarks of *Story*, J., in *Peele v. Merchants Ins. Co.* 3 Mason, 38.

(y) The insured may always withhold an abandonment if he chooses, and have his loss adjusted as a partial loss merely. *Smith v. Manuf. Ins. Co.* 7 Met. 451; *Hamilton v. Mendes*, 2 Burr. 1211.

(z) See *Barney v. Maryland Ins. Co.* 5 Harris & J. 139.

¹ That the power of abandonment will not be taken from the insured without express words, was declared in *Forwood v. No. Wales Ins. Co.* 9 Q. B. D. 732.

exclude from such a policy a constructive total loss. It has not, however, been always so held. (a)

* As the purpose and effect of abandonment are to make * 384 a legal transfer to the insurers of the property abandoned, no person can make this abandonment if he never had the power to make this transfer, or if at the time of abandonment he had lost this power by his own voluntary act, or by a peril not insured against. (b) This exception does not apply where the ship is lost by a sale from necessity. (c) And if a wrecked ship be abandoned, and after the abandonment the master sells the ship, the sale will be considered as a sale of the property of the underwriters, the master then being and acting as their agent from necessity. (d)

It is always best, and is always usual, when a claim is made for a total loss, to make an abandonment. It may not be necessary, however, to make one where a wrecked ship ceases to be a ship, and becomes, to use a phrase of Lord Tenterden, "a mere congeries of planks;" (e) or if the ship has not been heard from for a sufficiently long time. (f)¹

Where the property insured has passed from the persons insured, by a sale made necessary by a peril insured against, it may

(a) Until quite recently the authorities have almost uniformly held that the words "total loss only," or "partial loss excepted," or any similar phrase, excluded a constructive total loss. See *Cocking v. Fraser, Park, Ins.* 151; *Thompson v. Royal Exch. Ass. Co.* 16 East, 214; *Navone v. Haddon*, 9 C. B. 30; *Hugg v. Augusta Ins. Co.* 7 How. 595; *Morean v. U. S. Ins. Co.* 1 Wheat. 219; *Biays v. Chesapeake Ins. Co.* 7 Cranch, 415; *Saltus v. Ocean Ins. Co.* 14 Johns. 145; *Humphreys v. Union Ins. Co.* 3 Mason, 428; *Depeyster v. Sun Ins. Co.* 17 Barb. 308, 19 N. Y. 272; *Williams v. Kennebec Ins. Co.* 31 Me. 461; *Robinson v. Commonwealth Ins. Co.* 3 Sumner, 220; *Murray v. Hatch*, 6 Mass. 465; *Buchanan v. Ocean Ins. Co.* 6 Cowen, 331. In *Heebner v. Eagle Ins. Co.* 10 Gray, 181, where a vessel was insured against "total loss only," the court held, that the insured could recover for a constructive total loss. And in *Kettell v.*

Alliance Ins. Co. 10 Gray, 144, where insurance was effected on tin plates, "partial loss excepted," the same rule was applied. We consider these cases as directly opposed to the current of authority in this country. For a full discussion of this question, see 2 Parsons, *Mar. Law*, 338, note 2.

(b) *Higginson v. Dall*, 18 Mass. 96; *Rice v. Homer*, 12 Mass. 230; *Gordon v. Mass. Ins. Co.* 2 Pick. 249; *Smith v. Columbia Ins. Co.* 17 Penn. State, 258; *Bidwell v. North Western Ins. Co.* 18 N. Y. 179; *Williams v. Smith*, 2 Caines, 13; *Allen v. Commercial Ins. Co.* 1 Gray, 154.

(c) See post, note (g).

(d) *Center v. American Ins. Co.* 7 Cowen, 564; *Ruckman v. Merchants Ins. Co.* 5 Duer, 869; *Bryant v. Commonwealth Ins. Co.* 6 Pick. 191.

(e) *Cambridge v. Anderton*, 2 B. & C. 601.

(f) *Gordon v. Bowne*, 2 Johns. 150.

¹ It was held that no abandonment is necessary, and no notice of abandonment is required, where there is nothing to abandon which can pass to, or be of value to, the underwriter, in *Rankin v. Potter*, L. R. 6 H. L. 83, a case of homeward freight, where the ship was so injured on the outward voyage that the shipowner abandoned to the underwriter on the ship.

be that no abandonment is necessary to found a claim for a total loss. But upon the question whether a sale will, in any case, take the place of and have the effect of an abandonment, and

* 385 thus found a claim for a total loss which would not have existed had there been no sale, the cases are numerous * and quite irreconcilable. (g) If the assured abandon the salvage or proceeds, they belong at once to the insurers, and are afterwards at their risk; if no abandonment is made, the salvage remains at the risk of the insured, and he must account for it. (h)

The amount of the injury must determine, whether a partial loss may be made by abandonment a constructive total loss. At first it was held, that this could be done only when the ship had received so much injury, that it could not be recovered or repaired, without costing more than she would then be worth. And recent decisions would indicate that this is even now the rule in England. (i)

It is not so, however, in this country. A rule, first introduced on the continent of Europe, has become very generally established here. This rule is, that if more than half the property insured be lost by a peril insured against, or if it be thereby damaged to more than half its value, the loss may be made a constructive total loss by abandonment. (j) The rule applies in this country to ship and goods, but not, we think, to freight. Nor does it prevent a claim for total loss in cases of irreparable damage, though of less amount; for where the repairs are impossible, from the

(g) See *Roux v. Salvador*, 3 Bing. N. C. 266; *Cambridge v. Anderton*, 2 B. & C. 691; *Fleming v. Smith*, 1 H. L. Cas. 518; *Gardner v. Salvador*, 1 Moody & R. 116; *Knight v. Faith*, 15 Q. B. 649; *Irving v. Manning*, 1 H. L. Cas. 287, 6 C. B. 391. In this country it is held in several cases, that there need be no abandonment in case of a sale by necessity. *Fuller v. Kennebec Ins. Co.* 31 Maine, 825; *Prince v. Ocean Ins. Co.* 40 Maine, 481; *Mutual Safety Ins. Co. v. Cohen*, 8 Gill, 459; *Gordon v. Mass. Ins. Co.* 2 Pick. 249. See *dicta*, also, in *Orrick v. Commonwealth Ins. Co.* 21 Pick. 464; *Patapeco Ins. Co. v. Southgate*, 5 Pet. 623; *Ward v. Peck*, 18 How. 269. If the expense of repairs would not exceed the value of the vessel when repaired, a sale without an abandonment has been held insufficient. *Smith v. Manuf. Ins. Co.* 7 Met. 448. Where the expense would exceed the value when repaired, and a

sale is made, an abandonment has been held not necessary. *Bullard v. Roger Williams Ins. Co.* 1 Curtis, C. C. 148. See *contra*, *Am. Ins. Co. v. Francia*, 9 Barr, 390. And see *Greely v. Tremont Ins. Co.* 9 Cush. 415.

(h) *Smith v. Manuf. Ins. Co.* 7 Met. 448; *Roux v. Salvador*, 3 Bing. N. C. 266.

(i) *Moss v. Smith*, 9 C. B. 94; *Fleming v. Smith*, 1 H. L. Cas. 518; *Irving v. Manning*, 1 H. L. Cas. 287, 304, 6 C. B. 891.

(j) *Depeyster v. Col. Ins. Co.* 2 Caines, 85; *Allen v. Commercial Ins. Co.* 1 Gray, 154; *Sauvage v. Sun Mut. Ins. Co.* 2 Sandf. 482; *Wood v. Lincoln Ins. Co.* 6 Mass. 482; *Coolidge v. Gloucester Ins. Co.* 16 Mass. 343; *Peele v. Merchants Ins. Co.* 3 Mason, 74; *Am. Ins. Co. v. Ogden*, 20 Wend. 300. The cost must exceed fifty per cent. *Fiedler v. New York Ins. Co.* 6 Duer, 282.

place or other circumstances, and the ship is not at a port of destination, the master may sell the ship * from necessity. (k) But it may be doubted, if a ship can be abandoned which has arrived at a port of destination, although repairs made necessary by perils insured against would cost more than half her value. (l)

In the section on partial loss, we shall consider whether the rule of deduction "one third off, new for old," can be applied to determine the right of abandonment.

Upon the question, whether the valuation in a valued policy is to be regarded in estimating a fifty per cent. loss, the authorities are not only irreconcilable but balanced. We think the better reasons would exclude this valuation, and require that the estimate be made upon the actual value. (m)

The premium should not be included, (n) nor the wages and provisions of a crew during detention, or while they are employed in making the repairs, (o) nor the fees of surveyors, (p) or other similar expenses. But salvage payment, (q) or general average contribution, would be included. (r) * The insured has * 387

(k) *Ruckman v. Merchants Ins. Co.* 5 Duer, 342; *Allen v. Commercial Ins. Co.* 1 Gray, 158; *Williams v. Smith*, 2 Caines, 18. If the vessel is at a port of destination this rule does not apply, because the owner is obliged to furnish funds at such a place. *Am. Ins. Co. v. Ogden*, 20 Wend. 287; *Allen v. Commercial Ins. Co.* 1 Gray, 154.

(l) *Pezant v. National Ins. Co.* 15 Wend. 453; *Parage v. Dale*, 3 Johns. Cas. 156. See *Scottish Mar. Ins. Co. v. Turner*, 4 H. L. Cas. 312, note, 20 Eng. L. & Eq. 37. But see *Stewart v. Greenock Mar. Ins. Co.* 2 H. L. Cas. 159; *Peters v. Phoenix Ins. Co.* 3 S. & R. 25; *Raiston v. Union Ins. Co.* 4 Binn. 386.

(m) The valuation was set aside, and the value at the time of the loss taken, in *Peele v. Merchants Ins. Co.* 3 Mason, 27; *Bradlie v. Maryland Ins. Co.* 12 Pet. 378; *Marine Dock & Mut. Ins. Co. v. Goodman*, 4 Am. Law Reg. 481; *Fontaine v. Phoenix Ins. Co.* 11 Johns. 288; *Center v. Am. Ins. Co.* 7 Cow. 579. In Massachusetts the valuation is conclusive. *Deblois v. Ocean Ins. Co.* 16 Pick. 812; *Winn v. Col. Ins. Co.* 12 Pick. 279; *Hall v. Ocean Ins. Co.* 21 Pick. 472; *Allen v. Commercial Ins. Co.* 1 Gray, 154. See also *Am. Ins. Co. v. Center*, 4 Wend. 45; *Am. Ins. Co. v. Ogden*, 20 Wend. 287.

Whether the valuation is to be considered when the question is whether it would be worth while to repair, see *Irving v. Manning*, 1 H. L. Cas. 287; *Allen v. Sugrue*, 8 B. & C. 561; *Orrick v. Commonwealth Ins. Co.* 21 Pick. 456; *Hyde v. La. Ins. Co.* 14 Mart. La. 410.

(n) *Brooks v. Oriental Ins. Co.* 7 Pick. 259; *Orrick v. Commonwealth Ins. Co.* 21 Pick. 456; *Louisville Ins. Co. v. Bland*, 9 Dana, 148.

(o) See post.

(p) *Fiedler v. New York Ins. Co.* 6 Duer, 282; *Hall v. Ocean Ins. Co.* 21 Pick. 472, 478.

(q) *Bradlie v. Maryland Ins. Co.* 12 Pet. 378.

(r) *Pezant v. National Ins. Co.* 15 Wend. 453. In Massachusetts, owing probably to this clause making the right to abandon depend upon the loss amounting to fifty per cent., when adjusted as a partial loss, it is held, that those charges which are properly the subject of general average contribution are not to be considered, in making up the fifty per cent. *Orrick v. Commonwealth Ins. Co.* 21 Pick. 456; *Ellicott v. Alliance Ins. Co.* 14 Gray, 318; *Greely v. Tremont Ins. Co.* 9 Cush. 415. See also *Fiedler v. New York Ins. Co.* 6 Duer, 282. In respect to the cargo it has been held, that goods lost by jettison may properly be taken into the esti-

a right to have the damage done by the peril insured against, thoroughly repaired, and the fact that the vessel can be rendered seaworthy at an expense less than fifty per cent. is not enough to prevent an abandonment. (s) If repaired in fact, the actual expense of making the repair is to be taken; unless the ship could have been temporarily repaired at that place for a slight cost, so as to enable her to go in safety to a port of repair, and there be fully repaired with a material saving of cost on the whole. (t) For then it would be the duty of the insured to make this saving, and he could charge the underwriters, not only the cost of the temporary repairs, but the expense of going to the place of full repair; (u) and he cannot charge the underwriters with the loss of a saving which he ought to have made, and must therefore allow them whatever might have thus been saved.

It would seem, though it may not be certain, that the insurers have a right to take a ship abandoned to them, and repair her and return her to the insured, if in perfectly good condition; (v) and it is said, that if in making this repair they incur expenses which the insured could not have recovered of them under the policy, they may recover these from the assured. (w) If the master actually begins repairs before the abandonment is made, it is held, that the abandonment is not valid. (x)

The fifty per cent. rule, and the law of abandonment generally, apply to the cargo as well as the ship. It is obvious, however,

that there may be a total loss of the ship but not of
* 388 * the cargo, or a total loss of the cargo but not of the ship.

And in our chapter on contracts of shipping, we have con-

tract in making up the amount of more than fifty per cent. *Forbes v. Manuf. Ins. Co.* 1 Gray, 371.

(s) *Lincoln v. Hope Ins. Co.* 8 Gray, 22.

(t) *Center v. Am. Ins. Co.* 7 Cow. 584, 4 Wend. 45; *Orrok v. Commonwealth Ins. Co.* 21 Pick. 456; *Hall v. Franklin Ins. Co.* 9 Pick. 486. But see *Sauvez v. Sun Ins. Co.* 2 Sandf. 482.

(u) *Lincoln v. Hope Ins. Co.* 8 Gray, 22. So, of the expense of raising a submerged vessel and taking her into a port for repairs. *Sewall v. U. S. Ins. Co.* 11 Pick. 90; *Ellicott v. Alliance Ins. Co.* 14 Gray, 318.

(v) This is so held in Massachusetts. *Wood v. Lincoln Ins. Co.* 6 Mass. 479; *Commonwealth Ins. Co. v. Chase*, 20 Pick. 147; *Reynolds v. Ocean Ins. Co.*

22 Pick. 191. See also, *Marine Dock & Mut. Ins. Co. v. Goodman*, 4 Am. Law Reg. 481. See *contra*, *Peele v. Merchants Ins. Co.* 3 Mason, 27; *Cin. Ins. Co. v. Bakewell*, 4 B. Mon. 641; *Ruckman v. Merchants Ins. Co.* 5 Duer, 369; *Gloster Ins. Co. v. Younger*, 2 Curtis, C. C. 322. It has been held, that if the insurer repairs he must do so in a reasonable time. *Peele v. Suffolk Ins. Co.* 7 Pick. 254; *Reynolds v. Ocean Ins. Co.* 22 Pick. 191.

(w) *Commonwealth Ins. Co. v. Chase*, 20 Pick. 142.

(x) *Humphreys v. Union Ins. Co.* 8 Mason, 429; *Dickey v. Am. Ins. Co.* 3 Wend. 658; *Depau v. Ocean Ins. Co.* 5 Cow. 63. See *Kitchie v. U. S. Ins. Co.* 5 S. & R. 501.

sidered the duty and power of the master in respect to the cargo, when the ship is wrecked.

If any part of the goods insured arrives in safety at its port of destination, we think the rule of fifty per cent. does not apply to it. Thus, if a stranded ship is saved by a jettison of sixty per cent. of the cargo, and forty per cent. arrives safely at its destination, this partial loss cannot be made total by abandonment. Nor can a loss of a part of the goods, however large, the residue being saved and arriving uninjured, be made a constructive total loss by abandonment. (y) It seems now to be well settled in this country, that if memorandum articles arrive at the port of destination, and then and there exist *in specie*, the underwriters are not liable as for a total loss, whatever may be their condition or loss of value. (z) But if the goods reach an intermediate port, in such condition that, although existing *in specie*, there is no reasonable hope of their being carried forward safely and reaching *in specie* their port of destination, it is both the right and the duty of the master to sell them, if they are still salable, and thus obtain whatever value may remain to them; and the assured may recover as for a total loss. (a) And if the goods are in such a condition at the intermediate port that they cannot be carried forward consistently with the health of the crew and the safety of the vessel, the loss is considered as total. (b) If the ship or cargo be released from capture by a compromise of more than half the * value, this may be made by abandonment * 389 a constructive total loss. (c)

Freight is totally lost when there is a total loss of ship and

(y) *Forbes v. Manuf. Ins. Co.* 1 Gray, 371; *Seton v. Delaware Ins. Co.* 2 Wash. C. C. 175. But see *Moses v. Columbian Ins. Co.* 6 Johns. 219.

(z) *Morean v. United States Ins. Co.* 1 Wheat. 219, 3 Wash. C. C. 256; *Brooke v. La. State Ins. Co.* 16 Mart. La. 681; *Skinner v. Western Ins. Co.* 19 La. 278; *Robinson v. Commonwealth Ins. Co.* 3 Sumner, 224. In respect to what is an existence *in specie*, it has been held, that the value of the article has nothing to do with its existence *in specie*. Thus fish, though absolutely spoiled (*Cocking v. Frazer, Park, Ins.* 151), and corn which was putrid (*Neilson v. Col. Ins.* Co. 8 Caines, 108), and pork which was roasted (*Skinner v. Western Ins. Co. supra*), have been held to exist *in specie*. But if

merely the wheels of a chariot remain, the chariot no longer exists *in specie*. *Judah v. Randal*, 2 Caines, Cas. 324.

(a) See *Aranzamendi v. Louisiana Ins. Co.* 2 La. 482; *Williams v. Kennebec Ins. Co.* 31 Maine, 455; *Poole v. Protection Ins. Co.* 14 Conn. 47; *Robinson v. Commonwealth Ins. Co.* 8 Sumner, 220; *Hugg v. Augusta Ins. Co.* 7 How. 596; *Tudor v. New England Ins. Co.* 12 Cush. 554.

(b) *Hugg v. Augusta Ins. Co.* 7 How. 596; *Williams v. Kennebec Ins. Co.* 31 Maine, 455; *Poole v. Protection Ins. Co.* 14 Conn. 47; *De Peyster v. Sun Ins. Co.* 19 N. Y. 272.

(c) *Vandenheuvel v. United Ins. Co.* 1 Johns. 406; *Clarkson v. Phoenix Ins. Co.* 9 id. 1; *Waddell v. Columbian Ins. Co.* 10 id. 61.

cargo, (*d*) or of the cargo alone; (*e*) and it has been held, that the constructive total loss of the ship carries with it the loss of freight, and that the assured by abandoning can recover as for a total loss. (*f*) But this seems opposed to well settled principles of insurance law. (*g*) And it has been held, that a loss of goods of over fifty per cent. at the port of departure, does not authorize the assured to abandon and recover a total loss of freight. (*h*) If the goods remain in specie, and are so delivered to the consignee, whatever may be their deterioration, there is no loss whatever of freight. And if a ship arrive at an intermediate port, or return to the port of shipment, damaged, but capable of repair, and may be made capable, by repair, of carrying the goods to the port of destination, and so earning the freight, the owner, who is insured on his freight cannot abandon it, and claim as for a total loss, by reason of the expense or delay of such repair. (*i*)

* 390 * If the ship be abandoned, and thereby become the property of the insurers, and afterwards earn freight, the insurers on freight take by abandonment the freight earned before the abandonment, and the insurers on the ship take the freight earned after the abandonment. (*j*)

(*d*) *Idle v. Royal Exchange Ass. Co.* 8 Taunt. 755.

(*e*) See cases *infra*.

(*f*) See *Thwing v. Wash. Ins. Co.* 10 Gray, 448; *Am. Ins. Co. v. Center, 4 Wend.* 45.

(*g*) In the first place, it may be necessary to state, that the fact that the ship is insured and being constructively lost, the freight passed to the abandonees of the ship, does not necessarily carry with it a total loss of freight, for as between the parties the question is to be treated as if the ship were uninsured. *Scottish Ins. Co. v. Turner.* 4 H. L. Cas. 312, n., more fully reported 20 Eng. L. & Eq. 24; *Lord v. Neptune Ins. Co.* 10 Gray, 109, per *Shaw*, C. J.; *Fiedler v. New York Ins. Co.* 6 Duer, 282. See *contra*, *Coolidge v. Gloucester Ins. Co.* 16 Mass. 341. We have already seen, that if the vessel is at an intermediate port, and the master, although he cannot send the goods on in his own vessel, can procure another, it is his duty to do so. If this is done it is considered as done under the original contract. See *Shipton v. Thornton*, 9 A. & E. 314; *Rosetto v. Gurney*, 11 C. B. 176. In *Thwing v. Washington Ins. Co.* 10 Gray, 448, it was considered that, in such a case the master ceased to

be the agent of the ship, and became the agent of the shippers, and it was intimated, that the cases might be reconciled on the theory that the ship-owners might ratify the acts of the master, and treat him as their agent. But we are at a loss to see how the ship-owners can adopt the acts of the agent of the shippers to the disadvantage of the latter. If the master can send on the goods, and fails to do so, the insurers on freight should not be liable. See *Bradhurst v. Col. Ins. Co.* 9 Johns. 17; *Hugg v. Augusta Ins. Co.* 7 How. 609.

(*h*) *Lord v. Neptune Ins. Co.* 10 Gray, 109.

(*i*) *Jordan v. Warren Ins. Co.* 1 Story, 342; *Saltus v. Ocean Ins. Co.* 14 Johns. 188; *Clark v. Massachusetts Ins. Co.* 3 Pick. 104; *Mordy v. Jones*, 4 B. & C. 394; *Herbert v. Hallett*, 3 Johns. Cas. 93; *M'Gaw v. Ocean Ins. Co.* 23 Pick. 406; *Lord v. Neptune Ins. Co.* 10 Gray, 109; *Griswold v. N. Y. Ins. Co.* 1 Johns. 205; *Ogden v. Gen. Mut. Ins. Co.* 2 Duer, 204.

(*j*) *Coolidge v. Gloucester Ins. Co.* 15 Mass. 341; *United Ins. Co. v. Lenox*, 1 Johns. Cas. 377, 2 id. 443; *Leavenworth v. Delafield*, 1 Caines, 578; *Simonds v. Union Ins. Co.* 1 Wash. C. C. 443.

It may be true, theoretically, that profits (*k*) and commissions (*l*) may be abandoned; but we can hardly see in practice how such an abandonment can be operative.

C.—How and when Abandonment should be made.

It may be enough to say on this point, that it must be definite and unequivocal; and it must amount to an absolute abandonment and transfer to the insurers, of all interest and property in the subject-matter remaining in the insured. (*m*) It should state why the abandonment is made, and the cause so stated should be a peril within the policy. (*n*) The word "abandon" should be used, (*o*) but may not be necessary; nor is it strictly necessary that it be in writing, (*p*) though it usually is and always should be. And the demand of a total loss may itself be an abandonment, when the terms of the demand and the circumstances of the case make this the plain and certain meaning of the demand. (*q*)

The insured may abandon the ship when the voyage is broken up, and the ship taken from the master's control, by a peril insured *against. (*r*) But abandonment is not justified at once and necessarily, by any loss, not even wreck, or foundering, or capture, if circumstances render recovery probable; for then it is the duty of the master to use all means of recovery; and until they are used and fail, the right to abandon does not exist. (*s*)

(*b*) Abbott v. Sebor, 3 Johns. Cas. 89; Loomis v. Shaw, 2 id. 86; Henrickson v. Margetson, 2 East, 549, note.

(*l*) New York Ins. Co. v. Robinson, 1 Johns. 616.

(*m*) Patapsco Ins. Co. v. Southgate, 5 Pet. 604; Fuller v. McCall, 1 Yeates, 464.

(*n*) This rule is so stated in several cases. Hazard v. New England Ins. Co. 1 Sumner, 218; Pierce v. Ocean Ins. Co. 18 Pick. 88; Bullard v. Roger Williams Ins. Co. 1 Curtis, C. C. 152; McConochie v. Sun Ins. Co. 8 Bosw. 99. But see Macy v. Whaling Ins. Co. 9 Met. 354; Heebner v. Eagle Ins. Co. 10 Gray, 181; Thwing v. Washington Ins. Co. Id. 448; Perkins v. Augusta Ins. Co. Id. 312.

(*o*) Parmeter v. Todhunter, 1 Camp. 541.

(*p*) See Read v. Bonham, 3 Brod. & B. 147; Patapsco Ins. Co. v. Southgate, 5 Pet. 622; Crousellat v. Ball, 3 Yeates, 378; Parmeter v. Todhunter, 1 Camp. 541.

(*q*) See Cassedy v. Louisiana State Ins. Co. 18 Mart. La. 421; Patapsco Ins. Co. v. Southgate, 5 Pet. 604; Parmeter v. Todhunter, 1 Camp. 541; Thwing v. Washington Ins. Co. 10 Gray, 448; Watson v. Ins. Co. of N. A. 1 Binn. 47; Martin v. Crokatt, 14 East, 465; Murray v. Hatch, 6 Mass. 478; Pierce v. Ocean Ins. Co. 18 Pick. 98.

(*r*) See Peele v. Merchants Ins. Co. 3 Mason, 65; McConochie v. Sun Ins. Co. 8 Bosw. 99.

(*s*) Bosley v. Chesapeake Ins. Co. 3 Gill & J. 450; Wood v. Lincoln Ins. Co. 6 Mass. 479; Patrick v. Commercial Ins.

It is an important rule, that, as soon as the insured receives trustworthy intelligence justifying his abandonment, he cannot delay, but must abandon at once, or he will be held to have waived his right to abandon and to have lost that right. (*t*)¹

The reasons for this rule are, that the insured has no right to delay until he can ascertain whether it is for his interest to abandon, and the insurers have a right to be enabled to make at once the utmost advantage of all that abandonment would transfer to them.

But abandonment should not be made on mere conjecture or possibility, nor on general rumor and belief, unless circumstances made this extremely probable; nor on actual information not worthy of credit. (*u*) And in such cases the insured may wait a reasonable time for authentic information. (*v*)

Where there is actual total loss, as there need be no abandonment, delay in making it has no effect.

D.— *Of Acceptance of Abandonment.*

If insurers accept an abandonment properly made, they are bound thereby, and an acceptance waives all objections to a want of formality. (*w*)

The acceptance may be constructive; and insurers were held where the vessel was abandoned and they took possession and held it for a considerable time, although the insured had no right to abandon. (*ww*)

But the insurers neither need accept nor refuse; for, whether they refuse or are only silent, the insured possesses what-
* 392 ever * rights or remedies the abandonment would give him. (*x*) Even where insurers expressly refuse to accept,

Co. 11 Johns. 9; Howland *v.* Marine Ins. & J. 450; Bainbridge *v.* Neilson, 1 Camp. Co. 2 Cranch, C. C. 474; Sewall *v.* U. S. 237, 10 East, 341.

Ins. Co. 11 Pick. 90; Ellicot *v.* Alliance (*v*) Gardner *v.* Columbian Ins. Co. 2

Ins. Co. 14 Gray, 818. Cranch, C. C. 550; Duncan *v.* Koch, J. B.

(*t*) Allwood *v.* Henckell, Park, Ins. Wallace, 45.

239; Roux *v.* Salvador, 3 Bing. N. C. (*w*) Smith *v.* Robertson, 2 Dow, 482.

281; Teasdale *v.* Charleston Ins. Co. 2 (*ww*) Copelin *v.* Ins. Co. 9 Wall. 461.

Brev. 100. See Thwing *v.* Washington (*x*) Peele *v.* Merchants Ins. Co. 3

Ins. Co. 10 Gray, 443. Mason, 81; Badger *v.* Ocean Ins. Co. 23

(*u*) Muir *v.* United Ins. Co. 1 Caines, Pick. 847. But see Hudson *v.* Harrison,

49; Bosley *v.* Chesapeake Ins. Co. 3 Gill 8 Brod. & B. 97.

¹ See also Kaltenbach *v.* Mackenzie, 3 C. P. D. 467.

if they exercise the right and power of property over the salvage, this will be held to be the equivalent of acceptance. (y) If without acceptance, and even without abandonment, insurers pay a total loss, the salvage belongs to them.

Whenever salvage belongs to the insurers, they take it with the incumbrance of any charge or lien, caused by a peril against which they insure; as, for example, the charges and expenses incurred in saving the property. But charges or liens on the salvage, springing from perils not insured against, the insured must discharge, or repay to the insurers if they discharge them. (z)

After abandonment, the property thereby transferred, is at the risk of the insurers, who are now the owners, and they are chargeable as such for any further expenses in relation to it. (a)

E.— *Of Revocation of Abandonment.*

If the insurers accept an abandonment either expressly or by implication, the transfer becomes irrevocable, unless revoked by mutual consent. But either party may waive the rights acquired by it. If, however, the insurers refuse to accept the abandonment, it may be revoked at any time before they change their minds and accept it; and if the insurers are silent in respect to an abandonment, it may be revoked at any time before they either by word or by act indicate their acceptance.

An interference of the owner with the property abandoned, or his disposition of it, would not amount to a revocation, or a waiver of his rights, if his interference were such and the circumstances were such, as to indicate that he therein acted as the agent of the insurers. (b)

(y) *Peele v. Merchants Ins. Co.* 3 Mason, 196; *M'Bride v. Marine Ins. Co.* Mason, 81; *Badger v. Ocean Ins. Co.* 28 Johns. 481.
Pick. 347. See *Griswold v. N. Y. Ins. Co.* 1 Johns. 205, 3 Johns. 321; *Thelluson v. Fletcher,* 1 Esp. 73.

(b) See *Brown v. Smith,* 1 Dow, P. C. 349; *Catlett v. Pacific Ins. Co.* 1 Wend. 561, 1 Paine, C. C. 594; *Abbott v. Broome,*

(z) See cases, *ante.*
(a) See *Hammond v. Essex Ins. Co.* 4 Co. 5 Johns. 810.

* SECTION X.

OF PARTIAL LOSS.

A.—*What constitutes a Partial Loss.*

Every loss is a partial loss which is less than a total loss, either actual or constructive.

The phrase "particular average" is frequently used, as the equivalent of "partial loss."

An essential principle of all insurance is, that the insured shall be indemnified, and only indemnified, for any loss which he may sustain under the policy. If a new vessel is badly injured in rigging, sails, or hull, and is afterwards repaired as thoroughly as may be at the expense of the insurers, the owner certainly gains nothing; but loses a little, for a repaired ship can hardly be made quite equal to a new one. But if the spars, the sails, the rigging, or the sheathing, are nearly worn out, and then repairs are made necessary by an injury within the policy, these repairs cannot be made with equally old materials, for they must always be new and of good quality. By such repairs, it is obvious that the owner gains the whole difference in value between worn-out materials and new materials. It follows, therefore, that the condition of the old materials which are replaced by new, must determine whether and how much the owner gains or loses in any case. For the purpose of indemnifying the owner, without a minute inquiry into the particular circumstances of each case, American usage and law have now settled on a rule, which, being applied to all cases, on the whole works justice, although in any one case it may be inaccurate. This rule is commonly expressed as that of "one-third off, new for old." It means, that the insurers shall pay for any partial loss on the ship, two-thirds of the whole expense of making the

* 394 repairs thoroughly and with new materials; * and of course the owner pays or loses the remaining third. (c)¹

(c) See cases *infra*.

¹ As to whether the customary deduction of "one-third new for old" is applicable to iron vessels, see *Lidgett v. Secretan*, L. R. 6 C. P. 616. *Pitman v. Universal Ins. Co.* 9 Q. B. D. 193, declared that, if in case of a partial loss the owner sells during the continuance of the risk instead of repairing, where the cost of repairing would greatly exceed the value of the ship when repaired, the amount recoverable is the difference between the value of the ship at the port of departure and the amount received at the sale, and not two-thirds of the estimated cost of repairs.

Whether a loss shall be adjusted under this rule, where by such adjustment and the consequent deduction it will fall below fifty per cent., and thereby not be convertible into constructive total loss by abandonment, is not certain. We think the weight of authority and of reason require, either that this third should not be deducted from the amount of repairs, or if deducted from the repairs that it should be deducted from the value of the ship, which would be the same thing in effect. Then, if the loss were more than fifty per cent. before any deduction, there might be an abandonment. (d) Insurers of course contend against this view, and now many policies contain a clause to the effect, that the insured shall not abandon for amount of damage merely, unless when adjusted as a partial loss it exceeds half the amount insured. Such a clause settles the question, and the effect of it is, that there can be no abandonment making a constructive total loss for damage merely, unless this damage amounts to more than three-fourths of the amount insured. (e)

B.—*How the Cost of Repairs is estimated.*

All the rules applied in estimating the cost of repairs are not entirely settled, although the most important ones may be.

The repairs and the new work are to conform in material and style to the original character of the ship. (f) And the third is deducted from the wages of labor as well as from all the materials. (g) So it is deducted according to prevailing authorities, from the extraordinary expense of raising funds, from dockage, moving the vessel, and other expenses necessary *for *395 the repairs. (gg) One very important question has arisen, and must often arise. It is, whether the value of the old materials, as of spars, canvas, or copper saved, should be deducted from the

(d) *Dupuy v. United Ins. Co.* 8 Johns. Cas. 182; *Feele v. Merchants Ins. Co.* 3 Mason, 73; *Bradlie v. Am. Ins. Co.* 12 Pet. 378. See *contra*, *Smith v. Bell*, 2 Caines, Cas. 183; *Pezant v. National Ins. Co.* 15 Wend. 453; *Fiedler v. N. Y. Ins. Co.* 6 Duer, 282; *Orrok v. Commonwealth Ins. Co.* 21 Pick. 467; *Allen v. Commercial Ins. Co.* 1 Gray, 164; *Heebner v. Eagle Ins. Co.* 10 Gray, 148.

(e) Such a clause is inserted in the

Massachusetts policies, but when the question has arisen, the decision that the deduction is to be made has proceeded as much on general principles and usage as on any effect given to this clause.

(f) *Center v. Am. Ins. Co.* 7 Cow. 564, 4 Wend. 45.

(g) *Stevens & Benecke on Av. Phillips* ed. 385, 386.

(gg) 2 *Phillips Ins.* § 1432. See *Potter v. Ocean Ins. Co.* 8 Sumner, 45.

whole cost of repairs, before the one-third is deducted, or from the two-thirds after that third is deducted. We hold the true rule to be, that the old materials may be directly applied by using them in the repairs, or their value should be deducted from the whole cost of repair, and the insurers held liable only for two-thirds of the balance. (*h*)

If the ship be valued, and insurance is made only on a part of that value, the insured is regarded as insuring himself for the remaining part. Thus, if the insurance is on half the valuation, one-third is deducted from the whole cost of repair; and of the remaining two-thirds, the insurers pay half, and the owner loses half. (*i*)

The rule, "one-third off, new for old," has no application to a partial loss on goods. And where there is a partial loss of goods, the insurer pays what the goods have lost from their original invoice value; so that he neither loses nor gains by a rising or a falling market. Therefore, if goods damaged under the policy were sold at the port where they were shipped, for less than their invoice value, the insurer is liable for this loss, although parties who there buy the goods carry them to their port of destination, and they are there worth their original value or more. (*j*)

A partial loss is sometimes called a salvage loss, when a part of the goods insured are damaged, and are therefore sold in an intermediate port on account of that damage, and the net proceeds are transmitted to the shipper. Then the insurer pays the whole loss on that part of the goods; being, however, credited for the net proceeds received by the shipper. (*k*)

Generally, insurers are not discharged by any conduct of the master as to the cargo, as by drying, washing, or selling it, * 896 or * any part of it, if it was damaged by a peril insured against, and his conduct was required or justified by his duty. (*l*) Generally, insurers on goods only have nothing to do with the freight; but if the goods are transshipped and sent on, not to benefit the owner by enabling him to earn freight, but to

(*h*) *Byrnes v. National Ins. Co.* 1 Cow. 265; *Brooks v. Oriental Ins. Co.* 7 Pick. 259; *Eager v. Atlas Ins. Co.* 14 Pick. 141. This question is discussed in 6 Am. Jurist, 262; 6 id. 45.

(*i*) *Stewart v. Greenock Ins. Co.* 2 H. L. Cas. 159; *Whiting v. Independent Ins. Co.* 15 Md. 297.

(*j*) *Lewis v. Rucker*, 2 Burr. 1172; *Hardy v. Innes*, 6 J. B. Moore, 574.

(*k*) *Kettell v. Alliance Ins. Co.* 10 Gray, 144; *Bridge v. Niagara Ins. Co.* 1 Hall, 423.

(*l*) See *Navone v. Haddon*, 9 C. B. 90; *Rosetto v. Gurney*, 11 C. B. 176; *The Bark Gentleman*, *Olcott, Adm.* 110.

benefit the insurer by saving him from a greater loss, he should be liable for the increased freight. (*m*)

C.—*Of Total Loss following a Partial Loss.*

There may be a partial loss for an injury which was repaired, and has been paid for by the insurers ; and then a subsequent total loss for which they would be liable without the right of deducting for the amount paid on the partial loss. (*n*)¹ In this way insurers may become liable for more than a total loss ; and so they might be for expenses incurred, which were justified by some provision of the policy, (*o*) or by contribution for average. The general rule, however, in case of partial loss, and subsequent total loss, is that the partial loss is merged in the total loss, limiting the liability of the insurers to the total loss, unless some expenses were incurred before the total loss, on which a distinct claim could be founded. (*p*)

SECTION XI.

OF EXPRESS WARRANTIES.

Warranties may be express or implied, and in either case the general law of warranty applies to them.

Express warranties exist when the assured, in whatever is a * part of the policy, undertakes that certain things exist, or have been done, or shall exist or be done. A breach of a warranty is equally fatal, whether the thing warranted be

(*m*) *Mumford v. Commercial Ins. Co.* Johns. 412; *Lawrence v. Van Horne*, 1 Johns. 202; *Dodge v. Union Ins. Co.* 17 Mass. 471; *Shultz v. Ohio Ins. Co.* 1 B. Mon. 336.

Caines, 276; *Potter v. Prov. Ins. Co.* 4 Mason, 298; *Le Cheminant v. Pearson*, *Taunt.* 367.

(*n*) *Le Cheminant v. Pearson*, 4 *Taunt.* 387.

(*p*) *Livie v. Janson*, 12 East, 648;

(*o*) See *Barker v. Phoenix Ins. Co.* 8 Johns. 21; *Schleffelin v. N. Y. Ins. Co.* 9 Johns. 21;

Knight v. Faith, 15 Q. B. 649; *Stewart Johns.* 207; *Jumel v. Marine Ins. Co.* 7 *v. Steele*, 5 Scott, N. R. 927.

¹ In *Matheson v. Equitable Ins. Co.* 118 Mass. 209, it is said that by the general law of marine insurance, independently of any particular clause in the policy or local usage, if a partial loss of a vessel insured is repaired by the insured, and a total loss afterwards happens during the term of the policy, the insurer is liable for the amount of both losses, although it exceeds the amount named in the policy. See, however, *Alexandre v. Sun Ins. Co.* 51 N. Y. 253; *Lidgett v. Secretan*, L. R. 6 C. P. 616.

material or immaterial, (q) or was or was not intended, or was or was not the fault of the insured, or was made, not by the person insured, but by those employed by him. (r) And warranties must be not only substantially, but strictly complied with. (s) Any positive assertion may be a warranty, if it be a direct and not a collateral assertion. Thus, if a vessel is described as "the American ship, called the Rodman," (t) or as being in port on a certain day, (u) or goods are said to belong to persons who are American citizens, (v) there is in either case a warranty of the fact; but calling a vessel by an English or American name, is not a warranty that she is an American or English ship; (w) nor is a stipulation that the insurers are not to be liable for damage to her sheathing, a warranty that she has sheathing. (x)

It is held, that a policy is avoided by any breach of warranty at the commencement of a risk, although afterwards, and before any loss, the warranty is complied with. (y)

If a warranty be lawful when made, but becomes illegal afterwards, a subsequent breach does not discharge the insurers; for the law cannot require the doing of an act which the law prohibits. (z)

Express warranties usually relate to the ownership, and the neutrality of the property, the lawfulness of the goods, or of the voyage, the time of sailing, and the taking of convoy. The insurers have the right of selecting the persons whom they insure;

* 398 but they may waive this right, and the owners need not be named. But there may be an express warranty * of the ownership, and even if there be none, the owner cannot be changed by a transfer of property without the insurer's consent. (a)

The warranty of neutrality is intended to protect the insurers from any risk arising from the belligerent character of the property. The nationality of a person, or of his property, is generally

(q) *Blackhurst v. Cockell*, 8 T. R. 860; *Newcastle Ins. Co. v. Macmorran*, 3 Dow, 262.

(r) *Duncan v. Sun Ins. Co.* 6 Wend. 488.

(s) *Pawson v. Watson*, Cowp. 785; *De Hahn v. Hartley*, 1 T. R. 343, 2 id. 186; *Sawyer v. Coasters Ins. Co.* 6 Gray, 221.

(t) *Barker v. Phoenix Ins. Co.* 8 Johns. 807; *Atherton v. Brown*, 14 Mass. 152; *Vandenheuvel v. United Ins. Co.* 2 Johns. Cas. 127.

(u) *Kenyon v. Berthon*, 1 Doug. 12, note.

(v) *Walton v. Bethune*, 2 Brev. 453.

(w) *Clapham v. Cologan*, 8 Camp. 382.

(x) *Martin v. Fishing Ins. Co.* 20 Pick. 889.

(y) *Rich v. Parker*, 7 T. R. 705; *Goi-coches v. La. Ins. Co.* 18 Mart. La. 51; *Hore v. Whitmore*, 2 Cowp. 784.

(z) *Brewster v. Kitchell*, 1 Salk. 198, 1 Ld. Raym. 317.

(a) See *ante*, p. * 355, note (j).

determined by his domicile; and that subject is considered elsewhere.

One important rule, that a country which, during peace, confines the trade of its colonies to its own subjects, cannot, during war, open such a trade to a neutral,—has been strongly asserted in England, and as strongly denied in this country. (b) A warranty that the property is of a country then known to be at peace, is a warranty that the property is neutral by ownership, and is protected from belligerent risk by the usual documents and precautions. But a policy is not avoided, when the property is made belligerent by war after the policy is made. (c)

The warranty of neutrality of a ship is broken, if a belligerent owns any part of the ship. (d) The warranty of neutrality of goods extends only to the interest of the assured; (e) but property held by a neutral in trust for a belligerent, is belligerent property; (f) and if goods are shipped by a belligerent to a neutral, the belligerent retaining the control of them, and the neutral not having ordered them, the goods are belligerent. (g) But the mere right of a belligerent seller to stop the goods *in transitu*, does not make the goods belligerent. (h)

A ship must always have and always use, in a proper time, * and in a proper way, all the usual and proper documents to prove her neutrality. (i) The same rule applies to goods; (j) but leave is sometimes expressly given to carry simulated or false papers, and an established usage might have the same effect. (k)

(b) See Mr. Justice Duer's essay on this subject, in 1 Duer, Ins. 698-725. In support of the English rule, see The Ebenezer, 6 Rob. Adm. 250; The Emmanuel, 1 id. 296; The Providentia, 2 id. 142; The Thomyris, Edw. 17. For the American rule, see Mr. Monroe's letter to Lord Mulgrave, Sept. 28, 1805, Mr. Madison's letter to Messrs. Monroe and Pinckney, May 17, 1806, and the memorials of the merchants of Baltimore, New York, Boston, and Salem, 5 Am. State Papers, 830-855, 867-879.

(c) Eden v. Parkinson, 2 Doug. 782; Saloucci v. Johnson, Park, Ins. 449; Tyson v. Gurney, 3 T. R. 477.

(d) The Vrow Elizabeth, 5 Rob. Adm. 2; The Primus, 1 Spinks, Adm. 858.

(e) The Primus, *supra*; The Vreede Scholtys, 5 Rob. Adm. 5, note; Barker

v. Blakes, 9 East, 283; Livingston v. Maryland Ins. Co. 6 Cranch, 274.

(f) Murray v. United Ins. Co. 2 Johns. Cas. 168; The Abo, 1 Spinks, Adm. 847.

(g) The Carolina, 1 Rob. Adm. 306; The Josephine, 4 id. 25; The Frances, 8 Cranch, 369; The Francis, 1 Gallis. 446.

(h) See The Merrimack, 8 Cranch, 317.

(i) Barker v. Phoenix Ins. Co. 8 Johns. 307; Griffith v. Ins. Co. of N. A. 5 Binn. 464; Blagge v. N. Y. Ins. Co. 1 Caines, 549; The Success, 1 Dods. 132; Catlett v. Pacific Ins. Co. 1 Paine, C. C. 594; Calbreath v. Gracy, 1 Wash. C. C. 219.

(j) Griffith v. Ins. Co. of N. A. 5 Binn. 464.

(k) Livingston v. Maryland Ins. Co. 7 Cranch, 506, per Marshall, C. J.; Calbreath v. Gracy, 1 Wash. C. C. 219, per Washington, J.

If neutral interests or property are lost, because they were undistinguishably mixed with those which are belligerent, (*l*) or by resistance to rightfully demanded search, (*m*) or by an attempt at rescue, (*n*) or by seeking or receiving belligerent protection, (*o*) or by anything which gives to a belligerent the right of treating the property as belligerent, all these things are breaches of neutrality. But some of them at least might be justified by compulsive necessity, and then would not discharge the insurers. (*p*)

The ship and cargo are distinct as to neutrality. It is no breach of the warranty of her neutrality that the ship carries belligerent goods; and neutral goods on board a belligerent are not necessarily liable to be made prize of war. (*q*)

If a blockade exists, and notice of the blockade has been given by the blockading power to any foreign government, no individual of the nation thus notified is protected against seizure by his ignorance of the blockade; (*r*) but insurers are not discharged by the breach of the blockade, unless that breach was made with actual notice or knowledge. (*s*)

It may be added, that breaches of blockade have given rise, especially in the English courts, to a great variety of questions * and adjudications, which it is not considered desirable to notice in detail; especially as some of the foreign decisions would be at least doubted in this country.

An express warranty of frequent occurrence relates to the time of the ship's sailing. (*t*) A ship sails when she frees herself from her fastenings, and moves with the intention of going at once to sea; (*u*) although afterwards accidentally and compulsorily delayed. (*v*) But she does not sail by merely moving down the harbor and reanchoring, if she moved without being ready to con-

(*l*) *The Princessa*, 2 Rob. Adm. 49.

(*m*) *The Maria*, 1 Rob. Adm. 360; *Garrels v. Kensington*, 8 T. R. 230; *Snowden v. Phoenix Ins. Co.* 8 Binn. 468; *Brown v. Union Ins. Co.* 5 Day, 1.

(*n*) *Garrels v. Kensington*, 8 T. R. 230; *M'Lellan v. Maine Ins. Co.* 12 Mass. 246; *Robinson v. Jones*, 8 Mass. 586; *Brown v. Union Ins. Co.* 5 Day, 1.

(*o*) *The Maria*, 1 Rob. Adm. 340; *The Joseph*, 1 Gallis. 548; *The Julia*, id. 594, 8 Cranch, 181.

(*p*) As where the act is rendered necessary by the illegal conduct of the captor. *M'Lellan v. Maine Ins. Co.* 12 Mass. 246. See also *Snowden v. Phoenix Ins. Co.* 8 Binn. 457.

(*q*) *Barker v. Blakes*, 9 East, 283; *The Nereide*, 9 Cranch, 888.

(*r*) *The Neptunus*, 2 Rob. Adm. 110; *The Barque Coosa*, 1 Newb. Adm. 398.

(*s*) *Harratt v. Wise*, 9 B. & C. 712; *Naylor v. Taylor*, 9 B. & C. 718; *Medeiros v. Hill*, 8 Bing. 281.

(*t*) See *Baines v. Holland*, 10 Exch. 801; *Colledge v. Harty*, 6 Exch. 205; and cases *infra*.

(*u*) *Cochran v. Fisher*, 4 Tyrw. 424, 2 Cromp. & M. 581; *Fisher v. Cochran*, 5 Tyrw. 496, 1 Cromp. M. & R. 809; *Bond v. Nutt*, Cromp. 601; *Nelson v. Salvador*, Moody & M. 809.

(*v*) *Thellusson v. Fergusson*, 1 Doug. 361; *Earle v. Harris*, id. 357.

tinue her voyage uninterrupted. (w) If when ready and intending to sail she is stopped before getting under way, by a storm or any adequate obstruction from without, there are authorities which indicate that this is a compliance with the warranty. We should say, however, that if the policy were not to attach until the sailing, it attaches in no case until actual sailing. (x) A warranty to sail from a certain territory, or coast, or island, is not satisfied by sailing from one part to another part of it, or by anything less than sailing with the intent to go entirely away from it. (y) A warranty "to depart" has been held to mean more than a warranty "to sail." (z) And the terms "final sailing" (a) or being "despatched from" (b) a place, mean something more than is expressed by the word sailing.

English policies often contain a warranty to sail with convoy; but we have as yet had few or no warranties of this sort in this country, and no decisions directly bearing upon them. (c) Policies may and often do contain a variety of special warranties and * stipulations, and these have been much litigated. * 401 Of them it is only necessary to say, that the general rules of the law of warranty govern them whenever applicable, and the meaning of the mercantile terms used is determined by usage, or by the law-merchant. (d)

SECTION XII.

OF REPRESENTATIONS AND OF CONCEALMENTS.

It is sometimes difficult to discriminate between express warranties and representations; but it is important to do so, as the

(w) *Pettegrew v. Pringle*, 3 B. & Ad. 514; *Lang v. Anderdon*, 3 B. & C. 499; *Graham v. Barras*, 3 Nev. & M. 125, 5 B. & Ad. 1011; *Risdale v. Newnham*, 4 Camp. 111, 3 M. & S. 456; *Thompson v. Gillespy*, 5 Ellis & B. 209; *Hudson v. Bilton*, 6 id. 565; *Sharp v. Gibbs*, 1 H. & N. 801.

(x) See *Hore v. Whitmore*, Cowp. 784; *Bond v. Nutt*, id. 601.

(y) *Wright v. Shiffner*, 11 East, 515; *Cruikshank v. Janson*, 2 Taunt. 301; *Risdale v. Newnham*, 3 M. & S. 456; *Lang v. Anderdon*, 3 B. & C. 499.

(z) *Moir v. Royal Exch. Ass. Co.* 3 M.

& S. 461, 6 Taunt. 241; *Van Baggen v. Baines*, 9 Exch. 523.

(a) *Rolandts v. Harrison*, 9 Exch. 444.

(b) *Sharp v. Gibbs*, 1 H. & N. 801.

(c) For the English authorities on this subject, see 2 Parsons, Mar. Law, 122.

(d) See *Callaghan v. Atlantic Ins. Co.*

1 Edw. Ch. 64; *Kenyon v. Berthon*, 1 Doug. 12, note; *Colby v. Hunter, Moody & M.* 81; *Blackhurst v. Cockell*, 8 T. R. 360; *Bulkley v. Derby Fishing Co.* 1 Conn. 571; *Bidwell v. Northwestern Ins. Co.* 19 N. Y. 179.

rights and obligations created by representations differ in many respects from those which arise from express warranties. It is a general rule that every direct statement contained in a policy, and by that is meant whatever forms a part of the policy, is to be regarded as a warranty. (e) We may define a representation, in language used by the Supreme Court of the United States. It should be "an affirmation or denial of some fact, or an allegation which would plainly lead the mind to the same conclusion." (f) It may be made orally, or in writing, or by presenting a written or printed paper. And if it be false, and tends to obtain for the party uttering it the forming of the contract, or some advantage in the contract, it is a misrepresentation. And by the law of insurance, a misrepresentation, whether intentional or not, and whether fraudulent or not, discharges the insurers. (g)¹

The representation may be drawn by inference from the words of the policy, as those words constitute a warranty only when they express a direct statement. Thus, if the policy says

* 402 the * ship sailed between the 13th and 21st of September,

this is a warranty. But if the language express that the vessel was expected to sail between the 13th and 21st of September, this is only a representation that the insured did not know that she had sailed before the 13th. (h)

It has been intimated, that the ground upon which misrepresentations discharge insurers is fraud, either actual or constructive. It is quite certain, however, that they have this effect whether made fraudulently or not. (i) Nor need it refer to a

(e) *Bean v. Stupart*, 1 Doug. 11; *Kenyon v. Berthon*, 1 Doug. 12, note; *Jennings v. Chenango Co. Ins. Co.* 2 Denio, 75; *Glendale Woollen Co. v. Protection Ins. Co.* 21 Conn. 19; *Routledge v. Burrell*, 1 H. Bl. 254; *Williams v. New England Ins. Co.* 81 Maine, 219. And see *Garcelon v. Hampden Ins. Co.* 50 Me. 580; and *Ripley v. Aetna Ins. Co.* 30 N. Y. 136.

(f) *Livingston v. Maryland Ins. Co.* 7 Cranch, 508.

(g) *Lewis v. Eagle Ins. Co.* 10 Gray, 508; *Anderson v. Thornton*, 8 Exch. 425.

(h) *Stewart v. Morison, Millar, Ins.* 59. See also *Hodgson v. Richardson*, 1

W. Bl. 463, 3 Burr. 1477; *Reid v. Harvey*, 4 Dow, 97; *Seton v. Low*, 1 Johns. Cas. 1; *Palmer v. Warren Ins. Co.* 1 Story, 300.

(i) Mr. Arnold, in his work on Ins. 495, contends that a misrepresentation avoids the contract on the ground of constructive or legal fraud. See also *Pawson v. Watson*, Cowp. 786; *Cornfoot v. Fowke*, 6 M. & W. 379; *Elkin v. Johnson*, 13 M. & W. 658. But see 2 Duer, Ins. 647; 1 Phillips, Ins. § 537. However this may be, it seems well settled, that a false representation is sufficient to avoid the policy. *Lewis v. Eagle Ins. Co.* 10 Gray, 508; *Anderson v. Thornton*, 8 Exch. 425.

¹ An innocent misrepresentation by an assured to an underwriter, that a ship is new, when in fact she is old, will vitiate a policy on goods on board of her, for the age of the vessel must be material in considering the premium. *Ionides v. Pacific Ins. Co.* L. R. 6 Q. B. 674.

matter concerning which some representation is necessary. (*j*) It must, however, be material ; that is, it must have the tendency, above spoken of, to induce the making of the contract, or to render its terms more favorable to the insured ; (*k*) and if it were in reply to a distinct question of the insurers, this fact would go very far, and would be nearly, although perhaps not quite, conclusive, (*l*) in proof of its materiality.

It may rest upon a previous fact, as if an insured obtains insurance from some party merely to decoy subsequent insurers into their bargain ; this would operate as a misrepresentation and discharge the subsequent insurers. (*m*)

Concealment of facts which ought to have been stated, operates in the same way, and is subject to the same rule as misrepresentation ; and therefore neither inadvertence, or mistake, or forgetfulness, (*n*) prevents its operation, if it be material. (*o*) There may, however, be this distinction. An innocent misrepresentation * or concealment discharges insurers, only when they were influenced by it ; but if it were made intentionally and fraudulently, it would discharge them, although it had no effect upon the bargain. (*p*) If the ignorance is wilful or owing to the negligence of the insured, it is no excuse. (*q*) If the statement be, that a thing is believed to be so, or not so, and the belief exists, that satisfies the representation. (*r*) It has been said, that one who asserts that a certain thing is so, when he knows nothing about it, and the thing be not so, is affected by the assertion as if he had known it to be false. (*s*) This rule, if it be one, must have some qualification.

If the representation is true at the time it is made, that is gener-

(*j*) *Sawyer v. Coasters Ins. Co.* 6 Gray, 221; *Lewis v. Eagle Ins. Co.* 10 Gray, 508.

Cranch, 388; *Hurtin v. Phoenix Ins. Co.*

1 Wash. C. C. 400.

(*p*) See cases *supra*, p. * 402, note (*k*).

(*q*) *Biays v. Union Ins. Co.* 1 Wash. C. C. 506; *M'Lanahan v. Universal Ins. Co.* 1 Pet. 170; *Neptune Ins. Co. v. Robinson*, 11 Gill & J. 256.

(*r*) As where a vessel is represented as expected to sail at or within a certain time. *Bowden v. Vaughan*, 10 East, 416; *Whitney v. Haven*, 13 Mass. 172; *Rice v. New England Ins. Co.* 4 Pick. 439; *Bryant v. Ocean Ins. Co.* 22 Pick. 200; *Hubbard v. Glover*, 8 Camp. 318; *Astor v. Union Ins. Co.* 7 Cow. 202.

(*s*) *Macdowall v. Fraser*, 1 Doug. 260; *Pawson v. Watson*, 2 Cowp. 788.

(*l*) *Burritt v. Saratoga Co. Ins. Co.* 5 Hill, 188; *Dennison v. Thomaston Ins. Co.* 20 Maine, 125.

(*m*) *Whittingham v. Thornburgh*, 2 Vern. 206; *Wilson v. Ducket*, 3 Burr. 1361.

(*n*) *Curry v. Commonwealth Ins. Co.* 10 Pick. 535; *Sawyer v. Coasters Ins. Co.* 6 Gray, 221; *Dennison v. Thomaston Ins. Co.* 20 Maine, 125.

(*o*) *Maryland Ins. Co. v. Ruden*, 6

ally sufficient; (*t*) but it may relate to the future, and then it must be complied with in the future. (*u*)

Generally, the insured is bound to state what he has learned only from rumor, unless the rumor is manifestly frivolous or the authority is not worthy of credit; (*v*) but he need not disclose matters

of common notoriety; (*w*) or what the insured knew as * 404 * well as he; (*x*) or what he had every reason to believe the insurer knew as well; (*y*) or what is distinctly provided for in the policy. (*z*)

If different policies are connected together by identity of subject and by mutual understanding, a misrepresentation made to the first insurer operates on subsequent policies as if made in reference to them. (*a*)

A misrepresentation made before the insurance is made, has the same effect as if made at the time, if it were made in connection with the insurance and had any effect upon it. (*b*)

It may be doubted on authority, whether insurers are discharged when the insured concealed a material fact in ignorance of it, and therefore could not have stated it, but his ignorance was caused by the fraud of his master, in wilfully withholding information from him. (*c*) There are certainly reasons for holding a policy void,

(*t*) *Driscoll v. Passmore*, 1 B. & P. 200.
(*u*) *Flinn v. Headlam*, 9 B. & C. 698;

Dennistoun v. Lillie, 8 Bligh, 202; *Edwards v. Footner*, 1 Camp. 530; *Clark v. Manuf. Ins. Co.* 8 How. 286; *Houghton v. Manuf. Ins. Co.* 8 Met. 114; *Underhill v. Agawam Ins. Co.* 6 Cush. 440; 2 Duer, Ins. 657, note vi.; 1 Arnould Ins. 503; 1 Phillips, Ins. § 553. But the view has been taken, that all statements respecting future events, are mere representations of intention, and will not defeat the policy, unless made fraudulently. *Alston v. Mechanics Ins. Co.* 4 Hill, 329. See also *Rice v. New England Ins. Co.* 4 Pick. 439; *Bryant v. Ocean Ins. Co.* 22 Pick. 200; *Allegré v. Maryland Ins. Co.* 2 Gill & J. 186. It is also difficult to determine whether a statement respecting future event is to be regarded merely as a representation as to an expectation or intention, or as an absolute agreement. See *Benham v. United Ins. Co.* 7 Exch. 744; *Bowden v. Vaughan*, 10 East, 415; *Frisbie v. Fayette Ins. Co.* 27 Penn. St. 825; *Billings v. Tolland Co. Ins. Co.* 20 Conn. 139; *Stokes v. Cox*, 1 H. & N. 533; *Loud v. Citizens Ins. Co.* 2 Gray, 221; *Crocker v. Peoples Ins. Co.* 8 Cush. 79; *Jones Manuf. Co. v. Manuf. Ins. Co.* 8 Cush.

82; *Williams v. New England Mut. Ins. Co.* 81 Maine, 219.

(*v*) See *Lynch v. Hamilton*, 8 Taunt. 44; *Walden v. La. Ins. Co.* 12 La. 184; *Durrell v. Bederley, Holt, N. P.* 283; *Seaman v. Fonereau*, 2 Stra. 1188; *Burr v. Foster*, 2 Dane, Ab. 122; *Wilkes v. Glover*, 4 B. & P. 14. But see *Bell v. Bell*, 2 Camp. 475; *Ruggles v. General Ins. Co.* 4 Mason, 88.

(*w*) *Coulon v. Bowne*, 1 Caines, 288; *Thomson v. Buchanan*, 4 Brown, P. C. 482; *Vallance v. Dewar*, 1 Camp. 503; *Buck v. Chesapeake Ins. Co.* 1 Pet. 151; *Hurtin v. Phoenix Ins. Co.* 1 Wash. C. C. 400; *Moxon v. Atkins*, 8 Camp. 200; *Stewart v. Bell*, 5 B. & Ald. 238.

(*x*) *Carter v. Boehm*, 3 Burr. 1905.

(*y*) *Vasse v. Ball*, 2 Dall. 275.

(*z*) *De Wolf v. New York Ins. Co.* 20 Johns. 214. See 2 Duer, Ins. 573.
(*a*) *Feise v. Parkinson*, 4 Taunt. 640; *Pawson v. Watson*, 2 Cowp. 785. But the rule is otherwise if the policies are independent. *Elting v. Scott*, 2 Johns. 157; *Williams v. New England Ins. Co.* 81 Maine, 219.

(*b*) See *Dawson v. Atty*, 7 East, 367; *Edwards v. Footner*, 1 Camp. 530.

(*c*) The insurers were held liable un-

made under such concealment, if not because the master's knowledge is the knowledge of his principal, then because the contract was founded on an essential misunderstanding of both parties. (*d*)

Neither has it been quite certain how the policy is affected by the misrepresentation or concealment of an agent, who effects the policy, when the principal himself is wholly innocent. It seems, however, now settled that the insurers are thereby discharged. (*e*)

A similar question exists, how far an insurance company is bound by the knowledge of any member or officer of the company. But the answer to this question must always depend on the authority or agency which the member or officer possesses, by usage, by office, or by direct instructions. (*f*)

* If the insured when he states a fact gives truly his authority for it, and the insurers can judge of that fact and that authority as well as he can, though the authority is insufficient and the statement founded thereon erroneous, it is not a misrepresentation. (*g*)

As the misrepresentation must be of a fact material to that contract, it is obvious that this materiality must be determined by the circumstances of each case; as, for example, the national character of the property, (*h*) or the nature of it, or the interest of the assured in it, (*i*) or the time of sailing, (*j*) or the place of the ship at a certain time, or the age or construction of the ship.¹ The one principle which is certain and established, and answers all these questions, is, that everything should be stated, and stated truly, which the insured knows, and which insurers, acting as rea-

der such circumstances in *Ruggles v. Gen. Ins. Co.* 4 Mason, 74, 12 Wheat. 408. 423; *Francis v. Ocean Ins. Co.* 6 Cow. 404; *Murray v. United Ins. Co.* 2 Johns. Caa. 168.

(*d*) The decision in the case cited in the preceding note is doubted by Mr. Duer and Mr. Phillips. 2 Duer, Ins. 415, and note xi. to ch. xiv.; 1 Phillips, Ins. § 549. See also *Fitzherbert v. Mather*, 1 T. R. 12.

(*e*) *Sawyer v. Coasters Ins. Co.* 6 Gray, 221; *Stewart v. Dunlop*, 4 Brown, P. C. 488, note; *Carpenter v. Am. Ins. Co.* 1 Story, 63. See a strong case in *Proudfoot v. Montefiore*, Law Rep. 2 Q. B. 511.

(*f*) See *Himely v. S. Car. Ins. Co.* 3 Const. R. 154.

(*g*) *Tidmarsh v. Washington Ins. Co.* 4 Mason, 448.

(*h*) *Campbell v. Innes*, 4 B. & Ald.

423; *Francis v. Ocean Ins. Co.* 6 Cow. 404; *Murray v. United Ins. Co.* 2 Johns. Caa. 168.

(*i*) Generally the nature of the interest of the insured need not be stated. *Oliver v. Greene*, 3 Mass. 188; *Finney v. Warren Ins. Co.* 1 Met. 16; *Taylor v. Wilson*, 15 East, 324; *Russel v. Union Ins. Co.* 1 Wash. C. C. 409.

(*j*) This is generally material, *M'Lanahan v. Universal Ins. Co.* 1 Pet. 188; *Anderson v. Thornton*, 8 Exch. 425; *Baxter v. New England Ins. Co.* 3 Mason, 96; *Elkin v. Janson*, 18 M. & W. 655.

But if the time would not affect the premium it need not be disclosed. *Littledale v. Dixon*, 4 B. & P. 161; *Foley v. Moline*, 5 Taunt. 490; *Williams v. Delafield*, 2 Caines, 329.

¹ See *Ionides v. Pacific Ins. Co.* L. R. 6 Q. B. 674.

sonable men, should consider, either in determining whether they would insure at all or what premium they should ask. (*k*)¹ Nor will it be enough that the insurers might have learned the truth otherwise, if they did not know it, and the insured did and concealed it. (*kk*)

Every representation or statement will be construed by the fair and obvious meaning of the words, (*l*) and rational inferences from them; and will include all facts, however distinct, which are yet necessarily connected with the statement. (*m*)

It is an important difference between a warranty and a representation, that while a warranty must be literally and accurately complied with, a substantial compliance with a representation is sufficient; (*n*) and a literal compliance, if it be not substantial, is not sufficient. (*o*)

OF IMPLIED WARRANTIES.

A.— *Of Seaworthiness.*

The warranty of seaworthiness is by far the most important of the warranties implied by law. It enters as its very foundation into every contract of insurance on a ship. The general meaning of seaworthiness is, that a ship is in every particular of her condition competent to encounter safely the ordinary risks to which she must be exposed, at the place where, or during the period, or the

(*k*) See *Ingraham v. South Carolina Ins. Co.* 3 Brev. 522.

(*kk*) *Bates v. Hewitt*, Law Rep. 2 Q. B. 595.

(*l*) *Sibbald v. Hill*, 2 Dow, P. C. 268; *Livingston v. Maryland Ins. Co.* 7 Cranch, 508.

(*m*) *Steel v. Lacy*, 3 Taunt. 285; *Kirby v. Smith*, 1 B. & Ald. 672.

(*n*) *Chase v. Wash. Ins. Co.* 12 Barb. 595; *Suckley v. Delafield*, 2 Caines, 222; *Pawson v. Watson*, 2 Cowp. 785; *De Hahn v. Hartley*, 1 T. R. 345. See *Sawyer v. Coasters Ins. Co.* 6 Gray, 221.

(*o*) *Alsop v. Coit*, 12 Mass. 40; *Murray v. Alsop*, 8 Johns. Cas. 47; *Steel v. Lacy*, 3 Taunt. 285; *Houghton v. Manuf. Ins. Co.* 8 Met. 123.

¹ That the disclosure of a material fact, coming to the knowledge of the insured after the acceptance of the risk and the binding the underwriter in honor, but before the issuing of the policy, is unnecessary, see *Cory v. Patton*, L. R. 7 Q. B. 304; 9 Q. B. 577; and *Lishman v. Northern Maritime Ins. Co.* L. R. 8 C. P. 216; 10 C. P. 179. As to the non-disclosure of an over-valuation so great as to make the risk speculative, see *Ionides v. Fender*, L. R. 9 Q. B. 531. See *Gandy v. Adelaide Ins. Co.* L. R. 6 Q. B. 746.

voyage, for which she is insured. (*p*)¹ This warranty comprehends in its requirement everything used in the structure and fitting of the ship; her build and fastenings, (*q*) spars, sails, rigging, (*r*) boats, cables, and anchors, (*s*) all usual and proper papers and documents; food and water of sufficient quality and quantity; (*t*) fuel, charts; and such furniture and implements as are needed for safe navigation; (*u*) ballast, (*v*) pilotage, (*w*) and proper stowage of the cargo; (*x*) and a master, officers and crew, competent in number and ability. (*y*)

* The warranty of seaworthiness must be fully complied with; but a defect or deficiency may exist in some one or other of the things above enumerated, and yet not be sufficient in extent or character to constitute a breach of warranty; and whether it be so or not, is generally a question of fact for the jury. Thus, few ships go to sea without some rot in some part of the wood, or some weakness or deficiency in the sails or rigging; and this may be wholly unimportant or extremely dangerous, or

(*p*) *Dixon v. Sadler*, 5 M. & W. 405; *Knill v. Hooper*, 2 H. & N. 277; *Myers v. Girard Ins. Co.* 26 Penn. State, 192; *Cincinnati Ins. Co. v. May*, 20 Ohio, 211.

(*q*) *Watt v. Morris*, 1 Dow, 32; *Parker v. Potts*, 8 id. 32; *Bell v. Reed*, 4 Binn. 127; *Douglas v. Scougal*, 4 id. 269.

(*r*) *Wedderburn v. Bell*, 1 Camp. 1.

(*s*) *Wilkie v. Geddes*, 8 Dow, 67.

(*t*) *Fontaine v. Phenix Ins. Co.* 10 Johns. 58; *Moses v. Sun Ins. Co.* 1 Duer, 159; *Kettell v. Wiggin*, 18 Mass. 68. But a non-compliance with the provisions of a statute requiring the carrying of a certain quantity of water under deck, does not of itself render the vessel unseaworthy. *Warren v. Manuf. Ins. Co.* 13 Pick. 518; *Deshon v. Merchants Ins. Co.* 11 Met. 209. And the mere fact that all the water on board is carried on deck, does not, if it has been *held*, of itself, as matter of law, render the vessel unseaworthy, but it is a fact tending to prove unseaworthiness. *Deshon v. Merchants Ins. Co.* 11 Met. 208.

(*u*) As to a medicine chest, see *Woolf v. Claggett*, 3 Esp. 257.

(*v*) *Deblois v. Ocean Ins. Co.* 16 Pick. 303. See *Dixon v. Sadler*, 5 M. & W. 406.

(*w*) *Gibson v. Small*, 4 H. L. Cas.

363; *Dixon v. Sadler*, 5 M. & W. 415, 8 M. & W. 805; *Law v. Hollingsworth*, 7 T. R. 160; *Phillips v. Headlam*, 2 B. & Ad. 380; *Stanwood v. Rich*, 1 Phillips, Ins. § 715; *Keeeler v. Firem. Ins. Co.* 8 Hill, 250; *M'Millan v. Union Ins. Co.* Rice, 248; *De Pau v. Jones*, 1 Brev. 437; *Flanigan v. Wash. Ins. Co.* 7 Barr, 306; *Whitney v. Ocean Ins. Co.* 14 La. 486.

(*x*) *Chase v. Eagle Ins. Co.* 5 Pick. 51; *Weir v. Aberdeen*, 2 B. & Ald. 820; *Cin. Ins. Co. v. May*, 20 Ohio, 211.

(*y*) *Forshaw v. Chabert*, 3 Brod. & B.

158; *Walden v. N. Y. Ins. Co.* 12 Johns. 136; *Tait v. Levi*, 14 East, 481; *Draper v. Com. Ins. Co.* 4 Duer, 234; *Dow v. Smith*, 1 Caines, 32; *Silva v. Low*, 1 Johns. Cas. 184; *Crader v. Phil. Ins. Co.* 2 Wash. C. C. 262; *Cruder v. Penn. Ins. Co.* id. 339; *Hucks v. Thornton*, Holt, N. P. 30; *Busk v. Royal Exch. Ass. Co.* 2 B. & Ald. 73. It is generally necessary to have an officer on board competent to take the master's place in case of an emergency. *Clifford v. Hunter*, 3 Car. & P. 16; *Gillespie v. Forsyth*, 2 Law Rep. 257; *Walden v. N. Y. Ins. Co.* 12 Johns. 136; *Treadwell v. Union Ins. Co.* 6 Cow. 270; *Copeland v. New England Ins. Co.* 2 Met. 482.

¹ That it is not a compliance with the warranty of seaworthiness, that the ship is fit to encounter ordinary rough weather with safety to herself, because the deck cargo is such as may be readily jettisoned in such weather, was declared in *Daniels v. Harris*, L. R. 10 C. P. 1.

anywhere between these extremes ; and whether it renders her unseaworthy, depends upon the test, whether it makes her unfit to encounter the ordinary perils to which she will be exposed ; and the same rule applies to the sails and rigging, and everything else. Upon the trial of such questions, after evidence is received to determine as exactly as possible the facts of the case, experts are usually called to give to the jury their judgment, as to the influence of these facts.

It is obvious that seaworthiness must differ greatly under different circumstances. A ship may be insured only while in a certain port, (*z*) or for a coasting voyage, or a voyage to Europe, or a voyage round the world, or during a tempestuous season or a quiet one ; and the seaworthiness required in every case is the seaworthiness of that vessel (*a*) for that place, time, or voyage. (*b*)

Usage may have great influence in determining this point. Thus, in many cases, a log-line and a quadrant may be enough.

But in other cases, it might be necessary that the ship * 408 should * have a chronometer, a sextant, and a master competent to make a proper use of these instruments. So there must be proper charts on board ; but what charts are proper and necessary must be determined by the circumstances of each case. (*c*)

Seaworthiness is a condition precedent ; that is, unless the vessel be seaworthy the policy does not attach. (*d*) But by a rule somewhat peculiar, the insured is not in general bound to prove that this condition was fulfilled, until the insurers offer some proof of unseaworthiness. (*e*)¹ This the insurers may do, by showing

(*z*) *M'LANAHAN v. UNIVERSAL INS. CO.* 1 Pet. 184; *ABITBOL v. BRISTOW*, 6 Taunt. 464; *CRUDER v. PHIL. INS. CO.* 2 Wash. C. 262; *PADDOCK v. FRANKLIN INS. CO.* 11 Pick. 232.

(*a*) The term seaworthiness, as applied to steam-vessels, means not only that the hull shall be stanch, tight, and strong, but that the machinery shall be properly constructed, and of sufficient power to perform the contemplated voyage. *MYERS v. GIRARD INS. CO.* 26 Penn. State, 192. See, as to floating docks, *MARCY v. SUN INS. CO.* 11 La. An. 748.

(*b*) See *COBB v. NEW ENGLAND INS. CO.* 6 Gray, 192; *KNILL v. HOOOPER*, 2 H. & N.

277; *ALEXANDER v. PRATT*, 1 Arnould, Ins. 669; *SMALL v. GIBSON*, 16 Q. B. 141; *BROWN v. GIRARD*, 4 Yeates, 115; *BELL v. REED*, 4 Binn. 127.

(*c*) In all such cases the question is one of fact for the jury. *CHASE v. EAGLE INS. CO.* 5 Pick. 51; *BELL v. REED*, 4 Binn. 127; *CLIFFORD v. HUNTER, MOODY & M.* 108; *GILLESPIE v. FORSYTH*, 2 Law Rep. 257; *M'LANAHAN v. UNIVERSAL INS. CO.* 1 Pet. 184.

(*d*) *TIDMARSH v. WASHINGTON INS. CO.* 4 Mason, 489; *SMALL v. GIBSON*, 16 Q. B. 128; *WALLACE v. DE PAU*, 2 Bay, 508, 1 Brev. 262; and cases *passim*.

(*e*) It has been held in some cases,

¹ See *PICKUP v. THAMES INS. CO.* 3 Q. B. D. 594, as to the shifting of proof from the insurer to the insured.

that the loss occurred without any exposure to extraordinary peril; (*f*) but if a vessel has encountered an extraordinary peril, and the insurer resists a claim for loss, on the ground of unseaworthiness, he must prove this; (*g*) and so if the vessel sails and is never heard from. (*h*)

If a vessel becomes unseaworthy, and afterwards leaves an intermediate port in that condition, although she might have been repaired there, and is lost in consequence of that neglect on the part of the captain to repair her, the underwriters are not held liable in this country. (*i*) In England, however, the law seems now to be, that if the ship was seaworthy at the commencement of the voyage, subsequent unseaworthiness, from whatever cause, except the wilful and wrongful act of the assured himself, will not relieve the underwriter from liability * for a loss * 409 which is the proximate effect of a peril insured against. (*j*)

It is, however, an unquestionable rule of insurance law, that it is the duty of the master to repair unseaworthiness in the first port of repair which he reaches after the injury. The disregard of this duty is undoubtedly a breach of the warranty of seaworthiness. Still this breach does not operate altogether like a breach of this warranty at the beginning. It does not destroy the liability of the insurers, but only suspends it. It seems to be settled, for example, that if a ship loses her spars at sea, or a part of her crew, and reaches a port where they could be supplied, and leaves it without supplying them, but then proceeds to another port and there supplies them, the liability of the insurers continues until she reaches the first port where her wants can be supplied, and

that as the seaworthiness of the vessel is a condition precedent to the right of the assured to recover, it lies upon him to establish that fact. *Tidmarsh v. Wash. Ins. Co.* 4 Mason, 439; *Craig v. U. S. Ins. Co.* Pet. C. C. 410; *Moses v. Sun Ins. Co.* 1 Duer, 159. But the rule generally followed at the present day is, that seaworthiness is assumed as a fact in the absence of fraud, and the assured is not called upon to prove it *in limine*. *Deshon v. Merchants Ins. Co.* 11 Met. 207; *Taylor v. Lowell*, 3 Mass. 881; *Paddock v. Franklin Ins. Co.* 11 Pick. 227; *Parker v. Potts*, 3 Dow, 28; *Bullard v. Roger Williams Ins. Co.* 1 Curtis, C. C. 148; *Snethen v. Memphis Ins. Co.* 8 La. An. 474; *Dupeyre v. Western Ins. Co.* 2 Rob. La. 457.

(*f*) *Watson v. Clark*, 1 Dow, 344;

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Parker v. Potts, 3 Dow, 28; *Wright v. Orient Ins. Co.* 6 Bosw. 269; *Deshon v. Merchants Ins. Co.* 11 Met. 207; *Myers v. Girard Ins. Co.* 26 Penn. State, 192; *Bullard v. Roger Williams Ins. Co.* 1 Curtis, C. C. 148; *Walsh v. Washington Ins. Co.* 82 N. Y. 427.

(*g*) *Barnewall v. Church*, 1 Caines, 217.

(*h*) *Deshon v. Merchants Ins. Co.* 11 Met. 207.

(*i*) *Paddock v. Franklin Ins. Co.* 11 Pick. 227; *Hazard v. New England Ins. Co.* 1 Sumner, 230, 8 Pet. 557; *Deblois v. Ocean Ins. Co.* 16 Pick. 308; *Copeland v. New England Ins. Co.* 2 Met. 482.

(*j*) *Shee's Marshall on Ins.* 122; *Dixon v. Sadler*, 5 M. & W. 405; *Redman v. Wilson*, 14 id. 476.

is then suspended until they are supplied, and then revives after they are supplied.

Whether the suspension of the liability is complete, or only in reference to the wants not supplied, or, in other words, whether, if a loss happens during this suspension from any cause, the insurers would be discharged; or would be discharged only if the loss can be attributed in some degree to those wants, may not be certain. We should say, however, that the prevailing rule is, that the insurers would be liable even during the period of suspension, for a loss which cannot be attributed at all to the wants which caused the suspension. (*k*) In questions of this kind, as in most of those of seaworthiness, whether relating to the ship, her provisions, crew, or pilot, usage and the nature of the voyage would have much influence.

The seaworthiness required when she leaves an intermediate port, may not be so perfect as that required before she proceeds on her voyage. The only rule must be that she should be * 410 * made as seaworthy as she could be made, by a reasonable use of the means within reach.

So if the insurance is to attach while the vessel is at sea, or in a distant port, the seaworthiness must be that proper to the time and place. (*l*)

A similar question exists as to the warranty on time policies; and it may be still involved in some uncertainty. We think, however, the rule must be, that when she sails on her first voyage, she must be or have been completely seaworthy in the ordinary sense; and thereafter kept and made seaworthy, by the reasonable use of all available means, and that the insurers are not liable for a loss caused by a want of repairs which could have been made by the proper use of such means. But if the insurance is to attach to a ship at a distance, and after a part of her voyage has been made, the seaworthiness required is not the same with that required at the beginning of the voyage, but is qualified by a reasonable consideration of the circumstances, and of the nature of the contract. (*m*)¹

(*k*) *Capen v. Washington Ins. Co.* 12 *Phoenix Ins. Co.* 3 S. & R. 25; *Hazard v. Cush.* 517; *Starbuck v. New England New England Ins. Co.* 1 *Sumner*, 218, 230. *Ins. Co.* 19 *Pick.* 198; *Chase v. Eagle* (*l*) See *Paddock v. Franklin Ins. Co.* *Ins. Co.* 5 *Pick.* 51; *Am. Ins. Co. v. Ogden*, 16 *Wend.* 532, 20 *id.* 287; *Peters v. 11 *Pick.* 227.*

(*m*) In England, it is now settled that

¹ *Dudgeon v. Pembroke*, 2 *App. Cas.* 284, decided that in a time policy the law, in the absence of special stipulations in the contract, does not imply any warranty that the

B.—*Of Deviation.*

There is always a warranty that the ship shall pursue her proper course between the *termini* of the voyage insured, and therefore these *termini* should be distinctly stated in the policy. It is therefore one of the best established rules of insurance law, that the insurers are discharged by any deviation from the proper course of the voyage. Originally this term "deviation,"

* as employed in the law of insurance, had no wider meaning; but now it is extended by the reason of the rule, to any material change in the risks assumed by the insurers. And the rule applies in full force, although the change does not increase the risk; for the insurers have a right to say that they assumed certain risks, and no other risks; (n) and the rule is, that any deviation whatever, not merely suspends the liability of the insurers, but discharges them from all future responsibility; but not for a loss caused before the deviation by a peril insured against. (o)

It may indeed be said, that the change of risk might be merely temporary, and that thereafter all subsequent risks are certainly and precisely just what they would have been had there been no deviation; and then the liability of the insurers might revive. There can, however, be few changes in the risks, if any, that leave all subsequent perils entirely and certainly unaffected. (p)

Usage has especial influence in determining what is the proper

there is no implied warranty of seaworthiness in any case in a time policy of insurance. *Small v. Gibson*, 16 Q. B. 128, 141, 4 H. L. Cas. 353; *Jenkins v. Heycock*, 8 Moore, P. C. 351; *Michael v. Tredwin*, 17 C. B. 551; *Thompson v. Hopper*, 6 Ellis & B. 172, 987; *Ellis, B. & E.* 1028; *Fawcett v. Sarsfield*, 8 Ellis & B. 192. In this country, after some discussion, the rule appears to be settled, that if the vessel is at sea at the time the risk commences, the only implied warranty is that the vessel was in existence as a vessel, but that if she is in port at the time of the inception of the risk there is an implied warranty that she shall be seaworthy when she leaves the port. See

Hoxie v. Pacific Ins. Co. 7 Allen, 211; *Macy v. Mut. Ins. Co.* 12 Gray, 497; *Cappen v. Washington Ins. Co.* 12 Cush. 517; *Jones v. Ins. Co.* 2 Wallace, C. C. 278; *Rouse v. Ins. Co.* 25 Law Rep. 528; *Martin v. Fishing Ins. Co.* 20 Pick. 389; *Am. Ins. Co. v. Ogden*, 20 Wend. 287; *Hoxie v. Home Ins. Co.* 32 Conn. 21.

(n) *Maryland Ins. Co. v. Le Roy*, 7 Cranch, 26; *Child v. Sun Ins. Co.* 8 Sandf. 26; *Kettell v. Wiggin*, 13 Mass. 68; *Hartly v. Buggin*, 8 Doug. 39.

(o) *Hare v. Travis*, 7 B. & C. 14; *Green v. Young*, 2 Salk. 444; *Richardson v. Maine Ins. Co.* 6 Mass. 102.

(p) See *Coffin v. Newburyport Ins. Co.* 9 Mass. 449, per *Sedgwick*, J.

vessel should be seaworthy, *Gibson v. Small*, supplemented by *Thompson v. Hopper* and *Fawcett v. Sarsfield*, *supra*, being declared to have set at rest all controversies on this subject. See *MERCHANTS' INS. CO. v. MORRISON*, 62 Ill. 242.

course for a voyage, and what is a departure from this course. (q) If there be no such usage, the master is always bound to proceed to his destination in that which is the best way, all things being considered. (r) At the same time, a master always must have from the nature of the case a certain amount of discretion; it is his duty to exercise his judgment; and the insured is bound to

leave him at liberty to exercise his judgment. (s) There

* 412 may certainly be a deviation before the *voyage begins, by unreasonable delay; (t)¹ and such delay at an intermediate port would be a deviation. (u)

A deviation is always excused by a sufficient necessity; or rather a change of risk is not a deviation, which is caused and justified by a sufficient necessity. (v) This necessity must always be judged of by the circumstances, which, at the time, were presented for consideration to the assured or his master, and not by subsequent events. (w)²

It must always be a voluntary act; for whatever is done under compulsion, (x) or indeed for any sufficient cause, is not a devia-

(q) *Martin v. Delaware Ins. Co.* 2 Wash. C. C. 254; *Folsom v. Merchants Ins. Co.* 38 Maine, 414; *Bentaloe v. Pratt, J. B. Wallace*, 58; *Kettell v. Wiggin*, 18 Mass. 68; *Lockett v. Merch. Ins. Co.* 10 Rob. La. 889; *Mey v. South Carolina Ins. Co.* 3 Brev. 329; *Elliot v. Wilson*, 4 Brown, P. C. 470; *Vallance v. Dewer*, 1 Camp. 503; *Ougier v. Jennings*, id. 505, note; *Salvador v. Hopkins*, 3 Burr. 1707; *Gregory v. Christie*, 3 Doug. 419; *Depeyster v. Sun Ins. Co.* 19 N. Y. 272.

(r) *Martin v. Delaware Ins. Co.* 2 Wash. C. C. 254; *Brown v. Tayleur*, 4 A. & E. 241.

(s) As where the master is required by usage, on reaching a certain point, to decide, on a consideration of the winds and currents, which of two or more routes is the best, and he without so deciding takes one of them in obedience to the sailing orders of his owners, this would be a deviation. *Middlewood v. Blakes*, 7 T. R. 162.

(t) *Earl v. Shaw*, 1 Johns. Cas. 313; *Driscoll v. Passmore*, 1 B. & P. 200; *Chitty v. Selwyn*, 2 Atk. 359; *Hull v.*

Cooper, 14 East, 479; *Hartley v. Buggin*, 3 Doug. 89; *Seamans v. Loring*, 1 Mason, 127; *Himely v. S. Car. Ins. Co.* 3 Const. R. 154; *Palmer v. Marshall*, 8 Bing. 79; *Mount v. Larkins*, 8 Bing. 108. (u) *Hamilton v. Sheldon*, 3 M. & W. 49; *Murden v. South Car. Ins. Co.* 3 Const. R. 200; *Coffin v. Newburyport Ins. Co.* 9 Mass. 436; *Williams v. Shee*, 8 Camp. 469; *Kingston v. Girard*, 4 Dall. 274.

(v) Thus, a vessel damaged by a peril of the sea, may go out of her course to refit. *Motteux v. London Ass. Co.* 1 Atk. 545; *Coffin v. Newburyport Ins. Co.* 9 Mass. 447; *Colee v. Marine Ins. Co.* 3 Wash. C. C. 159; *Hall v. Franklin Ins. Co.* 9 Pick. 466. But whatever be the necessity, unnecessary delay or waste of time, or wandering under that necessity, will be a deviation. *Turner v. Protection Ins. Co.* 26 Maine, 515.

(w) *Byrne v. La. State Ins. Co.* 19 Mart. La. 126; *Gazzam v. Ohio Ins. Co.* Wright, 202; *Stewart v. Tenn. Ins. Co.* 1 Humph. 242.

(x) *Winthrop v. Union Ins. Co.* 2

¹ "In a policy 'at and from a port,' it is an implied understanding that the vessel shall be there within such time that the risk shall not be materially varied, otherwise the risk does not attach." Per *Blackburn*, J., in *De Wolf v. Archangel Ins. Co.* L. R. 9 Q. B. 451, 457.

² An unexpected failure of bait of the kind ordinarily taken on the fishing ground, will not justify a fishing vessel in going to a port outside of the course of the voyage to procure bait. *Burgess v. Equitable Ins. Co.* 126 Mass. 70.

tion ; and what would otherwise be a deviation is not one, if a change of risk were made to avoid a peril of sufficient reality and magnitude, and was no greater than this cause required. (y) And as we have seen in the chapter on contracts of shipping, a change of the course of a ship is justified, if it were for the purpose of saving the life of persons on board another vessel. (z)¹ And we should apply the same rule to a deviation to save life on board the vessel insured, unless this deviation was made necessary by the want of sufficient means of cure on board ; and this want might amount to unseaworthiness. (a)

* It is quite certain, that a mere intention to deviate is * 418 not a deviation. If the intended voyage is wholly abandoned and another substituted, a policy for the original voyage never attaches. But if, for example, a vessel insured from Boston to Rio Janeiro, takes goods on board which she intends to carry to New Orleans, and then returns to her voyage to Rio Janeiro ; and the first part of the voyage is precisely the same as if she had not intended to go to New Orleans ; the deviation does not take place until she actually changes her course to go to New Orleans. And for a loss occurring before this change of her course takes place, the insurers would be liable. (b) Whether if a vessel sails with the purpose of pursuing her course for a certain time and then of changing her course, this is only an intended deviation, or an en-

Wash. C. C. 7; Scott *v.* Thompson, 4 B. & P. 181. See Phelps *v.* Auldro, 2 Camp. 360.

(y) As capture. Driscoll *v.* Bovil, 1 B. & P. 318; Whitney *v.* Haven, 13 Mass. 172; Reade *v.* Comm. Ins. Co. 3 Johns. 362; Post *v.* Phoenix Ins. Co. 10 Johns. 79; Lee *v.* Gray, 7 Mass. 352; Gouverneur *v.* United Ins. Co. 1 Caines, 592. See O'Reilly *v.* Royal Exch. Ass. Co. 4 Camp. 246; Breed *v.* Eaton, 10 Mass. 21.

(z) The Sch. Boston, 1 Sumner, 323; Bond *v.* Brig Cora, 2 Wash. C. C. 80; Ship Henry Ebwbank, 1 Sumner, 400; Settle *v.* St. Louis Ins. Co. 7 Mo. 879; Walsh *v.* Homer, 10 id. 6; Lawrence *v.* Sydebotham, 6 East, 45. See Papayann *v.* Hocquard, Law Rep. 1 C. P. 250.

(a) In Perkins *v.* Augusta Ins. Co. 10 Gray, 312, the wife of the captain, who was on board in a pregnant condition, fell down the cabin stairs. To obtain medical assistance and advice, the master

deviated from his course and put into port. The court held, that the deviation, if necessary to save life on board, was justifiable. See also Brown *v.* Overton, Sprague, 462. In Woolf *v.* Claggett, 3 Esp. 257, Lord Eldon stated, that it was incumbent on the owner to provide against the results of accidents by every proper precaution, as to medicines and necessaries for the voyage, as much as he was bound with respect to the tightness of the ship.

(b) Foster *v.* Wilmer, 2 Stra. 1249; Carter *v.* Royal Exch. Ass. Co. id.; Thellusson *v.* Fergusson, 1 Doug. 361; Kewley *v.* Ryan, 2 H. Bl. 348; Hare *v.* Travis, 7 B. & C. 14; Marine Ins. Co. *v.* Tucker, 8 Cranch, 357; Hobart *v.* Norton, 8 Pick. 159; Winter *v.* Delaware Ins. Co. 30 Penn. State, 334; Lawrence *v.* Ocean Ins. Co. 11 Johns. 241; New York Ins. Co. *v.* Lawrence, 14 id. 46. See Silva *v.* Low, 1 Johns. Cas. 184.

¹ A deviation for the purpose of saving life is justifiable, but not for the mere saving of property. Scaramanga *v.* Stamp, 4 C. P. D. 316; affirmed in 5 C. P. D. 295.

tire change of the original voyage, discharging the insurers from the beginning, must always be a question of mixed law and fact. We should say, however, that if a vessel sailed with the original intention of terminating her voyage at some other port or place than that to which she is insured, this would, generally at least, be a change of the voyage. (*c*) If she sails, intending to go where she is insured to go, a clearance for a different port would not discharge the insurers. (*d*)

Policies of a certain description are commonly called liberty policies. They permit certain changes of course, which would otherwise be deviations. The expressions often used are "with liberty to enter such a port," or "to enter" or "touch at" or

"trade" or "stop" or "stay at." The parties may, of course, * make whatever stipulations they please; and the language used, although once construed with perhaps severe technicality, (*e*) would now undoubtedly be construed with due regard to the intention of the parties. (*f*)¹

It is now often expressly permitted, that intermediate voyages may be made, or intermediate ports visited. These intermediate ports are sometimes named, and sometimes only designated as ports between two *termini*. (*g*) In either case, it is quite certain that the ports should be visited in the order in which they are named, (*h*) unless it is obvious that the order in which they are enumerated was accidental, and not intended to have any effect; or, if not named, then in their geographical order. (*i*) By geographical order is generally meant the order in which they stand upon the map; but usage and the nature and purpose of the voyage may show a different intention of the parties, and so vary this

(c) *Stocker v. Harris*, 8 Mass. 409; *Merrill v. Boylston Ins. Co.* 3 Allen, 247; *Marine Ins. Co. v. Stras*, 1 Munf. 408. See *Marine Ins. Co. v. Tucker*, 3 Cranch, 857, per *Johnson*, J.

(d) *Planché v. Fletcher*, 1 Doug. 251; *Barnewall v. Church*, 1 Caines, 217; *Talcott v. Marine Ins. Co.* 2 Johns. 130; *McFee v. S. Car. Ins. Co.* 2 McCord, 508.

(e) Thus "to touch and stay" has been held not to authorize breaking bulk. *Stitt v. Wardell*, 2 Esp. 610, Park, Ins. 388. See also, *Sheriff v. Potts*, 5 Esp. 96; *United States v. The Paul Shearman*, Pet. C. C. 104.

(f) *Urquhart v. Barnard*, 1 Taunt. R. 533.

450; *Gregory v. Christie, Park, Ins.* 67, 3 Doug. 419; *Cross v. Shutliffe*, 2 Bay, 220; *Metcalfe v. Parry*, 4 Camp. 123; *Ashley v. Pratt*, 16 M. & W. 471, 1 Exch. 257; *Gilfert v. Hallet*, 2 Johns. Cas. 296; *Chase v. Eagle Ins. Co.* 5 Pick. 51. See an instructive case on the Construction of a Liberty Policy, in *Seccomb v. Provincial Ins. Co.* 10 Allen, 306.

(g) *Thorndike v. Boardman*, 4 Pick. 471; *Bize v. Fletcher*, 1 Doug. 284; *Hunter v. Leathley*, 10 B. & C. 858; *Leathley v. Hunter*, 7 Bing. 517.

(h) *Beatson v. Haworth*, 6 T. R. 531.

(i) See *Clason v. Simmons*, cited 6 T.

¹ In *Foreign Merchants v. British, &c. Ins. Co.* L. R. 8 Ex. 154, under a policy "to stay and trade," a delay other than for a trading purpose was held to be a deviation.

order. (*j*) The reason for the rule is, that if it were otherwise, a vessel might go to the further port and then return to a nearer, then go again to a further port and return to a nearer, and thus lengthen the voyage indefinitely; and no construction would give this power unless it were expressly given. (*k*) For the same reason, a liberty to go to any ports without naming them, would be construed with reference to the voyage insured, and would not be held to include permission to visit a port which could not be reached without a distinct change of the voyage. (*l*)

Policies on time may contain no *termini* whatever; and then * they usually add the clause, "wherever she may be," * 415 or some equivalent clause. But they may contain *termini* of place, or specify that certain places may be visited only at certain seasons. A very common insurance is to such "a port and a market;" and it covers the vessel to that port, and while on her way from that port to any other in search of a market. (*m*) But even to this general liberty, usage and a reasonable reference to the intention of the parties might give some limitation.

The insured is never bound to take advantage of the liberty given him, and a mere omission to exercise the whole or any part of it, would not amount to a deviation. (*n*)

In reference to all liberties whatever, however wide they may be, they must be so construed, if the language is not precise and clear, and they must also be so exercised as not to bring them into conflict with the proper progress of the vessel towards an ultimate destination, which is declared and defined in the policy. (*o*) But if there be no designation of an ultimate destination, it would seem that the permitted ports may be visited in any order, if so visited for the purpose of receiving orders or instructions to determine the final destination. (*p*)

(*j*) See *Gairdner v. Senhouse*, 3 Taunt. 16.

(*k*) *Hammond v. Reid*, 4 B. & Ald. 72; *Williams v. Shee*, 8 Camp. 469; *Solly v. Whitmore*, 5 B. & Ald. 45; *Clason v. Simmonds*, cited 6 T. R. 583; *Langhorn v. Allnutt*, 4 Taunt. 511; *Rucker v. Allnut*, 15 East. 278.

(*l*) *Bottomeley v. Bovill*, 5 B. & C. 210; *Hogg v. Horner, Park, Ins.* 394; *Ranken v. Reeve, Park, Ins.* 627; *Lavabre v. Wilson*, 1 Doug. 284; *Coles v. Marine Ins. Co.* 8 Wash. C. C. 159; *Winthrop v. Union Ins. Co.* 2 Wash. C. C. 7; *Lambert v. Liddard*, 5 Taunt. 430.

(*m*) *Deblois v. Ocean Ins. Co.* 16 Pick. 303; *Maxwell v. Robinson*, 1 Johns. 388; *Smith v. Bates*, 2 Johns. Cas. 299; *Gaither v. Myrick*, 9 Md. 118.

(*n*) *Marsden v. Reid*, 3 East, 572; *Hale v. Mercantile Ins. Co.* 6 Pick. 172; *Kane v. Columbian Ins. Co.* 2 Johns. 284; *Cross v. Shutliffe*, 2 Bay, 220.

(*o*) See *Bragg v. Anderson*, 4 Taunt. 229; *Perkins v. Augusta Ins. Co.* 10 Gray, 312.

(*p*) *Mellish v. Andrews*, 16 East, 812; 2 M. & S. 27, 5 Taunt. 498; *Armet v. Innes*, 4 J. B. Moore, 150; *Ashley v. Pratt*, 16 M. & W. 471, 1 Exch. 257.

SECTION XIV.

OF THE ADJUSTMENT.

The adjustment of a claim on insurers is not always required; nor is any particular form required. In all the United States, adjustments are usually made in a similar way, and * 416 * the larger mercantile ports, at least, by persons whose business it is to make them; and these persons are generally, though not always, insurance brokers.

These adjustments are sometimes long and complicated, especially in cases of general average; and sometimes short and simple. In either case, and equally, the law makes them binding upon all the parties in interest. (q) The exceptions to this rule are the same as those applied to all contracts. They may be avoided by a party defrauded, if they were made fraudulently. (r) Nor are they enforced if founded upon a material misrepresentation or concealment, (s) or a material mistake of fact, (t) or, we think, of law. (u) But the distinction of the common law between these two mistakes is still so far applied, that if money be actually paid under an adjustment, it may be recovered back if paid through a mistake of fact, (v) but not if paid through a mistake of law. (w)

The policies in common use make the loss payable "after proof and adjustment of the loss." But if payment is refused, and a suit is instituted, the want of an adjustment is no defence. (x) And if a claim be demanded and refused, which is founded upon an adjustment which was offered by the insured, he may then waive this adjustment, and present and sue upon a new adjustment, whether more or less advantageous to him. (y)

(q) *Hog v. Gouldney, Beawes, Lex Merc. 310, Park, Ins. 162; Hewit v. Flexney, Beawes, Lex Merc. 308; Adams v. Saundars, 4 Car. & P. 25; May v. Christie, Holt, N. P. 67.*

(r) *Haigh v. De la Cour, 3 Camp. 319. (s) Faugier v. Hallett, 2 Johns. 233; Shepherd v. Chewter, 1 Camp. 274.*

(t) *Rogers v. Maylor, Park, Ins. 168; Christian v. Coombe, 2 Esp. 489; De*

Garron v. Galbraith, Park, Ins. 168; Dow v. Smith, 1 Caines, 32.

(u) *Rogers v. Maylor, Park, Ins. 168. (v) Reyner v. Hall, 4 Taunt. 725; Kelly v. Solari, 9 M. & W. 64; Mutual Ins. Co. v. Munro, 7 Gray, 248.*

(w) *Bilbie v. Lumney, 2 East, 469.*

(x) *Rogers v. Maylor, Park, Ins. 168. (y) Am. Ins. Co. v. Griswold, 14 Wend. 399.*

An adjustment is equally binding, whether it be made at home or in a foreign port, provided it be there made by persons of competent skill, in accordance with the laws of that place, and in good faith. (z)¹ If payment be made on a claim * for a total loss, this is equivalent to an adjustment, (a) and an adjustment has no effect upon the claim of the insured or his action on the policy, if the subject-matter of the claim or action be not included in the adjustment. (b)

(z) See *Power v. Whitmore*, 4 M. & S. 141; *Lenox v. United Ins. Co.* 3 Johns. Cas. 178; *Shiff v. La. State Ins. Co.* 18 Mart. La. 629; *Walpole v. Ewer, Park, Ins.* 565; *Newman v. Cazalet*, id. 566; *Strong v. N. Y. Ins. Co.* 11 Johns. 323; *Depau v. Ocean Ins. Co.* 5 Cow. 63; *Loring v. Neptune Ins. Co.* 20 Pick. 411; *Thorn-ton v. U. S. Ins. Co.* 3 Fairf. 150. (a) *M'Leilan v. Maine Ins. Co.* 12 Mass. 246. (b) *Reynolds v. Ocean Ins. Co.* 22 Pick. 191.

¹ See *Harris v. Scaramanga*, L. R. 7 C. P. 481.

OF THE LAW OF FIRE INSURANCE.

SECTION I.

OF THE FORM OF THE CONTRACT.

THE general principles of contracts suffice to answer many of the questions raised by fire policies, and the principles of marine insurance are generally applicable. It will not therefore be necessary in this chapter to present a complete and independent view of the law of fire insurance, but we may dwell mainly on the questions which belong specifically to these contracts. This kind of insurance is sometimes made to indemnify against loss by fire of ships in port; (a) more often of warehouses, and mercantile property stored in them; still more frequently of personal chattels in stores or factories, in dwelling-houses or barns, of merchandise, furniture, books and plate, or pictures, or live stock. But the most common application of it is to dwelling-houses.

A. — *How the Contract is made.*

Fire insurance is now always, as we suppose, made in this country by companies incorporated for that purpose. These sometimes are both fire and marine insurance companies; but more generally confine themselves to fire insurance. They may be stock companies, or mutual companies, or both. The stock

* 419 * company offers to the insured as a security for the payment of losses, the whole amount of its stock, as well as

(a) The insurance on a ship "on the stocks building," does not include the materials which are so far wrought as to be in a condition to be framed, if they are not actually incorporated into the parts on the stocks, although they were in a proper place to be conveniently applied

to that use, and by reason of such adaptation had become valueless for other purposes. *Hood v. Manhattan Ins. Co.* 1 Kern, 592, overruling the same case in the Superior Court, 2 Duer, 191. See also *Mason v. Franklin Ins. Co.* 12 Gill & J. 468.

the proceeds of its business. Mutual companies, if without stock, have of course no other capital to rest upon than the proceeds of their business, or, in other words, the amount of their premiums. Usually, in mutual companies an insured pays but a small sum down, and is insured for a certain number of years, and gives his note for a much larger sum than he pays in cash. Then, if losses more than exhaust the whole amount paid in cash by all the insured, they are all called upon on their notes *pro rata*, and the whole amount which can be demanded of any insured, will not exceed the amount of the note. It follows, that the capital thus held as security for the payment of losses, is not only the whole amount of cash paid when policies are taken, but the whole amount of all the notes given by the insured. The purpose and effect of this arrangement is, that each insured pays only for the actual risk, and his share of the cost of carrying on the business. (b)¹

It is now common for mutual companies to have different departments or classes of risks; and each insured comes under the appropriate class. It seems to be determined that all the notes of a mutual company constitute its capital, whether they belong to one department or another; but the notes of each department are called on first for the demands of that department, and afterwards, if necessary, to satisfy the demands of the departments. (bb)

(b) The policy which a mutual insurance company issues and the premium note given at the same time for the payment of assessments, are independent contracts, and a vote by such a company, that if the assessments upon its premium notes should not be punctually paid, the insurances previously made should be suspended, is of no validity, unless assented to by the insured. New England Ins. Co. v. Butler, 34 Maine, 451. Where the policy has been rendered void by a transfer of interest, the insured is personally liable on the premium note, until an actual surrender of the policy, and the payment of all assessments against him for losses sustained before the surrender. Indiana Ins. Co. v. Coquillard, 2 Cart. Ind. 645. So the insured is liable for premiums during the whole term of the insurance, even though there was a previous loss, unless there is something in the policy, charter, or by-laws, or pre-

mium note, showing a different contract or discharge. New Hampshire Ins. Co. v. Rand, 4 Foster, 428; Swamscot Machine Co. v. Partridge, 5 id. 389. Where the charter and by-laws of the company provided for assessments in case of losses not to exceed the amount of the premium notes, it was held, that without such losses no recovery could be had on the notes, although absolute on the face. Insurance Co. v. Jarvis, 22 Conn. 188. It has been held, that, where the policy of a mutual insurance company becomes *ipso facto* void by an alienation, a member will not be liable for assessments for losses occurring after an alienation. Wilson v. Trumbull Ins. Co. 19 Penn. State, 372. The giving of the premium note is not necessary to the consummation of the contract of insurance. Blanchard v. Waite, 28 Maine, 51.

(bb) Sandis v. Sanders, 26 N. Y. 289; a. c. 28 N. Y. 416.

¹ Pacific Ins. Co. v. Guse, 49 Mo. 829; Com. v. Dorchester Ins. Co. 112 Mass. 142; Slater Ins. Co. v. Barstow, 8 R. I. 343; Monmouth Ins. Co. v. Lowell, 59 Me. 504; Nashua Ins. Co. v. Moore, 55 N. H. 48; Farmers' Ins. Co. v. Chase, 56 N. H. 341.

To secure the funds from which losses are ultimately payable (which are the premium notes), the charter of mutual companies sometimes provides, that the company has a lien to the extent of the premium note on the land on which the insured building stands.

* 420 * In regard to the making of the contract, as whether writing is required, or when the contract takes effect, or what is a sufficient agency, or a sufficient ratification, we are aware of no material difference between the law of marine insurance, and the law of fire insurance. (c)¹ Charters may con-

(c) When the offer to insure has been accepted, and the applicant has complied with all the conditions imposed, the risk commences, although the policy has not been issued. Thus, the plaintiff, having an interest in a building, applied to the agent of a mutual company for an insurance, and at the same time made the necessary cash payment and executed the premium note. The application being transmitted to the company, an alteration in the building was directed, and an authority required from the trustees of the building to effect the insurance. This was communicated to the plaintiff by the secretary, who stated, when the company were duly certified that these had been complied with, a policy would be sent. The conditions were complied with, and the agent notified, and the agent requested to call and examine; but he neglected to do so. It was held, that the risk commenced from the notification of compliance with the terms of the conditional agreement. *Hamilton v. Lycoming Ins. Co.* 5 Barr, 830. See also, *Andrews v. Essex Ins. Co.* 3 Mason, 8; *Kohne v. Ins. Co.* 1 Wash. C. C. 98; *Palm v. Medina Ins. Co.* 20 Ohio, 529; *Blanchard v. Waite*, 28 Maine, 51; *Bragdon v. Appleton Ins. Co.* 42 Maine, 259. Where the agreement to insure is complete, equity will compel the execution of a policy, or if a loss has occurred, decree its payment. *Perkins v. Washington Ins. Co.* 4 Cow. 645; *Lightbody v. North American Ins. Co.* 23 Wend. 18; *Carpenter v. Mutual Safety Ins. Co.* 4 Sandf. Ch. 408; *Suydam v. Columbus Ins. Co.* 18 Ohio, 459; *Neville v. Mer. Ins. Co.* 19 id. 452. Where the offer of the company by letter to insure is accepted in due season, the contract is complete by a deposit of their letter of acceptance in the mail before the

building is burned, or before the other party has withdrawn his offer. *Taylor v. Merchants Ins. Co.* 9 Howard, 390. See also *Mactier v. Frith*, 6 Wend. 103; *Palm v. Medina Fire Ins. Co.* 20 Ohio, 529. The case of *McCulloch v. Eagle Ins. Co.* 1 Pick. 278, so far as it decides, that a letter of acceptance does not bind the party accepting, till it is received by the party making the offer, and that, until that time, the party offering has a right to retract his offer, is effectually overruled by the above cases. But no contract subsists between the parties, where the policy issued by the company varies from the offer of the applicant. *Ocean Ins. Co. v. Carrington*, 3 Conn. 357. See a recent and interesting case on this question, *Kentucky Mut. Ins. Co. v. Jenks*, 5 Port. Ind. 96. A memorandum made in the application book of a company by the president, and signed by him, is not binding, when the party to be insured wishes the policy to be delayed until a different adjustment of the terms can be made, and, after some delay, is notified by the company to call and settle the business, or the company would not be bound, and he does not call. *Sandford v. Trust Fire Ins. Co.* 11 Paige, 547. Where written applications for insurance had been made to a mutual insurance company, and the rates of premium agreed upon, and when the policies were made out the applicant refused to take them or sign the deposit notes, and the policies remained in the possession of the company, it was held, that there was no completed contract, which would sustain an action against the applicant on the deposit notes. *Real Estate Ins. Co. v. Roessle*, 1 Gray, 386. See also *Lindauer v. Delaware Ins. Co.* 8 Eng. Ark. 461. So, where the buildings were

¹ See *Eames v. Home Ins. Co.* 94 U. S. 621; *Harris's Case*, L. R. 7 Ch. 587; *Piedmont Ins. Co. v. Ewing*, 92 U. S. 377; *Mut. Life Ins. Co. v. Young*, 23 Wall. 85; *Strohn v. Hartford Ins. Co.* 37 Wis. 625.

tain peremptory * provisions on some of these points. (*d*) * 421 And in policies of fire insurance, so far as we know, the insured is always specifically named. (*e*) Such expressions as "for whom it may concern," "for owners," and the like, not being often, if ever, used. (*f*)

In our mutual insurance companies, it is a general rule that every one who is insured becomes a member of the company. It follows that all who are insured insure each other; and also that every one insured is bound by all the laws and rules of the company, for he himself is one of those who made them.

In practice, there is this difference between marine policies and fire policies, issued by mutual companies. Mutual fire insurance companies require that there shall be a written application for insurance. This application is upon a printed sheet, and contains a very large number of questions, very carefully drawn up, for the purpose of eliciting by the answers to them the whole of the information which the insurers need, to enable them to determine whether they will take the risk at all, or at what rate of premium. To all these questions, there must be written and specific answers. Then the application itself, with all its contents, is made a part of the policy by the terms of the policy itself. (*g*) Then the statements in this paper are warranties; although the application itself may be regarded as having no other purpose than that of identifying the property. There are cases going to show, that, without expressions declaring a paper referred to to be a part of the policy, there may be a reference to a paper so connecting it to the policy as to make it a part. But a mere reference, to have this

burned, while the proposal of the company and the acceptance of the applicant remained in the possession of the agent of the latter, the company was held not to be liable. *Thayer v. Middlesex Ins. Co.* 10 Pick. 826. Where the applicant is notified that the payment of the premium is a condition precedent to the taking effect of the insurance, no contract subsists while it remains unpaid. *Flint v. Ohio Ins. Co.* 8 Ohio, 501; *Berthoud v. Atlantic Ins. Co.* 18 La. 539. See also *Buffum v. Fayette Ins. Co.* 8 Allen, 360. But generally a parol contract of insurance may be made by a stock company. See *ante*, p. * 350, n. (*a*). In respect to a ratification, see *De Bollé v. Pennsylvania Ins. Co.* 4 Whart. 68. See for parol contract, *New England Ins. Co. v. Robinson*, 25 Ind. 588.

(*d*) See *ante*, p. * 350, n. (*b*).

(*e*) The term "the insured" in a mutual fire insurance company, means the person who owns the property, applies for the insurance, pays the premium and signs the deposit notes, and not the person to whom the money is payable in case of loss, although he may have a lease of the premises. *Sanford v. Mechanics Ins. Co.* 12 Cushing, 541.

(*f*) *De Forest v. Fulton Ins. Co.* 1 Hall, 112. See *Alliance Ins. Co. v. La. State Ins. Co.* 8 La. 11, and *post*, p. * 442.

(*g*) *Susquehanna Ins. Co. v. Perrine*, 7 Watts & S. 348; *Holmes v. Charlestown Ins. Co.* 10 Met. 311; *Smith v. Bowditch Ins. Co.* 6 Cushing, 448; *McMahon v. Portsmouth Ins. Co.* 2 Foster, 16.

effect, must be very distinct and determinate. (h) The * 422 principles which should determine * between warranties and representations, and which apply either to the one or to the other, the proper rules of construction, or of the effect of either warranties or representations, are substantially the same in fire policies as in marine policies. (i)

A person who accepts a policy of insurance in which it is expressly provided that it is agreed and declared that the policy is made and accepted, upon and in reference to the application, cannot deny that the application is his, nor can he assert that it was made by an agent employed by him to procure insurance, but without authority to bind him by representations. (j) And fraud in inducing a person to accept a policy of insurance, will not render the insurers liable in an action of contract upon it, if by the terms of the policy such action cannot be maintained. (k)

Under a by-law, which provides that a policy of insurance shall

(h) Where the policy insures certain property as described, or more particularly described on the application, such a reference is not sufficient to make the application a part of the policy and give it the effect of a warranty, and it is sufficient if it be not false in any material point. *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72; *Snyder v. Farmers Ins. Co.* 13 Wend. 92, 16 id. 481; *Delonguemare v. Tradesmen's Ins. Co.* 2 Hall, 611; *Stebbins v. Globe Ins. Co.* 2 id. 632; *Burritt v. Saratoga Co. Ins. Co.* 5 Hill, 190; *Wall v. Howard Ins. Co.* 14 Barb. 888; *Insurance Co. v. Southard*, 8 B. Mon. 634. But see *Sillem v. Thornton*, 3 Ellis & B. 868, 26 Eng. L. & Eq. 238. Where, in the policy, this clause occurred, "reference being had to the application of A for a more particular description of the conditions annexed, as forming a part of this policy," *Beardsley*, J., said: "The conditions are thus undoubtedly made a part of the contract of insurance; as much so as if embodied in the policy. But it is otherwise with the application. That, as it seems to me, is referred to for the mere purpose of describing and identifying the property insured, and not to incorporate its statements into the policy as parts thereof." *Trench v. Chenango Co. Ins. Co.* 7 Hill, 124. But see *contra*, *Jennings v. Chenango Co. Ins. Co.* 2 Denio, 75. In *Sheldon v. Hartford Fire Ins. Co.* 22 Conn. 285, where the policy referred to the survey in these words: "Reference is had to survey No. 83, on file at the office of the Protection Insur-

ance Company," and the survey consisted of answers to questions, some of which were intended to draw forth a minute description of the premises, and others to enable the insurer to estimate the risk, it was held, that the reference to the survey was not merely for a fuller description, but for the purpose of incorporating all the survey into the policy. Where the application is referred to "as forming a part of the policy," it will have the effect of a warranty. *Burritt v. Saratoga Co. Ins. Co.* 5 Hill, 188; *Williams v. N. E. Ins. Co.* 31 Me. 224; *Murdock v. Chenango Co. Ins. Co.* 2 Comst. 210; *Sexton v. Montgomery Co. Ins. Co.* 9 Barb. 200; *Kennedy v. St. Lawrence Co. Ins. Co.* 10 Barb. 286; *Egan v. Mut. Ins. Co.* 5 Denio, 826; *Gates v. Madison Co. Ins. Co.* 1 Seld. 469.

(i) See *Wood v. Hartford Ins. Co.* 13 Conn. 583; *Egan v. Mut. Ins. Co.* 5 Denio, 826; *Farmers Ins. Co. v. Snyder*, 16 Wend. 481; *Duncan v. Sun Ins. Co.* 6 Wend. 488. "If by any words of reference, the stipulation in another instrument, such as the proposal or application, can be construed a warranty, it must be such as make it in legal effect a part of the policy." *Per Shaw*, C. J., *Daniels v. Hudson River Ins. Co.* 12 Cush. 423.

(j) *Draper v. Charter Oak Ins. Co.* 2 Allen, 580. See *Denny v. Conway Ins. Co.* 13 Gray, 492; *Liberty Hall Assoc. v. Housatonic Ins. Co.* 7 Gray, 261.

(k) *Tebbetts v. Hamilton Ins. Co.* 3 Allen, 589.

be void "if the insured shall neglect, for the term of thirty * days, to pay his premium note, or any assessment thereon, when requested to do so by mail or otherwise, the policy is avoided by the neglect of the assured for thirty days, after a written request for payment deposited in the post-office, prepaid, and duly directed to him, would in due course of mail reach the place of residence as set forth in the policy, whether he received such request or not. (*l*)¹

A large proportion of the contracts of insurance against fire are made through agents of the insurers. The general principles of the law of agency apply to all such transactions; and it is strongly insisted that the insurers are estopped from taking advantage of the acts of their agents, done within the scope of their authority. (*ll*)² A policy made and delivered by an agent, with

(*l*) *Lothrop v. Greenfield Ins. Co.* 2 241; *New England Fire Ins. Co. v. Schettler*, 88 Ill. 186; *Rowley v. Empire Ins. Co.* 82 N. Y. 82.

(*ll*) *Beal v. Park, &c. Ins. Co.* 16 Wis. Co. 36 N. Y. 550.

¹ *Supple v. Iowa State Ins. Co.* 58 Ia. 29, decided that a failure to pay assessments on a premium note, when on such failure the insurance company had the option to sue for the note or cancel the policy, does not authorize an annulling, without notice to the policy-holder.

² Thus, such an agent's authority cannot be limited by special instructions, unless the insured has notice of such limitation. *So. Life Ins. Co. v. McCain*, 96 U. S. 84; *U. S. Life Ins. Co. v. Advance Co.* 80 Ill. 549; *Alman v. Phoenix Ins. Co.* 27 Ia. 203. And his knowledge of errors upon which a policy issues binds the company, if the insured is innocent. *Union Ins. Co. v. Wilkinson*, 13 Wall. 222; *American Ins. Co. v. Mahone*, 21 Wall. 152; *Eames v. Home Ins. Co.* 94 U. S. 621; *Germania Ins. Co. v. McKee*, 94 Ill. 494; *Pechner v. Phoenix Ins. Co.* 65 N. Y. 195; *Miller v. Mut. Ben. Ins. Co.* 31 Ia. 216; *Planters' Ins. Co. v. Deford*, 38 Md. 382; *Dayton Ins. Co. v. McGookey*, 33 Ohio St. 555; *Hadley v. N. H. Ins. Co.* 55 N. H. 110; *Farmers' Ins. Co. v. Taylor*, 73 Penn. St. 342; *Hayward v. National Ins. Co.* 52 Mo. 181; *N. A. Ins. Co. v. Throop*, 22 Mich. 146; *Winans v. Allemania Ins. Co.* 38 Wis. 342. An agent to receive applications, take risks, settle terms, and issue policies, is looked upon as a general agent while so acting, *Pitney v. Glen's Falls Ins. Co.* 65 N. Y. 6; and may orally agree to renew, *Bauble v. Aetna Ins. Co.* 2 Dillon, 156; and to issue a policy, *Angel v. Hartford Ins. Co.* 59 N. Y. 171; may act through clerks, *Eclectic Ins. Co. v. Fahrenkrig*, 68 Ill. 463; *Mayes v. Mutual Ins. Co.* 38 Ia. 304; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; may waive conditions in the policy, *Winans v. Allemania Ins. Co.* 38 Wis. 342; *Roberts v. Continental Ins. Co.* 41 Wis. 321; *Shafer v. Phoenix Ins. Co.* 53 Wis. 361; as a condition that change in title or possession will avoid the policy, *Miner v. Phoenix Ins. Co.* 27 Wis. 693; or that the insured may procure insurance in other companies, *Schomer v. Hekla Ins. Co.* 50 Wis. 575; but may not waive a preliminary proof of loss, *Lohnes v. Ins. Co. of N. A.* 121 Mass. 439. That an insurer's agent is not the agent of the insured, though so stipulated in the policy or by-laws, see *Eilenberger v. Protection Ins. Co.* 89 Penn. St. 464; *Union Ins. Co. v. Chipp*, 93 Ill. 96; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; that he is, see *Alexander v. Germania Ins. Co.* 66 N. Y. 464. But see *Whited v. Germania Ins. Co.* 76 N. Y. 415.—*Aetna Ins. Co. v. Olmstead*, 21 Mich. 246, decided that if an insurance agent, assuming to know what information an insurance company required, after being furnished by the insured with all the facts, without any concealment, filled out the application and assured the insured that it correctly embodied the facts given by him, thus inducing him to sign it, and received and retained the premium, the insurer could deprive the insured of indemnity by reason of the agent's fraud, unskillfulness, or carelessness. A condition avoiding a policy, if the premises "become vacant or unoccupied," is waived if the insurance

a clause providing that it takes effect when approved by the general agent of the company, which policy the general agent disapproved and directed the withdrawal thereof, holds the insurers, if the disapproval is not made known to the insured until after the loss. (*lm*)¹ Even an oral contract of insurance for one year, made by an agent, was held valid. (*ln*)

B.— *Of the Description of the Property Insured.*

If a policy of fire insurance contain a scale of premiums, calculated upon what is regarded by the insurers as the greater or lesser risk of fire in different classes of buildings, or goods, or other property, and an insured, even by an innocent and unintentional error, puts the property he wishes insured, in a class lower in risk and in the premium required than that in which it belongs according to the classification, this has the effect of a breach of warranty, and discharges the insurers. (*m*)

If the policy enumerates certain risks, whether of buildings or other property, or certain employments of such buildings or property, as hazardous or extra-hazardous, the insurers are so far controlled by their own enumeration, that it would be very difficult for them, if not impossible, to show that other things should have been enumerated; and from the cases it would seem that the courts are disposed to make rather a strict construction of the terms used. But, on the other hand, the insured could not be permitted to show by evidence, that things which the policy called hazardous or extra-hazardous, were not so in fact. (*n*)²

(*lm*) *Ins. Co. v. Webster*, 6 Wallace, 129.

Macmorran, 8 Dow, 255. See, however, *Farmers Ins. Co. v. Snyder*, 18 Wend. 481, and, generally, *Lee v. Howard Ins. Co.* 8 Gray, 588; *Macomber v. Howard Ins. Co.* 7 id. 257.

(*ln*) *Sanborn v. Firemen's Ins. Co.* 16 Gray, 448. The defendant company was authorized by its charter to make contracts of insurance under the signature of the president, or some duly authorized person.

(*n*) *New York Ins. Co. v. Langdon*, 6 Wend. 628, 627; *Sutherland, J.*: "It was an express provision of the policy in this case, that if the building insured should at any time during the continuance of the policy, be appropriated, applied, or

agent knew that the premises were unoccupied at the date of the policy, or made the insurance without reference to the subject of occupation. *Short v. Home Ins. Co.* 90 N. Y. 16. — As to whether the facts stated showed a new oral contract of insurance in presenti, or a waiver of conditions of policy by agent, see *Taylor v. Phoenix Ins. Co.* 47 Wis. 365.

¹ But see *Morse v. St. Paul Ins. Co.* 21 Minn. 407.

² In *Reynolds v. Commerce Ins. Co.* 47 N. Y. 597, the words "extra hazardous" in a policy were construed to mean "specially hazardous."

* Where the policy describes the insured as engaged in a certain trade or business, it has been held, that he is permitted, by implication of law, to keep and use all articles necessary for the customary carrying on of such trade, although such goods are classed as extra-hazardous. (o)¹

The description of the property would generally have force, not only as a warranty for the present, but as a warranty for the future. Principles somewhat akin to those of deviation in the law of marine insurance, are applicable to this question. There must be no change of risk. Thus, where the property was stated to be "a tavern barn," and the insured permitted it to be used as a livery stable, the insurers were discharged. (p) But in this case,

used, to or for the purpose of carrying on, or exercising therein any trade, business, or vocation, denominated hazardous, or extra-hazardous, or specified in the memorandum of special rates in the proposals annexed to the policy, or for the purpose of storing therein any of the articles, goods, or merchandise, in the same proposals denominated hazardous or extra-hazardous, or included in the memorandum of special rates, the policy should cease and be of no force or effect. The trade or business of a grocer is not mentioned or specified in the proposals annexed to the policy. It was not, therefore, a prohibited trade. *Expressio unius, exclusio est alterius.* The enumeration of certain trades, or kinds of business, as prohibited on the ground of being hazardous, is an admission that all other kinds are lawful under the contract. The case of *Baker v. Ludlow*, 2 Johns. Cas. 288, is precisely in point. There dried fish were enumerated in the memorandum clause as free from average, and all other articles perishable in their own nature. It was held, that the naming of one description of fish implied that other fish were not intended; and that the subsequent words, 'all other articles perishable in their own nature,' were not applicable to the articles previously enumerated, and did not repel the implication arising from the enumeration of them. In *Doe v. Laming*, 4 Camp. 76, Lord *Ellenborough* held, that a coffee-house was not an inn, within the meaning of a policy of insurance against fire, enumerating the trade of an inn-keeper, with others, as doubly hazardous, and not covered by the policy. If the business of a grocer is not prohibited under the policy, the

ordinary incidents of that business, it would seem, were allowable; not being prohibited, the party had a right to keep a grocery store, and to conduct it in the usual manner. The cases of *Suckley v. Furse*, 15 Johns. 842, and *Kensington v. Inglis*, 8 East, 273, sanction this principle."

(o) *Harper v. Albany Ins. Co.* 17 N. Y. 194; *Bryant v. Poughkeepsie Ins. Co.* 17 N. Y. 200. See *Washington Ins. Co. v. Merchants Ins. Co.* 5 Ohio State, 450; *Archer v. Merchants, &c. Ins. Co.* 48 Mo. 484; *Viele v. Germania Ins. Co.* 26 Ia. 9. But see *contra*, *Macomber v. Howard Ins. Co.* 7 Gray, 257; *Whitmarsh v. Charter-Oak Ins. Co.* 2 Allen, 581; *Elliot v. Hamilton Ins. Co.* 18 Gray, 138.

(p) *Hobby v. Daws*, 17 Barb. 111. Where a building insured by a company was represented, at the time of effecting the insurance, as connected with another building on one side only, and before the loss happened it became connected on two sides, the policy was held not to be avoided unless the risk thereby became greater. *Stetson v. Mass. Ins. Co.* 4 Mass. 380, 387, per *Seawall*, J. And whether such alterations increase the risk, is a question for the jury. *Curry v. Commonwealth Ins. Co.* 10 Pick. 535. The following cases sustain the doctrine, that an alteration which increases the risk avoids the policy. *Jones' Manufacturing Co. v. Manufacturers Ins. Co.* 8 Cush. 82; *Perry Co. Ins. Co. v. Stuart*, 19 Penn. State, 46; *Jefferson Co. Ins. Co. v. Cotheal*, 7 Wend. 72; *Grant v. Howard Ins. Co.* 5 Hill, 10; *Allen v. Mutual Ins. Co.* 2 Md. 126, 128. See *Sillem v. Thornton*, 3 Ellis & B. 868, 26 Eng. L. & Eq. 238.

¹ *Mershon v. National Ins. Co.* 34 Ia. 87.

evidence was offered and received, showing that a livery
*** 425** stable was materially more hazardous than a tavern * barn.

It is not easy to draw a precise rule from the authorities, but the principles of insurance law would lead to the conclusion, that if the statement was a warranty, no question could arise as to its materiality; whereas, if it was only a representation, this question would be proper. (q)

Words looking to the future might be such as not to create a warranty on the part of the insured, but only to give him a permission. Thus, "at present occupied as a dwelling-house, but to be hereafter occupied as a tavern, and privileged as such," is not a warranty that it shall be a tavern, but only permission that it may be. (r) And an insurance of "a dwelling-house" is no warranty that the building shall continue to be used as a dwelling-house. (rr)¹ So if the whole policy would prohibit the storing

(q) *Glendale Woollen Co. v. Protection Ins. Co.* 21 Conn. 19.

(r) *Catlin v. Springfield Ins. Co.* 1 Sumner, 434. Where the premises were described in the application and policy as occupied by A as a private dwelling, this was held not to be a warranty of the continuance of the occupation during the risk, and the insurers were held liable, although the loss happened after the occupant had left the premises vacant. *O'Neil v. Buffalo Ins. Co.* 8 Const. 122. In *Rafferty v. New Brun. Ins. Co.* 3 Harrison, 480, it was held, that it is not a violation of a policy of insurance, that a house insured as a dwelling-house, was afterwards occupied as a boarding-house, if boarding-houses are not in the list of prohibited occupations. A change of tenants, the policy being silent on the subject, does not invalidate it, though the first tenant may be a prudent, and the second a grossly careless man. *Gates v. Madison Co. Ins. Co.* 1 Seld. 466. If the

insurer is informed that the premises are to be occupied by tenants, it seems that there is an implied agreement on his part, that, if the insured uses reasonable care and diligence in the selection of trustworthy tenants, and in the general management of the premises, the insurance should not be affected by acts done by the tenants without his knowledge or consent. *White v. Mutual Ins. Co.* 8 Gray, 568. And when the policy is made void whenever the risk is increased by the act of the insured, and he is also prohibited from altering the building without the consent of the company, he may recover in case of loss, notwithstanding an alteration and an increase of risk made by a lessee of the building, providing it is made without the knowledge of the insured. *Sanford v. Mechanics Ins. Co.* 12 Cush. 541.

(rr) *Cumberland, &c. Ins. Co. v. Douglas*, 58 Penn. St. 419.

¹ *Browning v. Home Ins. Co.* 71 N. Y. 508. But see *Alexander v. Germania Ins. Co.* 66 N. Y. 464. Nor if a house is described as occupied by a particular person, that it shall so continue. *Liverpool, &c. Ins. Co. v. McGuire*, 52 Miss. 227.—A dwelling-house, to be occupied within the meaning of a fire insurance policy, must be used by human beings as their customary place of abode. *Herrman v. Adriatic Ins. Co.* 85 N. Y. 162; and a warranty that a family shall occupy a house throughout the year is not fulfilled by workmen lodging therein, and taking their meals elsewhere. *Poor v. Humboldt*, 125 Mass. 274. See *Cook v. Continental Ins. Co.* 70 Mo. 610. That temporary vacancy merely is not "removal," see *Cummins v. Agricultural Ins. Co.* 67 N. Y. 260.—Where a man and family visited a sick daughter for twelve days, and engaged a person to look after their house daily, the house did not "become vacant or unoccupied," within a clause avoiding an insurance policy therefor. *Stupetski v. Transatlantic Ins. Co.* 43 Mich. 373. See *Whitney v. Black River Ins. Co.* 72 N. Y. 117; *Parmalee v. Hoffman*

of certain goods, the construction would be that this meant storing them in considerable quantities; and not the keeping a small quantity on hand for sample or retail. (s)¹ It * may be * 426

(s) *New York Ins. Co. v. Langdon*, 6 Wend. 623, 627, 1 Hall, 226. It was held, in this case, that the word "storing" applied only where the storing or safe-keeping is the sole or principal object of the deposit, and not where it is merely incidental, and the keeping is only for the purpose of consumption. This definition has been adopted by the courts. Thus, where oils and turpentine, which were classed among hazardous or extra-hazardous articles, were introduced for the purpose of repairing and painting the dwelling insured, and the dwelling was burned while being so repaired, the insurers were held liable. *O'Neil v. Buffalo Ins. Co.* 3 Comst. 122; *Lounsbury v. Protection Ins. Co.* 8 Conn. 450. Where a policy of insurance contained a clause suspending the operations of the policy in case the premises should be appropriated, applied, or used to or for the purpose of storing or of keeping therein any of the articles described as hazardous, one of the buildings insured being occupied by a card-machine, it was held, that the mere fact that a small quantity of undressed flax (although a hazardous article), had been permitted to remain in the basement of the carding-machine building, since the removal of the flax-dressing machinery from such basement a few days prior to the issuing of the policy, was not conclusive evidence that the building was appropriated, applied, or used for storing or keeping flax within the meaning of those terms as used in the policy, and that leaving the small pile of undressed flax in the building, with no purpose of having it regularly stored or kept there, would not contravene the terms of the policy. *Parker, J., dissented, being of opinion that the case came within the term "keeping," introduced into the policy.* *Hynds v. Schenectady Co. Ins. Co.* 16 Barb. 119. The keeping of spirituous liquors in the building insured, for the purpose of consumption or sale by retail to boarders and others, is not a storing within the meaning of the policy. *Rafferty v. New Brunswick Ins. Co.* 8 Harrison, 480. See *Williams v. New England Ins. Co.* 31 Maine, 225; *Allen v. Mutual Ins. Co.* 2 Md. 125; *Billings v. Tolland Co. Ins. Co.* 20 Conn. 189; *Duncan v. Sun Ins. Co.* 6 Wend. 488. In England, there is not complete harmony in the decisions. The earliest case is *Dobson v. Sotheby*, 1 Moody & M. 90. The policy was effected on premises "wherein no fire is kept and no hazardous goods are deposited," and, provided that "if buildings of any description insured with the company, shall at any time after such insurance be made use of to store or warehouse any hazardous goods without leave from the company, the policy should be forfeited." These words were held to mean the habitual use of fire or the ordinary deposit of hazardous goods, not their occasional introduction for a temporary purpose connected with the occupation of the premises, so that the policy was not vitiated by bringing a tar barrel and lighting a fire in order to effect repairs, in consequence of which the loss occurred. Where the premises insured were a granary and a "kiln for drying corn in use," and the policy was to be forfeited unless the buildings were accurately described, and the trades carried on therein specified, it was held, although proved that a higher premium was exacted for a bark-kiln than a malt-kiln, and that the latter was more dangerous, and the loss happened from the use of the kiln in drying the bark, that a temporary and gratuitous permission to a friend to dry bark in the kiln, did not avoid the policy. *Shaw v. Robberds*, 6 A. & E. 75. See *Barrett v. Jermy*, 3 Exch. 535. The authority of these cases has been diminished by a recent decision of the Court of Exchequer, under a condition providing that, in case any steam-engine, stove, &c., or any other description of fire-heat be introduced, notice thereof must be given, and every such alteration must be allowed by indorsement, and any further premium

Ins. Co. 54 N. Y. 193; *Franklin Ins. Co. v. Martin*, 11 Vroom, 568; *Ashworth v. Builders' Ins. Co.* 112 Mass. 422.

¹ *Morse v. Buffalo Ins. Co.* 30 Wis. 534, was to the point that a policy on a steam-boat, prohibiting the use or keeping of "gunpowder, camphene, spirit-gas, naphtha, benzine, benzole, chemical, crude, or refined coal or earth oils," was not avoided by the use of kerosene oil to light the cabin and saloon. See *Mears v. Humboldt Ins. Co.* 92 Penn. St. 15, as to the construction of the words "keep or have" and "use" in an insurance policy.

said generally, that warranties, restrictions, or declarations, * 427 of this kind, are construed somewhat liberally towards * the

which the alteration may occasion, must be paid, otherwise no benefit will arise to the assured in case of loss. The assured, who was a cabinet-maker, placed a small engine on the premises, with a boiler attached, and used it in a heated state for the purpose of turning a lathe, not in the course of his business, but for the purpose of ascertaining by experiment whether it was worth his while to buy it to be used in that business; and after the engine had been on the premises for several days, a fire happened. It was held that a policy was avoided, and that whether the engine was introduced for experiment as an improved means of carrying on the plaintiff's business, whether used for a longer or shorter time, or whether the fire was occasioned by the working of the steam-engine or not, were immaterial questions. *Glen v. Lewis*, 8 Exch. 607, 20 Eng. L. & Eq. 364, *Parke*, B.: "Now the clause in question implies, that the simple introduction of a steam-engine, without having fire applied to it, will not affect the policy; but if used with fire-heat, it will; and nothing being said about the intention of the parties as to the particular use of it, and as, if it be used, the danger is precisely the same, with whatever object it is used, it seems to us that it makes no difference whether it is used upon trial with the intent of ascertaining whether it will succeed or not, or as an approved means of carrying on the plaintiff's business, nor does it make any difference that it is used for a longer or a shorter time. The terms of the conditions apply to the introduction of a steam-engine in a heated state at any time, without notice to the company, so as to afford an opportunity to them to ascertain whether it will increase the risk or not. The clause proceeds to provide that every such alteration must be allowed by indorsement on the policy, and the premium paid, and if not, no benefit will arise to the insured in case of loss. The expression 'alteration' is inaccurate; but it obviously means to embrace all the circumstances before mentioned, though all are not, properly speaking, alterations. This appears to be the natural and ordinary construction of this part of the contract, and it is far from unreasonable. In such cases, which are unquestionably likely to increase the risk, the company stipulate for notice in clear terms, in order that they may consider whether they will continue their liability, and on what terms. There is not a word

to confine the introduction of the steam-engine to its intended use as an instrument or auxiliary in carrying on the business in the premises insured. If a construction had already been put on the clause precisely similar in any decided case, we should defer to that authority. But, in truth, there is none. All the cases upon this subject depend upon the construction of different instruments, and there is none precisely like this. Indeed, it seems not improbable that the terms of this policy have been adopted, as suggested by Sir F. *Thesiger*, to prevent the effect of previous decisions; the provision that 'no description of fire-heat shall be introduced' in consequence of the ruling of Lord *Tenterden*, in *Dobson v. Sotheby*, 1 Moody & M. 90, and the addition of 'process or operation' to trade or business, to prevent the application of that of *Shaw v. Robberds*, 6 A. & E. 75. The latter case is the only one which approached the present. One cannot help feeling that the construction of the policy in that case may have been somewhat influenced by the apparent hardship of avoiding it, by reason of the accidental and charitable use of the kiln, the subject of the insurance. The court considered the conditions in that case to refer to alterations, either in the buildings or the business, and to those only. Here the introduction of steam-engines, or any other description of fire-heat, is specifically pointed at, and expressly provided for. If, in that case, the condition had been (*inter alia*) that no bark should be dried in the kiln, without notice to the company, which would have resembled this case, we are far from thinking that the court could have held that the drying which took place, did not avoid the policy, by reason of being an extraordinary occurrence and a charity. We are therefore of opinion, that the defendant is entitled to our judgment, and that the material part of the second plea is proved." See *Sillem v. Thornton*, 3 Ellis & B. 868. Where there was a warranty that certain mills should be worked "by day only," a plea that a "steam-engine and horizontal shafts, being parts of the mills were worked by night," was adjudged bad, because it did not appear that the mills were worked "as a part might always be at work to supply water." *Mayall v. Mitford*, 6 A. & E. 670. See *Whitehead v. Price*, 2 Cromp. M. & R. 447. The description in an application for insurance of a building

insured, and somewhat strictly towards the insurers.¹ It would be reason enough for this, that the insurers frame the policy as they choose, and may make its language as strict as they think proper.

The words which describe the property insured, are construed according to the common meaning of such words as they are commonly used ; thus "merchandise" does not include any fixed or movable implements, then in the store, but only what was bought to be sold again. (ss)

A question may arise in fire policies, as in marine policies, in regard to the *termini* of the risk. This must generally relate to the time when the policy begins, when it attaches, and when it terminates. (t) It may also relate to circumstances, if the policy provides expressly or by sufficient implication, that it

* shall attach when certain circumstances occur, and shall * 428 continue only so long as they exist. Or it may apply to place, if that be designated or indicated.² In a recent English case, a ship lying in the Victoria Dock, was insured for three months ; with liberty to go into a dry dock for repair. The ship went down the Thames to a dry dock, but could not get in without having her paddles removed. This was done, and she went

that is used "for the manufacture of lead pipe only," includes the manufacture of wooden reels on which to coil the lead pipe, if essential to the reasonable and proper carrying on of the business of manufacturing lead pipe. *Collins v. Charlestown Ins. Co.* 10 Gray, 155. A building was insured as holding machinery for making barrels. The policy provided that if the premises were appropriated or used for carrying on the trade of a carpenter, the policy, so long as the premises were so appropriated or used, should cease and be of no effect. Machinery to make boxes was put in, and boxes were made. But for two months before the fire, the machinery,

though ready for use, was not used. The insurers were held. *U. S. F. & M. Ins. Co. v. Kimberly*, 34 Md. 224.

(ss) *Kent v. London Ins. Co.* 26 Ind. 294.

(t) A policy of insurance which is expressed to be from the first day of a specified month in a given year to the same day of the same month and year, may be shown by reference to the endorsements made by the insurers on the back of the policy, to the application which is made part of the policy, and to the amount of the premium and deposit note, to be an insurance for a different time. *Liberty Hall Association v. Housatonic Ins. Co.* 7 Gray, 261.

¹ Thus a continuing warranty in a policy of insurance, the breach of which (whether injurious to the insurer or not) avoids the policy, being in the nature of a forfeiture, must be construed as strongly against the insurer, and as favorably for the insured, as its terms will reasonably permit. *Wakefield v. Orient Ins. Co.* 50 Wis. 532.

² The removal of goods insured from the place described will avoid the policy unless the insurance company, after notice thereof, recognizes its validity. *Harris v. Royal Ins. Co.* 53 Ia. 236; *Williamsburg Ins. Co. v. Cary*, 83 Ill. 453. But where a policy covered a phaeton "contained in a frame barn," and the phaeton was burned while at a shop undergoing repairs, it was held, nevertheless, that the insured could recover for the loss. *McCluer v. Girard Ins. Co.* 43 Ia. 349. In *Sawyer v. Dodge County Ins. Co.* 37 Wis. 503, a policy on wheat was held to cover wheat on after-acquired land, though not adjoining the rest of the farm; while in *Providence, &c. R. Co. v. Yonkers Ins. Co.* 10 R. I. 74, it was decided otherwise, although such after-acquired land adjoined.

in, and was repaired. She then came out into the Thames, and while stopping there to have her paddles replaced, took fire and was destroyed within the three months. The plaintiff sued the insurers, and obtained a verdict; but the Court of Common Pleas set the verdict aside, and entered a non-suit, on the ground that the policy covered the ship while in the Victoria Dock, and while in the dry dock, and while going to the dry dock and returning from it, but not while she was stopping in the river to have her paddles replaced. (*u*)¹ We cannot but think this decision open to doubts.

C.—*Of Alterations in the Property.*

Many cases have arisen where the effect of alterations in the property insured is considered. The general rule must be, that mere alterations, although important and extensive, do not of themselves discharge the insurers. But they would have this effect if expressly prohibited, because they would then be a breach of warranty; and they would have this effect, although not expressly prohibited, if they materially increased the risk. (*v*)

If the alterations, when completed, did not increase the risk, but the process of making them subjected the property while it was going on to an increased risk, we should say that the insurers would be discharged, if the property was burned by reason of that increased risk, but not if the property was burned during the time of that increased risk, but from a totally independent cause.

It cannot be doubted, however, that the insured may have the right, under many circumstances, of increasing the risk * 429 * during the policy, and subjecting the insurers to that increase of risk. Thus, when a dwelling-house was insured, and, as a part of the condition and circumstances of the property in the description thereof, a store was described as belonging to the same owner, and near the dwelling-house, and the store burned

(*u*) Pearson *v.* Commercial Ass. Co. (v) See Young *v.* Washington Co. Ins. 15 C. B. (n. s.) 804. Co. 14 Barb. 546; Calvert *v.* Hamilton Ins. Co. 1 Allen, 808, and cases *infra*.

¹ Pearson *v.* Commercial Ass. Co. *supra*, was affirmed in the Exchequer Chamber in L. R. 8 C. P. 548, and in the House of Lords in 1 App. Cas. 498. See Wingate *v.* Foster, 3 Q. B. D. 582. "While loading at B." was declared to cover the period while the vessel was at B. for the purpose of loading, whether she was actually engaged in loading or not, in Reed *v.* Merchants' Ins. Co. 95 U. S. 23; and "Port risk," to cover a vessel while in port before leaving her wharf to begin her voyage, in Nelson *v.* Sun Ins. Co. 71 N. Y. 453.

down, and the owner rebuilt it, and in the rebuilding it took fire, and the dwelling-house caught from it and was destroyed, the insurers were not discharged. (w)

We have no doubt that the same rule would apply to the making of proper or necessary repairs; and the insured would have a right to make them without affecting his policy. (x)¹ Indeed, policies now not unfrequently give to the insured the right of making repairs. And it is obvious that it would generally be for the interest of the insurers, that the building should be kept in good repair. The failure of the insured to repair a defect in the building arising after the contract is made, does not prevent the assured from recovering, unless he was guilty of gross negligence. (y) It would always be safest, however, when important repairs are contemplated, to give notice to the insurance company of such intention. And we think that an unreasonable refusal on their part to allow such repairs would not enlarge their defence.

It is held that a covenant against alteration is broken, and the insurers discharged, although the alteration is made by a tenant of the insured without his knowledge. (yy)

D.—*Of Warranty, Representations, and Concealment.*

In most respects the law of warranty and representation is the same in fire as in marine insurance. A warranty is a part of the contract; and if it is broken, there is no valid contract,

(w) *Young v. Washington Co. Ins. Co.* 14 Barb. 545.

(x) See *Dobson v. Sotheby*, 1 Moody & M. 90. Where a fire policy was conditioned to become void if the building insured should be used for the purpose of carrying on or exercising any trade, business, or vocation, denominated hazardous, or extra-hazardous, or specified in the memorandum of special rates, and the memorandum referred to mentioned, among other things, "houses, building or repairing," it was held, that these words, taken in connection with the policy, must be understood in reference to car-

rying on the trade of house-building, or house-repairing, in or about the building insured, and that they did not apply to repairs made upon the building itself. *Grant v. Howard Ins. Co.* 5 Hill, 10; *O'Neil v. Buffalo Ins. Co.* 8 Comst. 122; *Jolly v. Baltimore Equitable Society*, 1 Harris & G. 295; *Allen v. Mutual Ins. Co.* 2 Md. 126, 128; *Lounsbury v. Protection Ins. Co.* 8 Conn. 450; *Billings v. Tolland Co. Ins. Co.* 20 id. 189.

(y) *Whitehurst v. Fayetteville Ins. Co.* 6 Jones, 352.

(yy) *Diehl v. Adams County Ins. Co.* 58 Penn. St. 443.

¹ *Franklin Ins. Co. v. Chicago Ice Co.* 36 Md. 102, 121; *Rann v. Home Ins. Co.* 59 N. Y. 387; *James v. Lycoming Ins. Co.* 4 Clifford, 272. See *Matson v. Farm Building Ins. Co.* 9 Hun, 415.

* 480 * and it makes no difference that the thing warranted was less material than was supposed, or was not material at all. (z)¹ A warranty may be for the present or for the future. It may be also, although of the present and affirmative, a continuing warranty, rendering the policy liable to avoidance by a non-continuance of the thing warranted to exist. The nature of the thing warranted generally determines this question. (a)² Thus a warranty that the roof of a house is slated, or that there are only so many fireplaces or stoves, would generally, at least, be regarded as continuing; but a warranty that the building was a certain distance from any other building, would not cause the avoidance of the policy, if another house should be built within the distance, without any act of privity of the insured. (b)³

(z) See cases *passim*.

(a) See *Blood v. Howard Ins. Co.* 12 CUSH. 472. A description of a house as occupied by a particular person, is not a warranty that he will continue to occupy it. *Joyce v. Maine Ins. Co.* 45 Maine, 168. See also, *Prieger v. Exchange Ins. Co.* 6 Wis. 89.

(b) See *Alston v. Mechanics Ins. Co.* 4 Hill, 829. A statement in a notice of alterations by the assured, that a machine put up by them on the premises is designed "for burning hard coal," will not be considered an agreement to burn hard coal only, or not to use other fuel, should it become necessary, and can be

used without increasing the risk. *Tillou v. Kingston Ins. Co.* 7 Barb. 570. In the application for insurance, referred to in the policy as forming part thereof, it was stated thus: "There is one stove-pipe passed through the window, at the side of the building. There will, however, be a stove chimney built, and the pipe will pass into it at the side." It seems that this amounted to a warranty that the chimney should be built within a reasonable time. *Murdock v. Chenango County Ins. Co.* 2 Comst. 210. Statements which are made a part of the policy, and are prospective, as, that water casks shall be kept in an upper

¹ That a policy does not become invalid unless the contract distinctly so provides, see *National Bank v. Hartford Ins. Co.* 95 U. S. 673; *Mutual Ins. Co. v. Coatesville*, 80 Penn. St. 407; *Wilkins v. Tobacco Ins. Co.* 30 Ohio St. 317. Thus a condition in a policy that incumbrances will vitiate it, unless the insurer assents to such in writing, does not apply to such as are created without the insured's assent. *Green v. Homestead Ins. Co.* 82 N. Y. 517. As to the construction of a warranty by the assured that certain facts were true, "so far as the same are known to the applicant, and are material to the risk," see *Redman v. Hartford Ins. Co.* 47 Wis. 89. A warranty that the risk shall be "detached at least one hundred feet" means that no building such as will increase the hazard is to be within that distance. *Burleigh v. Gebhard Ins. Co.* 90 N. Y. 230. See *Arkell v. Commerce Ins. Co.* 69 N. Y. 191, that a building fifty feet from the risk is not "contiguous."

² Thus a declaration that a watchman is kept on the premises is a continuing warranty, which is broken by his exclusion by an officer levying an execution, *Ballston Spa Bank v. Ins. Co. of N. A.* 50 N. Y. 45; so of an answer that there was "no regular watchman, but one or two hands sleep in the mill," *Blumer v. Phoenix Ins. Co.* 45 Wis. 622; 48 Wis. 535; and that the "machinery was regularly oiled with lard and sperm oil by the engineer and miller," *Redman v. Hartford Ins. Co.* 47 Wis. 89. But a reply "no stoves used" is not a warranty that stoves shall not be used at all, *Aurora Ins. Co. v. Eddy*, 55 Ill. 213; nor is a warranty that stoves and pipes are well secured broken by kindling a fire in a stove after a partial removal of a pipe, *Mickey v. Burlington Ins. Co.* 35 Ia. 174.

³ Where an application contained a warranty that the statements were full and true, "so far as the same are known to the applicant," the fact that there were more buildings within a certain distance than as stated in the application is no breach, without proof that the applicant knew that fact. *Wilkins v. Germania Fire Ins. Co.* 57 Ia. 529.

* Where an application by a town for insurance on a * 431 school-house stated, that the ashes were taken up in metallic vessels, which were not allowed to stand on wood with ashes in them, and that the ashes, if deposited in or near the building, were in brick or stone vaults, and concluded with a memorandum that "if ashes are allowed to remain in wood, the assurers will not assume the risk," and there were no vaults of brick or stone, and the ashes were generally deposited on the ground at a distance from the building; but the boy employed to take charge of the building, for two or three weeks before the fire, without orders, placed the ashes in a wooden barrel in a shed adjoining the school-house, it was held that the insurers were not liable. (c)

The word warranty need not be used if the language is such as to import unequivocally the same meaning. And an indorsement made upon the policy before it is executed, may take effect as a part of it. (d)

story, or a watch kept, or an examination made at night, must be substantially complied with. *Houghton v. Manufacturers Ins. Co.* 8 Met. 114; *Jones Manufacturing Co. v. Manufacturers Ins. Co.* 8 CUSH. 82; *Hovey v. American Ins. Co.* 2 Duer, 554; *Glendale Woollen Co. v. Protection Ins. Co.* 21 Conn. 19; *Sheldon v. Hartford Fire Ins. Co.* 22 id. 235. Where, by the terms of a policy, a misrepresentation or concealment as to the distance of the building insured from other buildings, avoids it, such representation or concealment will have that effect. *Burrill v. Saratoga County Ins. Co.* 5 Hill, 188; *Jennings v. Chenango County Ins. Co.* 2 Denio, 76; *Kennedy v. St. Lawrence County Ins. Co.* 10 Barb. 285; *Wilson v. Herkimer County Ins. Co.* 2 Seld. 53; *Wall v. East River Ins. Co.* 3 id. 370. But if the insurer, with a knowledge of the inaccuracy of the statement, makes and receives assessments of premiums from the insured, he will be estopped from setting it up in defence in a case of loss. *Frost v. Saratoga Ins. Co.* 5 Denio, 154. But it is held, that a misstatement as to the distance of other buildings, which is not material, will not avoid the insurance, where the policy does not specially give it the effect of a warranty. *Gates v. Madison County Ins. Co.* 2 Comst. 48, 1 Seld. 489, overruling the decision of the Supreme Court, 8 Barb. 73. See *Wall v. East River Ins. Co.* 3 Seld. 374. The erection by the party insured, without notice to the insurers, of a new building nearly adjoining the

building insured, does not invalidate the policy; there being no provision on the subject, and no actual injury having resulted from such erection, although, when the insurance was effected, the building was in contemplation, and preparations for its erection had commenced. *Gates v. Madison County Ins. Co.* 1 Seld. 469. So where the assured, upon an application by a diagram or otherwise, represent the ground contiguous to the premises as "vacant," this does not amount to a warranty that it shall remain vacant during the risk, or prevent the insured himself from building thereon. *Stebbins v. Globe Ins. Co.* 2 Hall, 632. Where the company insured the plaintiff \$2,000 on his machine-shop, "a watchman kept on the premises," it was held, that the stipulation, "a watchman kept on the premises," inserted in the body of the policy just after the description of the property, is in the nature of a warranty, and must be substantially complied with. It does not require a watchman to be kept there constantly, but only at such times as men of ordinary care and skill in like business keep a watchman on their premises. And in an action on such policy, evidence of the usage, in this respect, of similar establishments is admissible. *Crocker v. Peoples Ins. Co.* 8 CUSH. 79.

(c) *City of Worcester v. Worcester Ins. Co.* 9 Gray, 27.

(d) *Roberts v. Chenango Co. Ins. Co.* 3 Hill, 501.

Every statement, however, which is introduced into the policy is not a warranty. It may be merely a license or permission of the insurers that the premises may be occupied in a certain way, or that some fact may occur without prejudice to the insurance. (e)

A representation, in the law of insurance, differs from a warranty, in that it is not a part of the contract. If made after the signing of the policy or the completion of the contract, it cannot, of course, affect it. If made before the contract, and

* 482 with a view to effecting insurance, it is no part * of the contract; but if it be fraudulent, it makes the contract void. And if it be knowingly false it has this effect. (f) It must, however, be material; (g)¹ and a statement in an application for insurance is to be considered a representation rather than a warranty, unless it is clearly made a warranty by the terms of the policy or by some direct reference therein. (h)²

A representation may be more certainly and precisely proved if in writing; but it will have its whole force and effect if only oral. (i)

In some instances, by the terms of the policies, any misrepresentations or concealments avoid the policy. And it is held, that the parties have a right to make such a bargain, and that it is

(e) Catlin v. Springfield Ins. Co. 1 Sumner, 434.

(f) Lewis v. Eagle Ins. Co. 10 Gray, 508.

(g) See Clark v. Manuf. Ins. Co. 2 Woodb. & M. 472; Nicoll v. American Ins. Co. 3 id. 529. The statements in the application on a separate sheet, have the effect only of representations, and do not avoid the policy unless void in a material point, or unless the policy makes them specially a part of itself, and gives them the effect of warranties. Jefferson Ins. Co. v. Cotheal, 7 Wend. 72; Snyder v. Farmers Ins. Co. 13 Wend. 92, 16 id. 481;

Delonguemare v. Tradesmen's Ins. Co. 3 Hall, 611; Stebbins v. Globe Ins. Co. id. 632; Burritt v. Saratoga County Ins. Co. 5 Hill, 190; Murdock v. Chenango County Ins. Co. 2 Comst. 210; Sexton v. Montgomery County Ins. Co. 9 Barb. 200; Kennedy v. St. Lawrence County Ins. Co. 10 id. 285; Williams v. New Eng. Ins. Co. 31 Maine, 224; Insurance Co. v. Southard, 8 B. Mon. 634; Egan v. Mutual Ins. Co. 5 Denio, 326.

(h) Daniels v. Hudson River Ins. Co. 12 Cush. 416.

(i) 2 Duer on Ins. 644; 1 Arnould on Ins. 489.

¹ A representation concerning a matter material to the risk, as incumbrances, contained in an application, if untrue in fact, avoids the policy, whether intentionally made or not. Byers v. Farmers' Ins. Co. 35 Ohio St. 606. Thus an honest misrepresentation of the existing amount of insurance on a building will avoid a policy made in reliance on the truth of the statement, Armour v. Transatlantic Fire Ins. Co. 90 N. Y. 450; or that a mortgage amounted to about "\$3,000," when in fact it was for \$4,425, Glade v. Germania Ins. Co. 56 Ia. 400. That a mechanic's lien, for which an application has been filed, is an incumbrance, see Redmon v. Phoenix Ins. Co. 51 Wis. 292.

² Cushman v. United States Ins. Co. 70 N. Y. 72; Miller v. Mut. Ben. Ins. Co. 31 Ia. 216.

binding upon them; and the effect of it would seem to be to give to representations the force and influence of warranties. (j)¹

By the charters of many of our mutual insurance companies, the company has a lien, to the amount of the premium note, on all property insured. It is obvious, therefore, that no such description can be given, or no such language used, as would induce the company to suppose they had a lien when they could not have one, or would in any way deceive them as to the validity or value of their lien. In all such cases, all incumbrances must be stated, and the title or interest of the insured fully stated, in all those particulars in which it affects the lien. (k)

* If one of the insured has taken an assignment of a *433 first mortgage on the property insured, in trust for all the parties insured, and has completed a negotiation for the purchase of the interest of the mortgagee in a second mortgage, under which the title has been perfected by a foreclosure, a statement by the plaintiffs, in the application for insurance, that they are mortgagees in possession, will not avoid the policy. (l) And where two partners in an application for insurance on a building, which was required to contain "a full, fair, and substantially a true representation of all the facts and circumstances respecting the property, so far as they are within the knowledge of the assured, and are material to the risk," stated that they owned the land on which it stood, whereas the legal title was in one of them, and the other was charged on their books with half the cost, and the partnership was afterwards dissolved, and all that owner's interest in its assets transferred to his copartner, to whom the insurers, with notice of the facts, agreed that the policy should stand good, it

(j) *Burritt v. Saratoga Co. Ins. Co.* 5 Hill, 188; *Williams v. New England Ins. Co.* 31 Maine, 224; *Murdock v. Chenango Co. Ins. Co.* 2 Comst. 210; *Sexton v. Montgomery Co. Ins. Co.* 9 Barb. 200; *Kennedy v. St. Lawrence Co. Ins. Co.* 10 id. 285; *Houghton v. Manufacturers Ins. Co.* 8 Met. 114; *Lee v. Howard Ins. Co.* 3 Gray, 583; *Macomber v. Howard Ins. Co.* 7 Gray, 257.

(k) See *Brown v. Williams*, 28 Maine, 252; *Smith v. Bowditch Ins. Co.* 6 Cush. 448; *Lowell v. Middlesex Ins. Co.* 8 id. 127; *Allen v. Charlestown Ins. Co.* 5 Gray, 384; *Jenkins v. Quincy Ins. Co.* 7 id. 370; *Mut. Ass. Co. v. Mahon*, 5 Call, 517; *Phillips v. Knox Co. Ins. Co.* 20 Ohio, 174; *Addison v. Kentucky Ins. Co.* 7 B. Mon. 470; *Smith v. Columbian Ins. Co.* 17 Penn. State, 253; *Warren v. Middlesex Ass. Co.* 21 Conn. 444; *Egan v. Mut. Ins. Co.* 5 Denio, 326; *Fletcher v. Commonwealth Ins. Co.* 18 Pick. 419; *Masters v. Madison Co. Ins. Co.* 11 Barb. 631.

(l) *Nichols v. Fayette Ins. Co.* 1 Allen, 63. See *Wyman v. Peoples Ins. Co.* id. 301.

¹ *Graham v. Fireman's Ins. Co.* 87 N. Y. 69. Where an application is made a part of the contract and its contents warranties, a misrepresentation as to the amount of incumbrances on certain property avoids the policy. *Schumitsch v. American Ins. Co.* 48 Wis. 26.

was held, that the insurers were liable for loss by a subsequent fire. (m)¹ And an applicant for insurance on personal property, who has made, but not delivered, a bill of sale thereof, intending to take in return a promissory note secured by mortgage thereon, may truly warrant himself to be the owner. (n)

There seems to be this difference between marine policies and fire policies. In the former a material misrepresentation avoids the policy, although innocently made; in the latter, it has this effect only when it is fraudulent. This distinction seems to rest upon the greater capability, and therefore greater obligation, of the insurer against fire to acquaint himself fully with all * 434 the particulars which enter into the risk. For he may * do this either by the survey and examination of an agent, or by specific and minute inquiries. (o)

The question whether a statement which is relied on, be material, and whether there is or has been a substantial compliance with it, seems to be for the jury rather than for the court. (p)² But it is not unfrequently determined by the court as a matter of law. (q) And if the jury find the representation to be material, and to be false, the consequence follows as a matter of law, and the policy is avoided. (r)

Policies often provide, that unless the applicant shall make a correct description and statement of all the facts required or inquired for in the application, and all other facts material in

(m) *Collins v. Charlestown Ins. Co.* 10 Gray, 155.

(n) *Vogel v. Peoples Ins. Co.* 9 Gray, 23.

(o) *Burritt v. Saratoga Co. Ins. Co.* 5 Hill, 188; *Gates v. Madison Co. Ins. Co.* 2 Comst. 49; *Holmee v. Charlestown Ins. Co.* 10 Met. 214; *Insurance Co. v. Southard*, 8 B. Mon. 648.

(p) *Franklin Ins. Co. v. Coates*, 14 Md. 285; *Gamwell v. Merch. Ins. Co.* 12 CUSH. 167; *Parker v. Bridgeport Ins. Co.* 10 Gray, 302; *Grant v. Howard Ins. Co.* 5 Hill, 10; *Gates v. Madison Co. Ins. Co.* 2 Comst. 43; *Percival v. Maine Ins. Co.* 33

Maine, 242; *Campbell v. New England, &c. Ins. Co.* 98 Mass. 381.

(q) *Carpenter v. American Ins. Co.* 1 Story, 57, 16 Pet. 495, 4 How. 185; *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25; *Houghton v. Manufacturers Ins. Co.* 8 Met. 114.

(r) *Howell v. Cincinnati Ins. Co.* 7 Ohio, pt. 1, 284. "The fact is to be settled by the jury, but it must be upon legal and sufficient evidence; and where the evidence is agreed, it is a question of law whether it be sufficient or not to establish the fact." *Putnam*, J., in *Fletcher v. Commonwealth Ins. Co.* 18 Pick. 421.

¹ But where a partner contributes real estate as his share, but without any conveyance, the firm cannot describe it as "theirs." *Clay Ins. Co. v. Huron, &c. Co.* 31 Mich. 346; *Farmers' Ins. Co. v. Curry*, 13 Bush, 312.

² But for neither, if the parties agree that any falsity of statement in the application shall avoid, *Etna Ins. Co. v. France*, 91 U. S. 510; *Jeffries v. Ins. Co.* 22 Wall. 47; *Co-operative Ass. v. Leflore*, 53 Miss. 1; and whether the insured is innocent is immaterial, *McDonald v. Law, &c. Ins. Co.* L. R. 9 Q. B. 328. See *Moulor v. Am. Ins. Co.* 101 U. S. 708; *World Ins. Co. v. Schultz*, 73 Ill. 586.

reference to the insurance or to the risk, or to the value of the property, the policy shall be void. In such a case the insured must make true answers to all the interrogatories, although they may be on subjects not material to the risk. (s) So, if the policy provides that any change in the premises insured, such as the erection or alteration of a building, shall avoid the policy, unless the written consent of the insurers is first obtained, the question whether the change is material or not is of no importance. (t) If, however, the policy contains the clause, that the description of the property or answers are correct, "so far as regards the condition, situation, value, title, * and risk of the same," * 435 and that the misrepresentations or suppressions of material facts shall destroy the claim of the insured for damage or loss, the answers to the questions are not warranties. (u)¹

If the contract is entire, although different subjects are insured, a false representation as to one will avoid the entire contract. (v)²

Concealment is the converse of representation. The insured is bound to state all that he knows himself, and all that it imports the insurer to know for the purpose of estimating accurately the risk he assumes. A suppression of the truth has the same effect as an expression of what is false. And the rule as to materiality, and a substantial compliance, are the same. (w) And we know

(s) *Burritt v. Saratoga Co. Ins. Co.* 5 Hill, 188; *Williams v. New England Ins. Co.* 31 Maine, 224; *Murdock v. Chenango Co. Ins. Co.* 2 Comst. 210; *Sexton v. Montgomery Co. Ins. Co.* 9 Barb. 200; *Kennedy v. St. Lawrence Co. Ins. Co.* 10 id. 285; *Honghton v. Manuf. Ins. Co.* 8 Met. 114; *Lee v. Howard Ins. Co.* 3 Gray, 583; *Macomber v. Howard Ins. Co.* 7 id. 257; *Bowditch Ins. Co. v. Winalow*, 8 id. 38; *Tebbits v. Hamilton Ins. Co.* 1 Allen, 305, 3 id. 569; *Abbott v. Shawmut Ins. Co.* 3 Allen, 213; *Hardy v. Union Ins. Co.* 4 Allen, 217; *Chase v. Hamilton Ins. Co.* 20 N. Y. 52; *Patten v. Merchants Ins. Co.* 38 N. H. 338. And policies made by stock and mutual companies stand on the same footing in this respect. *Draper v. Charter-Oak Ins. Co.* 2 Allen, 569.

(t) *Calvert v. Hamilton Ins. Co.* 1 Allen, 308.

(u) *Elliott v. Hamilton Ins. Co.* 13 Gray, 139; *Richmondville Un. Sem. v. Hamilton Ins. Co.* 14 Gray, 459; *Parker v. Bridgeport Ins. Co.* 10 id. 302.

(v) *Lovejoy v. Augusta Ins. Co.* 45 Maine, 472.

(w) See *Daniels v. Hudson River Ins.*

¹ Where there is a stipulation in the policy that the omission "to make known a material fact respecting the condition, situation, value, or occupancy of the property" shall invalidate the policy, the insured, in the absence of fraud, is not bound, unless asked, to disclose a lien for taxes. *Alkan v. New Hampshire Ins. Co.* 53 Wis. 136.

² Where a policy covers both realty and personality, a misrepresentation regarding the former avoids the entire policy. *Hinman v. Hartford Ins. Co.* 36 Wis. 159. A policy covering both real and personal estate is not to be held a divisible contract, part of which may remain in force, though the rest be invalid, where it is not perfectly clear that the insurer would have assumed both risks separately. *Aetna Ins. Co. v. Resh*, 44 Mich. 55. See *National Bank v. Ins. Co.* 95 U. S. 673; *Day v. Charter Oak Ins. Co.* 51 Me. 91; *Bowman v. Franklin Ins. Co.* 40 Md. 620; *Gottzman v. Ins. Co.* 56 Penn. St. 210; *Plath v. Minn., &c. Ins. Co.* 23 Minn. 479.

no reason why the distinction above mentioned between fire policies and marine policies as to representation, should not be made for the same reason in regard to concealment. (x)

* 436 * Matters of common information need not be communicated. (y) But any special circumstance, such as a great number of fires in the neighborhood, and the probability of belief that incendiaries were at work, should be communicated. (z) But the omission to disclose to the insurers repeated incendiary attempts to destroy the property insured, after the insurance is effected, will not vitiate the policy, although the insurers have the right by the terms of the contract to terminate the same, if the continuance of the risk is considered unequal or injurious to the company. (a)

Any questions asked must be answered, and all answers must be as full and precise as the questions require. Concealment in an answer to a specific question can seldom be justified by showing that it was not material. (b) Thus, in general, nothing need

Co. 12 *Cush.* 416; *Lindenau v. Desborough*, 8 *B. & C.* 592; *Pim v. Reid*, 6 *Man. & G.* 1; *Columbian Ins. Co. v. Lawrence*, 2 *Pet.* 49; *Clark v. Manufacturers Ins. Co.* 8 *How.* 248. The plaintiff having one of several warehouses, next but one to a boat-builder's shop which took fire, on the same evening, after it was apparently extinguished, sent instructions to his agent by extraordinary conveyance, for insuring that warehouse, without apprising the insurers of the neighboring fire. It was held, that although the terms of the insurance did not expressly require the communication of this fact, the concealment avoided the policy. *Bufe v. Turner*, 6 *Taunt.* 338, 2 *Marsh.* 46. Where, pending the negotiations for a policy, the insurers expressed an objection to insuring property in the vicinity of gambling establishments, and the applicant knew at the time that there was one on the premises; it was held, that if, in the opinion of the jury, the risk was materially increased by such occupancy, the policy would be avoided. *Lyon v. Commercial Ins. Co.* 2 *Rob. La.* 266. So it seems, that the fact that a particular individual had threatened to burn the premises, in revenge for a supposed injury, should be disclosed to the insurer. *Curry v. Commonwealth Ins. Co.* 10 *Pick.* 537, 542. The rumor of an attempt to set fire to a neighboring building should be communicated. *Walden v. La. Ins. Co.* 12 *La.* 135. The insurer should be informed of any unusual appropriation of the building materially en-

hancing the risk. *Clark v. Manufacturers Ins. Co.* 8 *How.* 249. Where the plaintiffs underwrote a policy on the household goods and stock in trade of a party, and after being informed that the character of the insured was bad, that he had been insured and twice burnt out, that there had been difficulty in respect to his losses, and he was in bad repute with the insurance offices, effected a reinsurance with the defendants without communicating these facts; and the property insured was shortly after destroyed by fire; it was held, that there had been a material concealment, which avoided the policy, and whether occasioned by mistake or design was immaterial. *N. Y. Bowery Ins. Co. v. N. Y. Fire Ins. Co.* 17 *Wend.* 359. A pending litigation, affecting the premises insured, and not communicated, will not vitiate the policy. *Hill v. Lafayette Ins. Co.* 2 *Mich.* 476.

(x) *Burritt v. Saratoga Co. Ins. Co.* 5 *Hill*, 188; *Gates v. Madison Co. Ins. Co.* 1 *Seld.* 474; *Clark v. Manuf. Ins. Co.* 8 *How.* 235; *Cumberland Valley Ins. Co. v. Schell*, 29 *Penn. State*, 31. See *Satterthwaite v. Mut. Ben. Ins. Assoc.* 14 *Penn. State*, 393. (y) *Clark v. Manuf. Ins. Co.* 8 *How.* 249.

(z) *N. Y. Bowery Ins. Co. v. N. Y. Fire Ins. Co.* 17 *Wend.* 359; *Walden v. La. Ins. Co.* 12 *La.* 135; *Bufe v. Turner*, 6 *Taunt.* 338, 2 *Marsh.* 46.

(a) *Clark v. Hamilton Ins. Co.* 9 *Gray.* 148.

(b) *Burritt v. Saratoga Co. Ins. Co.* 5

be said about title. But if it be inquired about, full and accurate answers must be made. (c)¹

* It is often required, that all buildings standing within * 437

Hill, 188; Gates *v.* Madison Co. Ins. Co. 3 Barb. 73, 3 Comst. 43. In Loehner *v.* Home Ins. Co. 17 Misso. 256, Scott, J., said: "The thirteenth section of the charter provides, that, if the assured has a lease estate in the building insured, or if the premises be incumbered, the policy shall be void, unless the true title of the assured and the incumbrances be expressed thereon. There is no question but that the buildings insured were a leasehold estate, and that there was an incumbrance on them at the date of the policy. The application contains an interrogatory, whose aim was to ascertain whether there was an incumbrance on the premises proposed to be insured, but no response is made to it; leaving room for the inference that none existed. The charter then made the policy void. The plaintiffs were not at liberty to obviate this objection by showing that the agent of the company was informed of the existence of an incumbrance at the time of the application, but that he refused to write down the answer, saying that the incumbrance was too trifling. Independently of the statute, which required the incumbrance to be expressed in the policy at the peril of its being void, there was a memorandum indorsed on it, which made known that the company would be bound by no statement made to the agent not contained in the application. The facts being as represented, they could not give the plaintiffs a right

of action on the policy in the teeth of the statute, and against the terms of the contract. If the conduct of the agent was such as is alleged, he was guilty of a gross fraud, as is shown by his setting up this defence, which would avoid the policy, and give a right of action for the recovery of the premium, but could not, for reasons given, entitle the plaintiffs to an action on the policy."

(c) Where the mortgagor, whose right to redeem had been seized on execution, not being specially inquired of as to the state of his title, stated the property to be his own, on the application, this was held to be no material misrepresentation or concealment. Strong *v.* Manufacturers Ins. Co. 10 Pick. 40; Delahay *v.* Memphis Ins. Co. 8 Humph. 684. So where the store insured stood on the land of another person under an oral agreement, terminable at the pleasure of the owner of the land, on six months' notice, no inquiry being made as to the title, the concealment was held not material. Fletcher *v.* Commonwealth Ins. Co. 18 Pick. 419. So where a tenant from year to year insured the building as "his building." Niblo *v.* North American Ins. Co. 1 Sandf. 551; Tyler *v.* Akna Ins. Co. 18 Wend. 507, 16 id. 385. See also Hope Ins. Co. *v.* Brolasky, 35 Penn. State, 282. But see Catron *v.* Tenn. Ins. Co. 6 Humph. 176; Columbian Ins. Co. *v.* Lawrence, 2 Pet. 25; Carpenter *v.* Washington Ins. Co. 16 id. 495.

¹ A mortgagor of land in possession may describe himself as owner, Ins. Co. *v.* Haven, 95 U. S. 242; Dolliver *v.* St. Joseph Ins. Co. 128 Mass. 315; Clay Ins. Co. *v.* Beck, 43 Md. 358; Manhattan Ins. Co. *v.* Barker, 7 Heiskell, 503; so a *cestui que trust*, Newman *v.* Springfield Ins. Co. 17 Minn. 123; or an owner of the equity, Washington Ins. Co. *v.* Kelley, 32 Md. 421; see Mers *v.* Franklin Ins. Co. 68 Mo. 127; or one with an equitable title, Southern Ins. Co. *v.* Lewis, 42 Ga. 587; or a mortgagor of chattels, Hubbard *v.* Hartford Ins. Co. 33 Ia. 325; or a vendee in possession, Bonham *v.* Iowa, &c. Ins. Co. 25 Ia. 328; see Hinman *v.* Hartford Ins. Co. 36 Wis. 159; or one in possession in his wife's right under certain partly performed conditions precedent to his becoming the legal owner, Farmers' Ins. Co. *v.* Fogelman, 35 Mich. 481. In a policy providing that a failure to state the interest of the insured, if "other than the entire, unconditional, and sole ownership," shall avoid it, a description as "mortgagors" is sufficient, Williams *v.* Roger Williams Ins. Co. 107 Mass. 377; but not a description of the risk by an insured as "his frame dwelling-house," when his only title is under a quitclaim deed from a second mortgagee, Southwick *v.* Atlantic Ins. Co. 133 Mass. 457; nor if the insured describes himself as "owner" of property, the title to which was not to pass until it was paid for, although the policy was payable to the real owners, Lasher *v.* St. Joseph, &c. Ins. Co. 86 N. Y. 423. In Fowle *v.* Springfield Ins. Co. 122 Mass. 191, where the policy, to be effective, provided that the insured's interest in the risk as "owner, consignee, factor, lessee, or otherwise," should be truly stated, and lessees for years described a building erected by them as "theirs," "situate on leased land," the majority of the court held the description sufficient. See also Walsh *v.* Philadelphia Fire Ass. 127 Mass. 383.

a certain distance of the building insured, shall be stated. (*d*) But this might not always be considered as applicable to personal and movable property. (*e*) Still, an insurance of chattels described as in a certain building, would be held to amount to a warranty that they should remain there; or rather, it would not cover them if removed into another place or building, unless, perhaps, by some appropriate phraseology, the parties expressed their intention that the insured was to be protected as to this property wherever it might be situated. (*f*)¹ Where goods insured against fire were described as "contained in a granite store," and one of the walls of the store gave way, and half of the store and the whole of the adjoining building fell, and before there was time to remove the goods, fire broke out in that building, it was held, that the insurers were liable for damage done by fire to the goods not displaced or injured by the fall. (*g*)

Owing to the form of the pleadings in Massachusetts, a misrepresentation of the assured, not specified in the defendants' answer, cannot be relied on to show a policy of insurance to be void, and so defeat an action thereon, although first disclosed by the plaintiff's evidence. (*h*)

Policies not unfrequently provide that fraud or false swearing shall forfeit all claims against the insurers. (*hh*)

(*d*) *Burritt v. Saratoga Co. Ins. Co.* 5 Hill, 188; *Jennings v. Chenango Co. Ins. Co.* 2 Denio, 75; *Hall v. Peoples Ins. Co.* 6 Gray, 185; *Wilson v. Herkimer Co. Ins. Co.* 2 Seld. 53; *Wall v. East River Ins. Co.* 3 id. 370; *Gates v. Madison Co. Ins. Co.* 2 Comst. 43, 1 Seld. 469; *Allen v. Charlestown Ins. Co.* 5 Gray, 384. See *White v. Mutual Ass. Co.* 8 Gray, 566.

(*e*) *Trench v. Chenango Co. Ins. Co.* 7 Hill, 122. But see *Smith v. Empire Ins. Co.* 25 Barb. 497; *Wilson v. Herkimer Co. Ins. Co.* 2 Seld. 53; *Kennedy v. St. Lawrence Co. Ins. Co.* 10 Barb. 285.

(*f*) *Sexton v. Montgomery Co. Ins. Co.* 9 Barb. 191.

(*g*) *Lewis v. Springfield Ins. Co.* 10 Gray, 159.

(*h*) *Mulry v. Mohawk Valley Ins. Co.* 5 Gray, 541; *Haskins v. Hamilton Ins. Co.* 5 Gray, 438. These decisions were under a statute which required that "The answer shall set forth, in clear and precise terms, each substantive fact intended to be relied upon in avoidance of the action."

(*hh*) See a strong case under this provision, *Wall v. Howard Ins. Co.* 51 Me. 32.

¹ Thus, where goods were described as in the chambers of the assured, "No. 117 Franklin St.", the policy was held not to cover goods in an adjoining independent building, though access had been made to it through the partition walls. *Sampson v. Security Ins. Co.* 133 Mass. 49.

* SECTION II.

* 438

OF THE INTEREST OF THE INSURED.

The rule here is the same as in marine insurance. (*i*) Any interest which would be recognized by a court of law or equity, is an insurable interest; (*j*)¹ but not a mere expectancy or probable interest, however well grounded it may be. (*k*) Thus one who

(*i*) The proof of an application for insurance and of a policy issuing thereon, both of which describe the property insured as the property of the plaintiffs, is *prima facie* evidence of title and of an insurable interest in the plaintiffs in an action upon the policy. *Nichols v. Fayette Ins. Co.* 1 Allen, 63.

(*j*) *Tyler v. Aetna Ins. Co.* 12 Wend. 507, 16 id. 385; *Swift v. Vt. Ins. Co.* 18 Vt. 305. Where a moiety of a building insured by a company, was conveyed in fee, the grantor reserving a term of seven years therein, and the grantee immediately reconveyed the same to the grantor on mortgage, and the mortgagor demised it to the mortgagor and another for seven years, reserving rent, it was held, that the company was liable in case of loss, notwithstanding such conveyances. *Stetson v. Mass. Ins. Co.* 4 Mass. 330. See *Morrison v. Tennessee Ins. Co.* 18 Miss. 262. Where a party holds the legal title, and the equitable title is in another, he has an insurable interest. Thus, where one has made an agreement for the sale of his

real estate insured, but has not made a conveyance nor received the purchase-money, his interest in the property and policy is not thereby parted with so as to bar his right of action on the happening of a loss. *Ferry Co. Ins. Co. v. Stewart*, 19 Penn. State, 45. See also *Ins. Co. v. Udegraff*, 21 Penn. State, 518; *Norcross Ins. Co.* 17 Penn. State, 429.

(*k*) *Lucena v. Craufurd*, 5 B. & P. 324, per Lord *Eldon*. One has no insurable interest in a house erected on land of another without license or shadow of title. *Sweeny v. Franklin Ins. Co.* 20 Penn. State, 337. "But he has an insurable interest if his house was placed on another's land with the owner's consent." *Fletcher v. Commonwealth Ins. Co.* 18 Pick. 419. A party has no insurable interest on goods for which he has made an oral contract, where the sale of such goods is within the statute of frauds. *Stockdale v. Dunlop*, 6 M. & W. 224. It is held in Ohio, that a stockholder in an incorporated company has no insurable interest in its property. *Phillips v. Knox Co. Ins. Co.* 20 Ohio, 174.

¹ *Commonwealth v. Hide & Leather Ins. Co.* 113 Mass. 136; *Sturm v. Atlantic Ins. Co.* 63 N. Y. 77; *Shaw v. Aetna Ins. Co.* 49 Mo. 578. The test is whether a party may suffer loss. *Cone v. Niagara Ins. Co.* 60 N. Y. 619. The following have been held to have an insurable interest: one who has conveyed his land as security, taking an instrument of defasance, *Walsh v. Philadelphia Fire Ass.* 127 Mass. 388; a mortgagor after foreclosure with a right to redeem, *Cone v. Niagara Ins. Co.* 60 N. Y. 619; the holder of an equitable title, *Redfield v. Holland Ins. Co.* 56 N. Y. 354; a mechanic's lien-holder, *Ins. Co. v. Stinson*, 103 U. S. 25; a vendee in possession before price paid, *Holbrook v. St. Paul Ins. Co.* 25 Minn. 229; a creditor in the land of a debtor with insufficient personalty, *Rohrbach v. Germania Ins. Co.* 62 N. Y. 47; a sub-lessee, *Fowle v. Springfield Ins. Co.* 122 Mass. 191; a railroad in exposed property adjoining, *Monadnock R. Co. v. Manufacturers' Ins. Co.* 113 Mass. 77; an obligor on a warehouse bond in the goods, *Ins. Co. v. Thompson*, 95 U. S. 547; a purchaser of goods not separated who had advanced the price to the seller on an agreement that the latter give them free storage, deliver them as wanted, and insure to protect advances, which was done in the purchaser's name, *Cumberland Bone Co. v. Andes Ins. Co.* 64 Me. 466; and a buyer of property under an agreement (in a note given for the purchase-money) stipulating that the title shall remain in the seller until the note is paid. *Reed v. Williamsburg Ins. Co.* 74 Me. 537. See *Hidden v. Slater Ins. Co.* 2 Clifford, 266, as to a lessor's insuring a lessee's interest.

has orally agreed to buy a building, cannot insure that building; but if the agreement could be enforced in equity, either because it was in writing or by reason of part performance, the purchaser would then have an insurable interest. (*l*)¹ So if the insured has assigned his property to pay his debts, we should say that he retained an insurable interest until the property is sold, even without evidence that the property would more than pay his debts; although in a case in which this question * arose, it was held that evidence of some surplus was requisite. (*m*)

A partner may have an insurable interest in a building purchased with partnership funds, although it stands upon land owned by the other partner. (*n*)

A mortgagor may certainly insure the whole value of his property; nor does the possession of the mortgagee, (*o*) nor the seizure of his property, or even its sale on execution, divest him of his insurable interest, (*p*) provided he still retains the power of redeeming it. And in case of loss the insurers are responsible for the whole value of the property insured, to the extent of their insurance. (*q*)²

A mortgagor and a mortgagee may severally insure the same property, each calling it his own property, and neither specifying his interest. But in the settlement of losses under such policies questions have arisen which may not yet be settled. It would

(*l*) *McGivney v. Phoenix Ins. Co.* 1 Wend. 85.

(*m*) *Lazarus v. Commonwealth Ins. Co.* 19 Pick. 81, 5 id. 76. A person discharged by the Insolvent Debtors' Court as an insolvent debtor, effected an insurance on some property acquired by him before the insolvency. The property having been destroyed by fire, the order for his discharge was afterwards annulled on the ground of fraud, and he was adjudged to imprisonment. In a suit on the policy, he was held to have an insurable interest. *Marks v. Hamilton*, 7 Exch. 323, 9 Eng. L. & Eq. 503. See also *Dadmun Manuf. Co. v. Worcester Ins. Co.* 11 Met. 429.

(*n*) *Converse v. Citizens Ins. Co.* 10 Cush. 37.

(*o*) *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25; *Traders Ins. Co. v. Robert*, 9 Wend. 404, 17 id. 631; *Tillot v. Kingston Ins. Co.* 7 Barb. 570; *Stetson v. Mass. Ins. Co.* 4 Mass. 330; *Locke v. North American Ins. Co.* 13 id. 66, 67. A mortgagee may insure the property to insure his claim. *Wheeling Ins. Co. v. Morrison*, 11 Leigh, 362, 363; *King v. State Ins. Co.* 7 Cush. 1; *Allen v. Mut. Ins. Co.* 2 Md. 111.

(*p*) *Strong v. Manufacturers Ins. Co.* 10 Pick. 40; *Miltenberger v. Beacom*, 9 Barr, 199.

(*q*) *Jackson v. Mass. Ins. Co.* 23 Pick. 422; *Traders Ins. Co. v. Robert*, 9 Wend. 404, 17 id. 631.

¹ As if he has taken possession, and paid part of the purchase-money. *Tuckerman v. Home Ins. Co.* 9 R. I. 414.

² This is true where land is taken for a public use, and compensation awarded, *Collingridge v. Royal Exchange Ass. Co.* 3 Q. B. D. 173; or sold under a bond for a deed, although the conveyance has been made, *Clinton v. Hope Ins. Co.* 45 N. Y. 454; and where a mortgagee, who has agreed to sell, has received certain payments for certain mortgages, *Haley v. Manuf. Ins. Co.* 120 Mass. 292.

seem to be certain, that the mortgagee, before possession and foreclosure, has no interest in the property, but that which is created by the debt to him; and no interest beyond that debt. (*r*)¹ If therefore the debt be paid in part, his interest is so far diminished; and if it be paid in full, his interest wholly ceases, and his insurance is annulled.

It must be remembered, also, that his interest in the property is only as a security for his debt. Therefore, if after the buildings are destroyed, the land itself is unquestionably sufficient to secure his debt, it would seem that he has lost nothing.

And * there is both reason and authority for saying, that * 440 in such case he has no claim on the insurers; although this may not be regarded as an established rule. (*s*)

The same conclusion might be reached by another principle. We have already seen, that, by the law of marine insurance, insurers who pay for a total loss, take, even without abandonment, all the salvage of the property for which they pay. For a similar reason, insurers against fire, who pay to a mortgagee for a total loss of the building, should be subrogated to the rights of the mortgagee, and take his claim on the mortgagor, and whatever he still holds as a security for that debt.² We have always regarded this as a general and well-established rule; but recent cases in Massachusetts have thrown some doubt upon it. They favor the doctrine, that where the mortgagee effects the insurance, and there is no reference therein to the mortgagor, and the mortgagee himself pays the premium, there is no privity of contract between the insurers and the mortgagor, but the contract between the insurers and the mortgagee is an independent one; and therefore the mortgagee may recover his whole insurance from the

(*r*) *Motley v. Manuf. Ins. Co.* 29 Maine, *Macomber v. Cambridge Ins. Co.* 8 *Cush.* 337; *Carpenter v. Providence Ins. Co.* 16 *I33.*
Pet. 495; *Wilson v. Hill*, 3 *Met.* 66; (*s*) See *Smith v. Ins. Co.* 17 *Penn. State*, 260.

¹ The liability of a mortgagee, however, as indorser of the mortgage note to an assignee of the mortgage, gives him an insurable interest in the mortgaged property. *Williams v. Roger Williams Ins. Co.* 107 *Massa.* 377.

² A policy of fire insurance is a contract of indemnity, and upon payment of the amount of loss the insurer is entitled to be put into the place of the insured; and if at a subsequent time the insured receives compensation from other sources for the loss sustained by him, the insurer is entitled to recover from the insured any sum which he may have received in excess of the loss actually sustained by him. *Darrell v. Tibbitts*, 5 *Q. B. D.* 560. But see *Burnand v. Rodocanachi*, 7 *App. Cas.* 333, that a sum paid by the United States out of the Geneva award as compensation to the insured for property destroyed by a Confederate cruiser is not thus recoverable.

insurers, and hold his whole claim against the mortgagor and his remaining security for his own benefit. (t)¹

* 441 * There is authority, strengthened as we think by reason, that where a mortgagor is bound by the mortgage contract to keep the premises insured, for the benefit of the mortgagee, and does in fact keep them insured by a policy which contains no statement that the mortgagee has any interest therein, the mortgagee nevertheless has an equitable interest in, or even a

(t) It was held in *White v. Brown*, 2 CUSH. 412, that if a mortgagee, in possession for condition broken, insure his interest in the premises without any agreement therefor between him and the mortgagor, and a loss occurs, which is paid to the mortgagee, the mortgagor, on a bill to redeem and an account stated for the purpose, is not entitled to have the amount of such loss deducted from the mortgagee's charges from repairs. There is no privity in law or fact between the mortgagor and the mortgagee in the contract of insurance, and if the mortgagee gets his interest insured, and receives the amount of his insurance under his policy, it does not affect his claim against the mortgagor. The two claims are wholly distinct and independent. See also *Suffolk Ins. Co. v. Boyden*, 9 Allen, 123, and *Davis v. Quincy Ins. Co.* 10 Allen, 113; *Cushing v. Thompson*, 34 Maine, 496. In *King v. State Ins. Co.* 7 CUSH. 1, it was held, that a mortgagee, who, at his own expense, insures his interest in the property mortgaged against loss by fire, without particularly describing the nature of his interest, is entitled, in case of loss by fire before payment of the mortgage debt, to recover the amount of the loss from the insurers to his own use, without first assigning his mortgage, or any part thereof, to them. In an elaborate opinion, the court maintain that, notwithstanding respectable authorities to the contrary, when a mortgagee causes insurance to be made for his own benefit, paying the premium from his own funds, in case a loss occurs before his debt is paid, he has a right to recover the total loss for his own benefit; that he is not bound to account to the mortgagor for any part of the money so recovered, as part of the mortgage debt; it is not a payment, in whole or in part; but he has still a right to re-

cover his whole debt of the mortgagor. And so, on the other hand, when the debt is thus paid by the debtor, the money is not, in law or equity, the money of the insurer, who has thus paid the loss or money paid to his use. The court, in a note, cite the case of *Dobson v. Land, 8 Hare*, 216, reviewed in 13 Law Reporter, 247: "The question there was upon the branch of the proposition, whether a mortgagee in possession, on stating his account under a bill to redeem, had a right to charge premiums of insurances obtained by himself on buildings constituting part of the mortgaged property, and add the same to the principal and interest of his debt; and it was decided that he could not. It was conceded, that this involved the correlative proposition, that if the mortgagee had received any sum by way of loss on such policies, he would be under no obligation in equity to credit it to the mortgagor, or be responsible to him for it." See *Morrison v. Tenn. Ins. Co.* 18 Miss. 262. In Pennsylvania it is held, that where the mortgagee insures the debt, the underwriter, having paid the mortgage debt, is entitled to have recourse to the mortgaged property and to a cession of the security. *Smith v. Columbia Ins. Co.* 17 Penn. State, 253; *Insurance Co. v. Updegraff*, 21 id. 513. The right of the insurers to subrogation, where they pay the debt, is sustained in *Aetna Insurance Co. v. Tyler*, 16 Wend. 385, 397, per *Walworth*, Chancellor. See *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495, 501. It seems to have been allowed by the old French law, and its justice has been approved in England. *Quebec Ins. Co. v. St. Louis*, 7 Moore, P. C. 286, 22 Eng. L. & Eq. 73. See also a case strongly asserting the right of subrogation of the insurers, *Home Ins. Co. v. Western Trans. Co.* 4 Rob. 257.

¹ So it was held in *Castellain v. Preston*, 8 Q. B. D. 613, in the case of an unpaid vendor who received insurance money for damage to a house by fire after the date of the contract of its sale, but before the date of the completion of the sale, that the insurance company could not recover it either for its own benefit or as trustees for the purchaser. See *Excelsior Ins. Co. v. Royal Ins. Co.* 55 N. Y. 343; *Honore v. Lamar Ins. Co.* 51 Ill. 409.

lien upon, the proceeds of the policy, which a court of equity will enforce for his benefit. (u)

One who has an interest in a building only as a tenant for years, or from year to year, can insure only that interest; and whatever he insures, he would recover, not the value of the whole property, but only the value of his interest. (v)¹ A trustee, an agent, or a consignee, is generally under no obligation to insure against fire; but may do so at his discretion. (w) If policies provide that property held only in trust, or on commission, must be so stated and insured, such a provision may be extended by its own terms, and otherwise perhaps by construction,

* to include everything in which the insured has but a * 442 qualified interest, the ownership being in another person. (x)

If a consignee insures against fire, in his own name, goods in his possession to their full value, there is good reason as well as authority for saying, that he will be regarded as having an implied authority to insure them for the benefit of the owner, and he will recover their full value for his own benefit, as far as his own interest extends, and beyond that for the benefit of the owner. (y)² At the same time, the intention of the parties operates upon the construction of a fire policy, much as it does upon that of a marine policy; therefore, if a fair and reasonable con-

(u) Thomas *v.* Vonkapff, 6 Gill & J. 372; Vernon *v.* Smith, 5 B. & Ald. 1. But if there is no obligation on the part of the mortgagor to insure for the benefit of the mortgagee, the latter has no equitable lien upon the property. Carter *v.* Rockett, 8 Paige, 437. See Columbia Ins. Co. *v.* Lawrence, 10 Pet. 507, 512; McDonald *v.* Black, 20 Ohio, 193. It seems that an order indorsed by the insured on a policy issued by a mutual insurance company "to pay the within, in case of loss," to a mortgagee, and assented to by the company, will enable the mortgagee to sue on the policy in his own name. Barrett *v.* Union Ins. Co. 7 Cush. 175.

(v) Niblo *v.* North American Ins. Co.

1 Sandf. 551. If the tenant owns the building, and not the land under it, with the right of removing the building, he may recover the value of the building, if insured to that extent. Laurent *v.* Chatham Ins. Co. 1 Hall, 41. See Fletcher *v.* Commonwealth Ins. Co. 18 Pick. 419.

(w) Lucena *v.* Craufurd, 3 B. & P. 95; De Forest *v.* Fulton Fire Ins. Co. 1 Hall, 103.

(x) Turner *v.* Stetts, 28 Ala. 420. See also, Stilwell *v.* Staples, 6 Duer, 63, 19 N. Y. 401.

(y) De Forest *v.* Fulton Ins. Co. 1 Hall, 84, 116; Siter *v.* Morris, 13 Penn State, 220; Goodall *v.* New England Ins. Co. 5 Foster, 169, 186.

¹ Where lessees held machinery which they were to return in good order, it was said that their interest was the value of the property they were bound to replace, in Imperial Ins. Co. *v.* Murray, 73 Penn. St. 13.

² A policy of insurance taken out by warehouse-keepers against loss or damage by fire on "merchandise, their own or held by them in trust, or in which they have an interest or liability, contained in" a designated warehouse, covers the merchandise itself, and not merely the interest or claim of the warehouse-keepers. Home Ins. Co. *v.* Baltimore Warehouse Co. 93 U. S. 527.

struction of the words and facts in the case, leads to the conclusion that it was not the intention of the parties to insure more than the consignee's interest, no more than that will be recovered. (z)

It is now common for a commission-merchant to cover by a policy, taken out in his own name, all the goods of his various consignors. (a) And it has been held, that the phrase "goods held on commission," has a similar effect with the phrase "for whom it may concern," in marine policies. (b)

* 443 * A person having a lien on buildings under a State lien law has an insurable interest in the buildings. (c)

Any bailee having any legal or equitable interest in the goods, may insure that interest. Hence a common carrier, who has a lien on the goods for his compensation, and also insures them himself to a considerable extent, may insure his interest. (d) We should doubt, however, whether he would be held to have the implied authority of a consignee, which, as we have seen, is to insure the whole value and recover it for the owner. Still, this authority might be given him by ratification, if it was his intention to insure as agent of the owner. And if the principle applied to marine policies should be held applicable to fire policies

(z) *Parks v. Gen. Interest Ass. Co.* 5 Pick. 34. An insurance upon merchandise in a warehouse, "for account of whom it may concern," protects only such interests as were intended to be insured at the time of effecting the insurance. *Steele v. Insurance Co.* 17 Penn. State, 290, 298. *Lewis, J.*: "All the authorities go to show, that the intention of the party effecting an insurance, at the time of doing so, ought to lead and govern the future use of it, and that no one can, by any subsequent act, entitle himself to the benefit of it, without showing that his interest was intended to be embraced by it when it was made. This rule has especial application to insurances made 'for account of whom it may concern,' and where these terms are used in the policy, it is not sufficient for the party who claims the benefit of the insurance, to show merely that he is the owner of, or has an insurable interest in, the goods. He must show that he caused the insurance to be effected for his benefit, or that it was intended, at the time, for his security. These terms in the policy will not, in general, dispense with this evidence. And where the party claiming the benefit cannot show that he caused or directed the insurance to be effected, it will

not serve him to rest upon some supposed secret intention not manifested by a single word or act, at the time of the transaction, to mark its character, and indicate the person or interest intended to be insured. That which is not manifested by evidence, is to be treated as having no existence. The nature of the transaction must be fixed at the time of insurance, and cannot be changed by subsequent consent of the insured, without the authority of the underwriters. If this were not law, all the mischiefs arising from gambling policies might ensue." See also *Brichta v. New York Ins. Co.* 2 Hall, 372.

(a) *Millaudon v. Atlantic Ins. Co.* 8 La. 557.

(b) *De Forest v. Fulton Ins. Co.* 1 Hall, 124.

(c) *Franklin Ins. Co. v. Coates*, 14 Md. 285.

(d) In *Crowley v. Cohen*, 3 B. & Ad. 478, it was held, that an insurance "on goods" was sufficient to cover the interest of carriers in the property under their charge, and that their particular interest need not be specified. *Van Natta v. Mutual Ins. Co.* 2 Sandf. 490; *Chase v. Washington Ins. Co.* 12 Barb. 595.

(and we know no reason why it should not be), this ratification might be made after the loss. (e)

The rule of *delectus personarum*, and the right of insurers to choose whom they will insure, and therefore to know whom they insure, applies to fire policies in the same way that it applies to marine policies; (f) and so do the general principles and rules which determine agency, authority, and ratification. (g)

There is, however, one important difference, arising from the provision in many of our fire policies, which is indeed required by some of the charters of the companies, by force of which the company has a lien to the amount of the premium note on all the property insured. It is obvious, that, in all such cases, it would be a misrepresentation or a concealment discharging the insurers, if the insurers were not informed of any previous liens or incumbrances by mortgage or otherwise, which would encumber or prevent the lien to which the insurers are entitled. (h)

* SECTION III.

* 444

OF THE RISK ASSUMED BY THE INSURERS.

It seems to be held, that the policy fails to attach, not only if the property does not exist at the time of the insurance, or if it is then on fire, but also if it is at that time exposed to a near and dangerous fire. (i) The reason given for this is, that the contract of insurance is founded on the assumption, that when the policy attaches the property is not exposed to an extraordinary peril. But where no such circumstances exist, and there is no fraudulent misrepresentation or concealment, a policy against fire may be made by its date to have, without the phrase "lost or not lost," a retrospective operation; if this be the intention of the parties. (j)

Fire policies of course insure against fire, and nothing but fire;

(e) *Durand v. Thouron*, 1 Port. Ala. 238; *Watkins v. Durand*, id. 251; *De Bollé v. Pennsylvania Ins. Co.* 4 Whart. 68; *Miltenberger v. Beacom*, 9 Barr. 198.

(f) See *Catlett v. Pacific Ins. Co.* 1 Paine, C. C. 615; *Leathers v. Farmers Ins. Co.* 4 Foster, 259; *Foster v. U. S. Ins. Co.* 11 Pick. 85. See *ante*, p. *356.

(g) See *Alliance Ins. Co. v. La. Ins. Co.* 8 La. 1, and cases *supra* n. (e).

(h) See *supra*, p. *432, n. (k).

(i) *Babcock v. Montgomery Co. Ins. Co.* 6 Barb. 637, 643, 4 Comst. 326;

Austin v. Drew, 4 Camp. 360, 6 Taunt 436. See also *Bentley v. Columbia Ins. Co.* 17 N. Y. 421.

(j) *Hallock v. Ins. Co.* 2 Dutch. 268.

but it may sometimes be a very difficult question, whether a loss for which payment is demanded was a loss under the policy. This question is twofold. First, What is fire? and, secondly, How far does the insurance against fire cover the consequences of a fire, although the property lost or injured was not itself reached or touched by the fire?

A.—*What is Fire?*

This is a difficult question even in a scientific point of view; or rather, science acknowledges no such thing as fire. But by fire, in the common use of the word, is probably meant flame. Flame, however, is only hydrogen-gas heated to redness, or whiteness. We do not, however, call a cannon-ball, heated to redness, or even to whiteness, fire; and yet it cannot be doubted, that if red-hot iron, or any substance sufficiently heated, coming * 445 * in contact with property insured, injured it by heat, in a certain way, this would be a loss under a policy against fire. But this injury must reach a certain extent to come under the policy. Perhaps a rule which has been applied in the trial of persons charged with arson, might be found applicable here. If a person charged with this crime were proved to have put kindlings upon a floor, and set fire to them, with a purpose of burning a house, and the fire was extinguished or burnt out without affecting the floor, the crime would be only attempted and not committed. But what operation of the fire upon the floor would suffice to constitute the crime? It has been said, that the floor must be charred, or, in other words, the surface of the floor must be changed by heat from the condition of wood into that of charcoal. Such a rule would meet cases which sometimes arise in respect to property insured. It would be equivalent to this: that insurers against fire are not liable unless there be ignition or combustion. It is certain that very great injury may be caused by fire, without either ignition or combustion. In one case, a sugar-house, with its contents, was insured against fire, and in each story sugar in a certain state of preparation was deposited, for the purpose of being refined, and for this purpose a certain degree of heat was necessary. To obtain this there was a chimney running up through the whole building, with a register in it

on each story, whereby more or less heat could be introduced at pleasure into the rooms. At the top of the chimney was a register, which was closed at night, that the heat might be retained in the building. This register was, by the negligence of a servant, left shut one morning when the fires were lighted; and consequently the smoke and heat were forced into the rooms where the sugars were drying, and they were very much injured thereby. Held, that the insurers were not liable. (*k*) But if there is an extraordinary fire, the insurers are clearly liable for the direct effects of it, as where furniture or pictures are injured by the heat, although they do not actually ignite. (*l*) Where there was insurance on a theatre, "not to cover any loss or damage by fire which may originate in the theatre proper," and a fire outside the building heated the wall so much as to cause the interior to burn, the insurers were held. (*ll*)

* It was formerly supposed that lightning was fire; and * 446 then all injuries by lightning might be regarded as injuries by fire. Now it is known, as a matter of science, that lightning is not fire, and that the light or flash of lightning arises from the shock upon the air. But the same shock produces great heat, wherever it falls; and therefore a house struck by lightning is frequently set on fire. If, however, a house be destroyed by lightning, but without ignition, insurers against fire are not liable; (*m*)¹ nor if a house falls and becomes mere rubbish, and then takes fire and burns up. (*mm*)²

A similar question has arisen in cases of explosion. Here it seems to be settled by authority, that if the explosion be caused by gunpowder, it is a loss by fire; (*n*)³ and the same rule would

(*k*) *Austin v. Drew*, 4 Camp. 360, Holt, Co. 6 Barb. 637, 4 Comst. 326; *Kenniston N. P.* 126, 6 *Taunt.* 426, 2 *Marsh.* 130. *v. Mer. Co. Ins. Co.* 14 N. H. 341.

(*l*) *Case v. Hartford Ins. Co.* 13 Ill. 676. See also *Scripture v. Lowell Ins. Co.* 10 *Cush.* 356.

(*ll*) *Sohier v. Norwich Ins. Co.* 11 *Allen, 336.* (*mm*) *Nave v. Home Ins. Co.* 37 Mo. 430. *v. Home Ins. Co.* 10 *Cush.* 356; *Waters v. Merchants Ins. Co.* 11 *Pet.* 213, 225; *Grim v. Phoenix Ins.* Co. 13 *Johns.* 451.

¹ Where a tornado, accompanied by electrical disturbance, destroyed insured property, it was held, in an action on the policy, which covered loss by lightning, that the jury must decide whether lightning was an active agent in the destruction. *Spensley v. Lancashire Ins. Co.* 54 *Wis.* 433.

² As where the floors and roof have fallen in, and the walls only are standing. *Huck v. Globe Ins. Co.* 127 *Mass.* 306. See *Breuner v. Liverpool Ins. Co.* 51 *Cal.* 101. But where a building is standing on its posts, though out of plumb and abandoned, it has not fallen. *Firemen's Ins. Co. v. Congregation, &c.* 80 *Ill.* 558.

³ Where an explosion occurred from vapor, given off from material in process of manufacture coming into contact with a lamp, the insurers were held liable for the loss

undoubtedly be applied if the explosion were caused by the burning of saltpetre or any other combustible substance. But a violent explosion may injure things at a considerable distance, by the mere shock; and this would not be injury by fire. Thus, where the damage was caused by the explosion of a powder-magazine a mile distant, the insurers were not held. (*nn*) And where a warehouse was insured against fire with an exception of explosion, and an explosion took place in a neighboring building which set it on fire, from which the insured building caught and was destroyed, the insurers were held not liable, the rule of *causa proxima non remota* not applying. (*no*) The explosion of a steam-boiler is not a loss by fire. (*o*) The distinction taken is this: that gunpowder explodes by combustion, and steam by expansion without combustion.

B. — *Of the Liability of Insurers for the Consequences of Fire.*

The universal rule of contracts, *causa proxima non remota spectatur*, applies also to insurance against fire. But both usage and law give a very liberal construction in favor of the assured under fire policies. Thus, one of the most common grounds for a claim upon insurers against fires, is for injury caused by the water used to extinguish the fire. This would probably be confined, nearly if not altogether, to goods within the building which was on fire. We doubt, however, if there is any other exception. Thus, if a large building, of many stories, were filled throughout with goods, and the building or the goods were under such insurance, and a fire took place in any part of the building, all the goods within

that building which were injured by the water used by the

* 447 firemen, must be paid for. *We have never known an instance in which the question has been raised in regard to the necessity or expediency of using so much water, or as to the unskilfulness of the firemen. Nor should we indeed confine this

(*nn*) *Everett v. London Assurance Co.* 19 C. B. (n. s.) 126. (*o*) *Millaudon v. N. O. Ins. Co.* 4 L. An. 15.
(*no*) 7 Wallace, 44.

from the resulting fire, but not from the explosion, *Briggs v. N. A. Ins. Co.* 53 N. Y. 446; and where an insurance company was not to be liable for collision unless fire ensued, nor for fire from petroleum, it was held not liable for fire from petroleum after a collision. *Insurance Co. v. Express Co.* 95 U. S. 227.

absolutely to goods within the building. If a building not insured were on fire, and a contiguous or a very near building were in real danger, and, to avert this, efforts were made to wet the outside of the endangered building, and goods insured within this building are hurt by this water, we believe the injury would be regarded as a loss within the policy. (*p*) So it might be, if damage was done to goods in a building not on fire by leakage from the hose carried through the building to extinguish a fire in an adjoining building. If, however, there were no fire anywhere, and water were thrown, in the erroneous belief that there was a fire, a different question would arise; and we should say that the insurers would not be liable.

Policies of insurance on goods against fire, sometimes require that the insured shall employ all possible diligence to save or remove their goods; but such a provision would be only a confirmation of the obligation which the law and public policy impose upon the insured. Hence, injury to or loss of goods which was caused by their removal from the danger of fire, is a common ground for a claim under a fire policy. (*pp*) But there must be a reasonable application of this rule; the goods must be removed from immediate danger, and not because of some fear of a possible or remote danger. And if the loss or injury could be attributed to the want of even so much care as could be given under such circumstances, the negligence, and not the fire, would be regarded as the proximate cause, and the insurers would not be liable. (*q*) Insurers are liable for the loss caused by the blowing up of buildings to arrest the progress of a fire, * when that pre- * 448 caution was justified by the circumstances. (*r*)¹ And this

(*p*) *Case v. Hartford Ins. Co.* 13 Ill. 680; *Hillier v. Alleghany Co. Ins. Co.* 3 Barr, 470; *Agnew v. Ins. Co.* 7 Am. Law Reg. 168; *Babcock v. Montgomery Co. Ins. Co.* 6 Barb. 637; *Scripture v. Lowell Ins. Co.* 10 Cushing. 356, per *Cushing*, J.; *Lewis v. Springfield Ins. Co.* 10 Gray, 159; *Whitehurst v. Fayetteville Ins. Co.* 6 Jones, 352.

(*pp*) Insurers were held for a loss by larceny, in *Witherell v. Maine Ins. Co.* 49 Me. 200. See also, where the insurers were held for a loss on goods removed from imminent peril, although the store from which they were removed was never

reached by the fire. *White v. Republic Ins. Co.* 57 Me. 91.

(*q*) See *Case v. Hartford Ins. Co.* 13 Ill. 676; *Babcock v. Montgomery Co. Ins. Co.* 6 Barb. 640; *Hillier v. Alleghany Co. Ins. Co.* 3 Barr, 470; *Agnew v. Ins. Co.* 7 Am. Law Reg. 168, affirmed *Independent Ins. Co. v. Agnew*, 34 Penn. State, 96; *Tilton v. Hamilton Ins. Co.* 1 Bosw. 367; *Webb v. Protection Ins. Co.* 14 Misso. 3.

(*r*) *City Fire Ins. Co. v. Corlies*, 21 Wend. 367; *Pentz v. Receivers of Aetna Fire Ins. Co.* 3 Edw. Ch. 341, 9 Paige, 568; *Gordon v. Rimmington*, 1 Camp. 123.

¹ In *Boon v. Aetna Ins. Co.* 40 Conn. 575, insurers were held liable for a loss caused by the firing of buildings by the commander of United States troops to prevent stores from falling into the hands of the Confederate troops, who were in superior force, which

was held, where a house on fire was blown up by gunpowder, and the policy provided that the insurers should not be liable for a loss from the explosion of gunpowder; because this provision was held to exclude only fire originating from an explosion of gunpowder. (s) But in another case, where the policy excluded any loss occasioned by the explosion of a steam-boiler, and by reason of such explosion the building was set on fire, the insurers were held not liable, although the fire was the proximate cause of the loss; because the loss was directly and wholly occasioned by the explosion. (t)

We are not aware that general average claims or provisions are ever inserted in American fire policies, although they are said to be in English policies; but the principle of general average may have some application in this country. In one case where insurance was effected on a stock of goods in a certain store, and, an adjoining store being on fire, the insured, with the consent of the president of the insurance company, bought some blankets and spread them on the outside of the store where it was exposed to the flames, the building was saved, but the blankets were ruined. The assured claimed to recover the entire expense. The company contended, that if liable at all, it was only for the proportion which they had at risk upon the policy, taken in connection with the store, of which the plaintiffs had a lease for ten years, and the value of the stock over and above the sum insured upon it; and the court held that they were only liable for this amount. (u)

It is common for policies against fire to provide that the insurers may elect either to pay for damages in money or to repair or rebuild. And it has been held that if insurers under this provision elect to rebuild, this converts the contract of insurance into a building contract; and if then they do not rebuild, the damages for their failure are not limited by the amount insured, but must be the sum required to erect a building of equal value with that insured. (uu)

(s) *Greenwald v. Ins. Co.* 7 Am. Law Reg. 282. The clause was construed to mean "fire originating from an explosion of gunpowder."

(t) *St. John v. American Ins. Co.* 1 Duer, 371, 1 Kern. 516

(u) *Welles v. Boston Ins. Co.* 6 Pick.

182. It was also contended, that the property in the neighborhood ought also to contribute; but the court held, that the contribution must be limited to the building and the property therein immediately saved.

(uu) *Morrell v. Irving Ins. Co.* 33 N.

act was justified by the emergency, although the policy contained a proviso against liability for loss from "any invasion, insurrection, riot, or civil commotion, or of any military or usurped power."

C.— *Of a Loss caused by the Negligence of the Insured.*

There is this difference between marine policies and fire policies. The perils against which marine policies insure are generally, * although not always, such as could not be averted by any care or skill which could reasonably be demanded; whereas, the great majority of fires are caused by the negligence of somebody, and very commonly by the negligence of some of the family or servants of the insured. It is to guard against this very risk, that fire policies are made; and it has been held, that insurers are liable for a fire caused not only by persons employed by the insured, but by his own negligence. (v)¹ In either case the fire would be regarded as the proximate cause of the loss, and the negligence as the remote cause. It may be said, therefore, that the negligence of the insured, which is but an imperfect ground of defence, even in marine policies, is almost none in fire policies. In a case in Massachusetts, the insurers admitted the loss, and that a fraudulent design to set fire to the building was not imputed to the plaintiff, and offered to show that the building insured was destroyed through the gross negligence and carelessness of the plaintiff, and through his gross misconduct. The court below ruled, that evidence to prove

Y. 429; *Beals v. Home Ins. Co.* 36 N. Y. 522.

(v) In *Shaw v. Robberds*, 6 A. & E. 75, 83, Lord Denman, C. J., said: "One argument more remains to be noticed, viz., that the loss here arose from the plaintiff's own negligent act in allowing the kiln to be used for a purpose to which it was not adapted. There is no doubt that one of the objects of insurance against fire, is to guard against the negligence of servants and others; and, therefore, the simple fact of negligence has never been held to constitute a defense. But it is argued that there is a distinction between the negligence of servants and strangers, and that of the assured himself. We do not see any ground for such a distinction, and are of opinion that, in the absence of all fraud, the proximate cause of the loss only is to be looked to." This doctrine is now well-settled law

in this country. *Patapeco Ins. Co. v. Coulter*, 3 Pet. 222; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 517, 518; *Waters v. Merchants Ins. Co.* 11 id. 213, 225; *Perri v. Protection Ins. Co.* 11 Ohio, 147, overruling *Lodwick v. Ohio Ins. Co.* 5 id. 488; *St. Louis Ins. Co. v. Glasgow*, 8 Miss. 718; *Mathews v. Howard Ins. Co.* 13 Barb. 234, overruling *Grim v. Phenix Ins. Co.* 18 Johns. 451; *Hynds v. Schenectady Co. Ins. Co.* 16 Barb. 119; *St. John v. American Ins. Co.* 1 Duer, 371; *Gates v. Madison Co. Ins. Co.* 1 Seld. 469; *Copeland v. New England Ins. Co.* 2 Met. 432; *Butman v. Monmouth Ins. Co.* 36 Maine, 227; *Catlin v. Springfield Ins. Co.* 1 Sumner, 434; *Henderson v. Western Ins. Co.* 10 Rob. La. 164; *National Ins. Co. v. Webster*, 83 Ill. 470; *Germania Ins. Co. v. Sherlock*, 25 Ohio St. 33; *Jameson v. Royal Ins. Co.* Ir. R. 7 C. L. 126.

¹ *Enterprise Ins. Co. v. Parisot*, 35 Ohio St. 35; *Mickey v. Burlington Ins. Co.* 35 Ia. 174.

such facts was not material; but the Supreme Court, declaring that they could not say that negligence could not be such as to discharge the insurers, ordered a new trial. But the court, in their decision, so described the negligence which alone would have this effect, that there was no new trial; the insurers paying the loss, with some abatement. (w)

OF ALIENATION.

It is quite certain, that policies against fire are contracts only between the insured and the insurer, and do not pass to any other party without the consent of the insurers. (x) If, therefore, before the loss occurs, the insured alienates the whole of his interest in the property, he loses nothing by the fire, and has no claim for any loss. (y) And if he alienates only a part, his claim is in proportion to the interest he retains. (z)

But when a loss occurs, it vests in the insured a right to indemnity. This right is assignable, and an assignee for value may enforce his claim against the insurers, (a) although it may be necessary to bring the action in the name of the insured. But a mere assignment or transfer of the premises after a loss, does not of itself transfer the right of indemnity for the previous loss, unless the contract shows this to have been the intention of the parties.

Our policies against fire very commonly provide expressly, that an assignment either of the property or the policy shall avoid the policy. If this prohibition covers in its terms only a transfer of

(w) *Chandler v. Worcester Ins. Co.* 8 *Cush.* 328. In *Johnson v. Berkshire Ins. Co.* 4 *Allen*, 338, it was found that the fire was caused by the act of the insured; that there had been a want of ordinary care, judgment, and discretion on his part, but that he had not been guilty of recklessness and wilful misconduct. *Held*, that the insured was entitled to recover.

(x) *Tate v. Citizens Ins. Co.* 13 *Gray*, 79; *Granger v. Howard Ins. Co.* 5 *Wend.* 200; *Lane v. Maine Ins. Co.* 3 *Fairf.* 44;

Morrison v. Tennessee Ins. Co. 18 *Misso.* 262; *Rollins v. Columbian Ins. Co.* 5 *Foster*, 204. This doctrine was early held in England. *Lynch v. Dalzell*, 4 *Brown, P. C.* 431 (1720); *Sadlers Co. v. Badcock*, 2 *Atk.* 554 (1743).

(y) *Carroll v. Boston Ins. Co.* 8 *Mass.* 516; *Wilson v. Hill*, 3 *Met.* 66.

(z) *Aetna Ins. Co. v. Tyler*, 16 *Wend.* 386, 401.

(a) *Wilson v. Hill*, 3 *Met.* 69; *Brichta v. N. Y. Ins. Co.* 2 *Hall*, 372. But see *Lynch v. Dalzell*, 4 *Brown, P. C.* 431

the interest of the insured, it would seem that this prohibition is not extended by its terms to the contract of insurance. (b)¹

* Some recent policies contain a provision prohibiting a transfer of his claim by the insured after a loss occurs; and then make such a transfer an avoidance of the policy. It has been held, that the policy of the law makes such a restriction upon the power of transferring a vested right itself void. (c)² But it has also been held, that if the parties choose to make such a bargain they are bound by it. (d)

An alienation of the property, to have the effect of discharging the insurers, must amount to an absolute conveyance of the title of the insured thereto. (e)³ Hence, a mortgage of real estate has no such effect, until entry for breach and foreclosure; (f)⁴ or a sale of the equity of redemption; (ff)⁵ nor a contract to convey; (g)

(b) Carpenter v. Providence Ins. Co. 16 Pet. 502. Where a policy issued by a mutual fire insurance company contained this clause: "The interest of the assured in this policy is not assignable without the consent of said company in writing; and in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent, this policy shall thenceforth be void, and of no effect," it was held, that this clause did not merely nullify the assignment of the policy, when made without consent, but operated on the policy. Smith v. Saratoga Co. Ins. Co. 1 Hill, 497, 8 id. 508. As to the meaning and effect of the word "assigns," see an interesting case, Holbrook v. American Ins. Co. 1 Curtis, C. C. 198.

(c) Goit v. National Ins. Co. 25 Barb. 189. See also Courtney v. New York Ins. Co. 28 Barb. 118.

(d) Dey v. Poughkeepsie Ins. Co. 23 Barb. 623.

(e) Masters v. Madison Co. Ins. Co. 11 Barb. 624; Van Deusen v. Charter-Oak

Ins. Co. 1 Rob. 55; Ayres v. Home Ins. Co. 21 Ia. 186.

(f) Conover v. Mut. Ins. Co. 1 Comst. 290, 3 Denio, 254; Jackson v. Mass. Ins. Co. 23 Pick. 418. Nor a mortgage of personal property without a transfer of possession to the mortgagor. Rice v. Tower, 1 Gray, 426. See also Holbrook v. Am. Ins. Co. 1 Curtis, C. C. 198. Nor a levy on execution. Clark v. New Eng. Ins. Co. 6 Cush. 342; Rice v. Tower, 1 Gray, 426. Nor a sale of the equity of redemption, so long as the party has the right to redeem. Strong v. Manufacturers Ins. Co. 10 Pick. 40. But a mortgage is considered a material alteration in the ownership of the property insured. Edmands v. Mutual Ins. Co. 1 Allen, 311. And sometimes alienation by mortgage is directly prohibited. Ede v. Hamilton Ins. Co. 3 Allen, 962. See Shepherd v. Union Ins. Co. 88 N. H. 232.

(ff) Lawrence v. Holyoke Ins. Co. 11 Allen, 887.

(g) Trumbull v. Portage Co. Ins. Co. 12 Ohio, 806; Masters v. Madison Co. Ins.

¹ Ferree v. Oxford Ins. Co. 67 Penn. St. 373.

² Alkan v. New Hampshire Ins. Co. 53 Wis. 136.

³ A conveyance in fee with mortgage back will be an alienation, Savage v. Howard Ins. Co. 52 N. Y. 502; Home Ins. Co. v. Hauslein, 60 Ill. 521; but the deed must be delivered. Farmers' Ins. Co. v. Graybill, 74 Penn. St. 17; Manhattan Ins. Co. v. Stein, 5 Bush, 652; so is a mortgage, Atherton v. Phoenix Ins. Co. 109 Mass. 32; but not a sale of the equity of redemption, so long as the seller can redeem, Loy v. Ins. Co. 24 Minn. 315. A conveyance by a husband and wife to a third person, and by him back to the wife to effectuate the provisions of a will, was held an alienation in Langdon v. Minn. Ins. Co. 22 Minn. 193.

⁴ Foreclosure, however, is complete, although proceedings are pending to correct an error. McKissick v. Millowners' Ins. Co. 50 Ia. 116. See Commercial Union Ass. Co. v. Scammon, 102 Ill. 46; Bishop v. Clay Ins. Co. 45 Conn. 430.

⁵ Contra, by statute, if the owner of the equity takes an unrecorded bond for a reconveyance. Foote v. Hartford Ins. Co. 119 Mass. 259.

nor a conditional sale, where the condition is precedent and not yet performed; (*h*) nor a mere agreement between the owner of property insured and another person, to represent to the creditors of the owner in order to prevent attachments, that it had been sold to such other person. (*i*) But it has been held that a policy on an undivided half of a building was avoided by a partition made by the court between the insured and his cotenant. (*ii*)¹ And that a sale and release of the interest of one partner in the business and property, does not avoid the policy. (*iv*)² A transfer of a part of the property does not avoid the policy as to the part not transferred. (*ik*)³

The effect of bankruptcy, or of voluntary assignment to assignees in trust, may not be certain. It may be an inference from the weight of authority, that in either case this is an alienation. Policies sometimes provide for such circumstances. In the absence of such provisions, we should say on general principles * 452 * that where property insured against fire, is taken into the possession of the law, for the benefit of creditors, the insurance would remain valid for their benefit, until the property was sold by the assignees. (*j*)⁴ But if the insured on his own application is declared an insolvent or a bankrupt, this may be an alienation. (*k*)⁵ So if there is a voluntary assignment to assignees in trust. (*l*)⁶

Co. 11 Barb. 624; Perry Co. Ins. Co. v. Stewart, 19 Penn. State, 45.

(*h*) Tittemore v. Vt. Ins. Co. 20 Vt. 546.

(*i*) Orrell v. Hampden Ins. Co. 18 Gray, 481. The policy provided that the insurance should be void "in case of any sale, transfer, or change of title."

(*ii*) Barnes v. Union Ins. Co. 51 Me. 110.

(*ij*) Hoffman v. Aetna Ins. Co. 1 Rob. 501.

(*ik*) Manley v. Ins. Co. 1 Lans. 20.

(*jl*) See Bragg v. New England Ins. Co. 5 Foster, 298.

(*km*) Adams v. Rockingham Ins. Co. 29 Maine, 292; Young v. Eagle Ins. Co. 14 Gray, 150.

(*lm*) Dadmun Manuf. Co. v. Worcester Ins. Co. 11 Met. 429, 484.

¹ See Plath v. Minn. Farmers' Ins. Co. 23 Minn. 479.

² Pierce v. Nashua Ins. Co. 50 N. H. 297; West v. Citizens' Ins. Co. 27 Ohio St. 1; Cowan v. Iowa Ins. Co. 40 Ia. 551; Burnett v. Eufaula Ins. Co. 46 Ala. 11.

³ Quarrier v. Ins. Co. 10 W. Va. 507. So where the insured exchanges one horse for another. Mills v. Farmers' Ins. Co. 37 Ia. 400.

⁴ An assignment in bankruptcy by a mortgagor of chattals, the legal title to which is in the mortgagee, will not avoid a policy, providing that a change in title by "legal process, judicial decree, or voluntary transfer or conveyance," would avoid it, loss, if any, payable to mortgagees. Appleton Iron Co. v. Brit. Am. Ass. Co. 46 Wis. 23.

⁵ A condition in a policy of fire insurance forfeiting it in case the property insured becomes encumbered in any way without the consent of the company written thereon refers to incumbrances created by the act of the insured, and not to those created by judgment or otherwise *in invitum* by operation of law. Baley v. Homestead Fire Ins. Co. 80 N. Y. 21. See Starkweather v. Cleveland Ins. Co. 5 Bennett's Cas 338.

⁶ See Hazard v. Franklin Ins. Co. 7 R. I. 429.

The death of the insured is no alienation of the property insured, within the meaning or the prohibition of alienation. (n)¹

Policies of insurance are certainly not negotiable. (n) They may be however, and often are, assigned with the consent of the insurers. Generally the assignor of a *chase in action* cannot prejudice the rights of the assignee after the debtor has assented to the assignment. (o) But where the owner of property mortgaged, effects insurance in his own name, "loss payable to the mortgagee," or has such a clause afterwards indorsed on the policy with the assent of the insurers, the insurance is still upon the interest of the mortgagor, and he does not cease to be a party to the original contract with the insurers; and any act of his which would otherwise render the policy void, will have this effect, although the policy is in the hands of the mortgagee. (p)² But if the insurers, at the time of their assent to the transfer of the policy, impose any further obligation on the transferee, this is evidence of a new contract with him, and then the acts of the mortgagor cannot affect his rights as mortgagee. (q)

* In practice it is usual, and always proper, that due notice of transfers should be given to the insurers, and their consent obtained, and duly indorsed or approved, as their rules may require. But notice and consent may be entirely sufficient, although they do not precisely conform to the formal requirements.

An agent of an insurance company, to receive premiums and

(n) *Burbank v. Rockingham Ins. Co.* 4 Foster, 550. *State Ins. Co. v. Roberts*, 7 Am. Law Reg. 229; *Grovesnor v. Atlantic Ins. Co.* 17 N. Y. 891; *Bidwell v. Northwestern Ins. Co.* 19 N. Y. 179. See *Buffalo Steam-Engine Works v. Sun Ins. Co.* 17 N. Y. 401; *Pollard v. Somerset Ins. Co.* 42 Maine, 221.

(o) *Hackett v. Martin*, 8 Greenl. 77; *Hatch v. Dennis*, 1 Fairf. 244; *Matthews v. Houghton*, id. 420; *Frear v. Evertson*, 20 Johns. 142. *(p) Hale v. Mechanics Ins. Co.* 6 Gray, 169; *Bowditch Ins. Co. v. Winslow*, 8 Gray, 38; *Loring v. Manuf. Ins. Co.* id. 28; *Edes v. Hamilton Ins. Co.* 3 Allen,

2 Gray, 216. In *Edes v. Hamilton Ins. Co.* 3 Allen, 362, *Bigelow*, C. J., speaking of the above case, said: "The decision in that case, although fully warranted by the peculiar facts which were there shown to exist, was nevertheless going as far as the rules of law will permit, in order to sustain a claim for loss under a policy which has been assigned by the original assured."

¹ See also *Sherwood v. Agricultural Ins. Co.* 73 N. Y. 447.

² *Franklin Savings Institution v. Central Ins. Co.* 119 Mass. 240. See *State Ins. Co. v. Maackens*, 9 Vroom, 564; *Continental Ins. Co. v. Hulman*, 92 Ill. 145.

applications for insurance, and transmit policies, has no authority to waive notice of an assignment of a policy. (r)¹

Policies against fire sometimes contain a provision that the policy shall be void if the building be used for an unlawful purpose. Such a policy is held to be avoided by a sale of ardent spirits therein without a license, where that sale is prohibited by law; and this when the violation of law was made without the knowledge of the policy-holder. (rr)² So a policy on intoxicating liquors is void, if they are kept for sale and that sale is illegal. (rs)

SECTION V.

OF VALUATION.

This is seldom made in fire policies, and perhaps never made with the purpose and effect of valuation in marine policies. Whether a loss be total or partial, the insurers are bound to pay so much of the sum insured as will indemnify the insured, and no more. (s) Where personal chattels are insured, of which the value is uncertain, as for example, works of art, it is not uncommon to agree and express what shall be held to be their value in case of loss; and such agreement is of course binding. (t)

The value which the insurers on goods pay for, is their value at the time of loss; and it is a common practice to determine this value by a sale at auction of such part of the goods as remains uninjured. But the insurers must have notice, and due precautions must be taken, to make the auction a fair measure of their value. (u)

It is quite certain that the profits which the insured sustains

(r) Tate v. Citizens Ins. Co. 13 Gray, 79. Harris v. Eagle Fire Co. 5 Johns. 363.
 (rr) Kelly v. Worcester, &c. Ins. Co. See Laurent v. Chatham Ins. Co. 1 Hall,

97 Mass. 284.

(rs) Same case.

(s) Niblo v. North American Ins. Co.

1 Sandf. 551.

(t) The parties may make a valued policy on any subject, if they see fit.

Hall, 41; Wallace v. Ins. Co. 4 La. 289; Mil-

landon v. Western Ins. Co. 9 id. 32, and

cases *infra*, p. * 455, n. (d).

(u) Hoffman v. Western Ins. Co. 1 La.

An. 216.

¹ Nor does an authority to take one kind necessarily authorize the taking of all kinds of risks. Smith v. State Ins. Co. 58 La. 487.

² The policy in such a case does not attach, although an application is made for a license immediately after the unlawful business is begun. Johnson v. Union Ins. Co. 127 Mass. 555.

by the interruption of his business caused by the fire, are not * taken into consideration in assessing the damages; (v) * 454 unless the terms of the insurance expressly cover them. And generally it may be said, that if a building be burned, the damages are measured by its actual value, without any consideration of external circumstances, which might upon some contingency increase or diminish that value. (w)

As insurers against fire always endeavor to be certain, that they do not insure upon any building more than the building is worth, the question of value seldom arises in case of a total loss. If there be a partial loss, the insurers usually have by the policy, and frequently exercise, the right of repairing the building; and they must do this as to style, work, and materials, in conformity with the original character of the house. It is common in practice for them to estimate the cost of repairs, and offer that sum to the insured. If he refuses this, they may make the repairs. If the money is tendered unconditionally, he may take it, and still bring his action, and recover whatever more he may prove to be his loss. (ww)

If the building insured is entirely destroyed and then rebuilt, the insured is entitled to indemnity for his actual loss, and although there is no rule analogous to that which prevails in marine insurance, of deducting one-third new for old, still the jury may make a deduction from the value of the new materials, so as to give the insured only complete indemnity. (x)

If insurers elect to repair a building, and do so, and the cost of repair is less than the amount they insure, they remain liable for the balance during the time for which the policy attaches; (y) and if they elect to repair a building injured, and competent authorities forbid this, whether on the ground that the building would then be in a dangerous condition, or for other sufficient reason, the insurers lose their election, and are then liable to pay for the loss. (z) Repairs must be made in a * rea- * 455 sonable time, and what is a reasonable time is a question

(v) Niblo v. N. A. Ins. Co. 1 Sandf. 551.

(w) Laurent v. Chatham Ins. Co. 1 Hall, 41.

(ww) See *ante*, p. * 448.

(x) Brimley v. National Ins. Co. 11 Met. 195.

(y) Trull v. Roxbury Ins. Co. 3 Cush. 263. See N. H. Ins. Co. v. Rand, 4 Foster,

428. The insured will also be liable for assessments for losses after the destruction of his building by fire, during the whole term of the policy. N. H. Ins. Co. v.

Rand, 4 Foster, 428; Swanscot Machine Co. v. Partridge, 5 id. 369.

(z) Brown v. Royal Ins. Co. London Jurist, 1859, p. 1255, 8 Am. Law Reg. 235.

for the jury; (*a*) and under a policy allowing the insurers to "make good the damage by repairs," the insured "to contribute one-fourth of the expense," it was held, that if the insurers, intending to comply with this provision in good faith, made repairs of substantial benefit, though not fully making good the loss, the measure of the insured's damages is the difference between the value of the building as repaired, and what it would have been if fully repaired, deducting one-fourth of the value of the repairs to the estate, and not one-fourth of the cost. (*b*) Where insurers had reserved a right to replace articles destroyed, and the insured refused to permit them to examine and inventory the goods that they might judge what it was expedient for them to do, relief was refused the insurers in equity. (*c*)

Valuation often enters into policies against fire effected by mutual insurance companies, for a different purpose. Their charters forbid them to insure for more than a certain proportion of the value of buildings; and for this purpose a valuation is made in the policy; and, unless it be set aside for fraud, it is conclusive upon both parties, for most purposes. (*d*) If upon a certain valuation in a policy the insurers insure more than the proportion which their charter permits them to insure, the insured only recovers the legal proportion; and he cannot recover more by proof that the property was undervalued; and that a fair valuation would have authorized the whole amount insured. (*e*)¹ A by-law of a company prohibiting an insurance that exceeds two-thirds the estimated value of the property, has been held to be directory only, and not a condition of the contract. (*f*)

(*a*) *Haskins v. Hamilton Ins. Co.* 5 *229*; *Cushman v. N. W. Ins. Co.* 34 *Maine, 487*; *Phillips v. Merrimack Ins. Co.* 10 *Cnab. 350*; *Nichols v. Fayette Ins. Co.* 1 *Allen, 69*.

(*b*) *Parker v. Eagle Ins. Co.* 9 *Gray, 152*.

(*c*) *N. Y. Ins. Co. v. Delavan*, 8 *Paige, 419*.

(*d*) *Borden v. Hingham Ins. Co.* 18 *Pick. 523*; *Fuller v. Boston Ins. Co.* 4 *Met. 206*; *Cane v. Com. Ins. Co.* 8 *Johns.*

(*e*) *Holmes v. Charlestown Ins. Co.* 10 *Met. 211*.

(*f*) *Cumberland Valley Prot. Co. v. Schell*, 29 *Penn. State, 31*.

¹ See *Bardwell v. Conway Ins. Co.* 118 *Mass. 465*.

* SECTION VI.

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OF DOUBLE INSURANCE AND OF RE-INSURANCE.

A. — *Of Double Insurance.*

We have seen, that in marine policies double insurance is guarded by many rules, and not unfrequently provided for in the policies. There is, however, in contracts of insurance against fire, a much stronger reason why double insurance should be, if not prevented altogether, at least guarded from becoming the means of fraud. All property under insurance may be fraudulently destroyed by the insured; and such cases sometimes occur under marine policies; but the danger of their occurrence under fire policies is far greater. And many of the rules and usages of fire insurance are intended to guard against this danger. The temptation to destroy insured property, arises when it is insured above its value; for then only would this fraud be profitable. It is true that other circumstances might exist, having a tendency to induce the fraud; but they must be very peculiar, and do not need especial consideration.

Insurers can guard against over insurance by themselves, or, in other words, against making it the interest of the assured that the property should be destroyed, so far as their own policy is concerned, by ascertaining the value of the property they insure; and the common clause in the charter of mutual fire insurance companies, prohibiting them from insuring more than a certain portion of the value, is intended to guard against this danger. It is, however, obvious, that any precaution of this kind would be wholly useless, if the assured were at liberty to go to other companies, and there obtain insurance on the same property; for if each company insure but a quarter part of the value, he might obtain from all of them together many times its whole value.

Fire insurance companies usually guard against this abuse by very stringent rules and prohibitions. They generally require * that any other insurance upon the property must * 457 be stated by the insured, and indorsed upon the policy; and it is a frequent provision, that any other insurance of the interest

of the assured in the same property, if it be not so stated and indorsed, shall wholly annul and avoid the policy, or prevent any recovery upon it. (*f*)¹ It is also provided, that where such other insurances are so stated and indorsed, all the insurances shall be adjusted as one insurance, and each insurer shall pay only a ratable proportion of the whole loss. (*g*)² But it would seem, that where in such a case one insurer pays more than his proportion, he has no claim against the others for contribution, because the clause renders each insurer liable for only a ratable proportion; and therefore it gives him adequate defence if more than this proportion be demanded; and the right of contribution exists only where two or more are bound severally to pay the whole sum, and one pays more than his share by compulsion, and asks contribution from the rest who might have been bound by the same compulsion. (*h*)

These precisions have passed repeatedly under adjudication. It has been determined that they apply to a subsequent as well as to a prior insurance. (*i*) Some difficulty has been found in ascertaining what is a sufficient notice or assent to come within these provisions. The difficulty has arisen, in part from the different rules or the different language employed by the companies to

(*f*) See *Dietz v. Mound City Ins. Co.* 38 Mo. 85; *N. England Fire Ins. Co. v. Schettler*, 38 Ill. 166.

(*g*) See *Haley v. Dorchester Ins. Co.* 1 Allen, 536. In *Richmondville Union Seminary v. Hamilton Ins. Co.* 14 Gray, 459, the following words were written on the face of the policy: "Additional to \$9,000 insured in other offices, and \$8,000 to be insured in other offices." The application stated that there was \$9,000 already insured, and \$8,000 wanted in other companies. The by-laws provided, that in case of double insurance, the company should be liable to pay only such proportion thereof as the sum insured by them should bear to the whole amount insured thereon. *Held*, that the liability of the company was to be calculated by the amount of insurance actually procured, and not by the amount stated in the policy.

(*h*) *Lucas v. Jefferson Ins. Co.* 6 Cow. 635; *Thurston v. Koch*, 4 Dall. 348; *Craig v. Murgatroyd*, 4 Yeates, 161; *Millaudon v. Western Ins. Co.* 9 La. 27; *Peters v. Del. Ins. Co.* 5 S. & R. 475; *Mutual Safety Ins. Co. v. Hone*, 2 Comst. 235.

(*i*) *Harris v. Ohio Ins. Co.* 5 Ohio, 466; *Westlake v. St. Lawrence Ins. Co.* 14 Barb. 206; *Stacey v. Franklin Ins. Co.* 2 Watts & S. 543. But it has been held, that if the subsequent insurance is declared void in the policy, if there has been a previous insurance, without the knowledge and consent of the insurers, it cannot be set up as evidence of a subsequent insurance, where the first policy provides that a subsequent insurance, without the consent, in writing, of the underwriters thereof, shall be *ipso facto* void. *Jackson v. Mass. Ins. Co.* 23 Pick. 418.

¹ That a renewal is not such "other insurance" if notice was given with the original insurance, unless the renewal is in a new name, by reason of a change of interest, see *Pitney v. Glens Falls Ins. Co.* 65 N. Y. 6.

² But before different policies can be held to contribute to the same loss, it must appear that the insurances were upon the same interest in the same property or some part thereof, and as between a party to a policy and a stranger evidence may be given to show that a policy was not intended to cover all the property it assumed to cover. *Lowell Manufact. Co. v. Safeguard F. Ins. Co.* 88 N. Y. 591.

effect their object. In some instances, the charter of * the company provides, that any policy made by it shall be avoided by any double insurance of which notice is not given, and to which the consent of the company is not obtained, and expressed by their indorsement on the policy. (*j*) But this would not apply to a non-notice by an insured of an insurance effected by the seller on the house which the insured had bought, if this policy were not assigned to him. (*k*) Some policies provide, that in case of any other insurance on the same property, the contract shall be null and void, unless notice is given to the company, and the same is mentioned in or indorsed upon the policy. (*l*)¹ In others, such subsequent insurance does not vitiate the policy if it is assented to by the prior insurers; and a parol assent would be sufficient, unless the contract provided that it should be in writing. (*m*) In others, the insurers are required to be notified of a subsequent insurance with all reasonable diligence. (*n*) But the obtaining subsequent insurance will not have the effect of vitiating the first policy if it be void for any cause, although it be on account of the fault of the insured, as by his misrepresentations. (*o*)² A court of equity would give relief, where notice and consent were entirely sufficient in their character, though not formally accurate, but never otherwise. (*p*)

It has been held, that where there was an insurance of a certain amount upon goods, the whole amount divided specifically on different portions of the property, and the policy contained

(*j*) Stark Co. Ins. Co. v. Hard, 19 Ohio, 149.

(*k*) Extra Ins. Co. v. Tyler, 16 Wend. 385; Burbank v. Rockingham Ins. Co. 4 Foster, 550.

(*l*) Pendar v. Am. Ins. Co. 12 Cush. 469; Conway Tool Co. v. Hudson River Ins. Co. id. 144.

(*m*) See Hale v. Mechanics Ins. Co. 6 Gray, 169.

(*n*) Mellen v. Hamilton Ins. Co. 5 Duer, 101, 17 N. Y. 609. And whether the pol-

icy so provides or not, the notice should be given as soon as possible. Kimball v. Howard Ins. Co. 8 Gray, 33.

(*o*) Jackson v. Mass. Ins. Co. 23 Pick. 418; Hardy v. Union Ins. Co. 4 Allen, 217; Stacey v. Franklin Ins. Co. 2 Watts & S. 506; Clark v. New England Ins. Co. 6 Cush. 342. See contra, Carpenter v. Providence Ins. Co. 16 Pet. 495; Bigler v. N. Y. Ins. Co. 22 N. Y. 402.

(*p*) See Carpenter v. Providence Ins. Co. 4 How. 185.

¹ See Phoenix Ins. Co. v. Michigan, &c. R. Co. 28 Ohio St. 69.

² Some policies, however, provide for the forfeiture, if other insurance be procured, "whether valid or not." Liverpool Ins. Co. v. Verdier, 35 Mich. 395. See Home Ins. Co. v. Baltimore Warehouse Co. 93 U. S. 527; Sturm v. Atlantic Ins. Co. 63 N. Y. 77; Gee v. Cheshire Ins. Co. 55 N. H. 65; Hough v. People's Ins. Co. 36 Md. 398; Hubbard v. Hartford Ins. Co. 33 Ia. 325. Where a policy was conditioned on there being no other insurance, a prior insurance was held to invalidate it, although the prior insurance was to be void if the premises remained vacant or neighboring buildings were erected, both of which circumstances had happened. Landers v. Watertown Ins. Co. 86 N. Y. 414.

such a condition as above stated, the policy was void if any part of the above goods was afterwards insured without notice. (q) But where the policy required that notice should be given, and the assent of the company indorsed upon the policy, "or otherwise acknowledged and approved in writing," it was a * 459 sufficient compliance * with this requirement, both as to notice and assent, that the secretary of the company said in a letter to the insured, "I have received your notice of additional insurance." (r) And in another case, parol evidence that the secretary knew of and advised the second insurance, was held to be sufficient. (s)

It has been held in Massachusetts, that a substantial compliance with a by-law requiring notice of previous insurance, is sufficient. (t) The main difficulty is in determining what is a substantial compliance; for in the same State, in a case where a policy provided that it should be void if there were any previous insurance on the property insured, and the policy did not express this previous insurance when it was issued, this policy was held to be void, even in the hands of an assignee; because a previous insurance existed and was not expressed therein, although the insurers knew of the previous insurance, and of the intention of the insured that it should remain in force, and prepared the policy and delivered it to the assured, he supposing it to be made in conformity with his intention, and not knowing that the prior insurance was not therein expressed, and the amount insured by both policies did not exceed the value of the property insured. (u) It is to be remarked, however, that the decision was made by the court sitting as a court of law, and that in the decision itself some intimations are thrown out, that a court of equity might have given relief.

It would seem to be clear, that the insured is not bound to give any details of a previous insurance, unless they are specially called for. (v)

That is a double insurance, where both policies cover the same

(q) Associated Firemen's Ins. Co. v. Assum, 5 Md. 165.

(r) Potter v. Ontario Ins. Co. 5 Hill, 147. See also Sexton v. Montgomery Co. Ins. Co. 9 Barb. 191; Wilson v. Genesee Ins. Co. 16 id. 511; McEwen v. Montgomery Ins. Co. 5 Hill, 101; Kimball v. Howard Ins. Co. 8 Gray, 33; Conway Tool Co. v. Hudson River Ins. Co. 12 Cush. 144.

(s) Goodall v. New England Ins. Co. 5 Foster, 169.

(t) Liscom v. Boston Ins. Co. 9 Met. 205.

(u) Barrett v. Union Ins. Co. 7 Cush. 175. See also Pendar v. Am. Ins. Co. 12 Cush. 469.

(v) McMahon v. Portsmouth Ins. Co. 2 Foster, 15.

insurable interest against the same risks. It is also a general rule, that they must be in the name of the same assured. But it may be a double insurance, at least within the provisions above spoken of, if all or any part of the insurable interest is insured in the name of another party, but in some way for the benefit of the original insured. Hence insurance made by a mortgagee, at the expense of the mortgagor, the latter having been insured, was held to be a subsequent insurance. (w)¹

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Where to an action on a policy the defence relied upon is a subsequent insurance, contrary to the terms of the first policy, the burden of proving that the two policies covered the same property is on the defendants. (x)

B. — *Of Re-insurance.*

Re-insurance means the same thing in fire policies as in marine policies, and is in general governed by the same rules. Of these, the principal one is, that a re-insurer is entitled to make the same defence, and on the same grounds, which the party whom he insured could have made in a suit by the original insured (y) against him on the same policy. If an insurer causes himself to be re-insured, and then becomes insolvent, and a loss occurs, the original insured has no lien upon and no interest in the policy of re-insurance. He is only a creditor of his own insurer, and takes only his dividend of the assets of the insolvent company, the assignees of the insolvent re-insured taking whatever is payable under the policy of re-insurance, and holding it as assets for the general creditors of the re-insured. (z)

An insurer cannot, by a contract of re-insurance, stipulate for indemnity against a risk which he has not assumed. (a)

(w) *Holbrook v. Am. Ins. Co.* 2 Curtis, C. C. 193.

(z) *Herckenrath v. American Ins. Co.* 3 Barb. Ch. 63.

(x) *Clark v. Hamilton Ins. Co.* 9 Gray, 148.

(a) *Commonwealth Ins. Co. v. Globe Ins. Co.* 35 Penn. State, 475.

(y) *New York Ins. Co. v. Protection Ins. Co.* 1 Story, 458.

(z) *Westchester Ins. Co. v. Foster*, 90 Ill. 121.

¹ But the fact that the mortgagor has insured his interest will not defeat a policy afterwards taken on the same property by the mortgagee in the names of both without the mortgagor's knowledge, payable in case of loss to the mortgagee. *Westchester Ins. Co. v. Foster*, 90 Ill. 121. A provision in an insurance policy inserted by the company after an assignment by the mortgagor as collateral that the insurance of the mortgagee's interest should be unaffected by any act of the mortgagor or owner, and that when any

* SECTION VII.

OF PROOF AND ADJUSTMENT.

Policies frequently contain express provisions as to notice of loss, and proof, and adjustment; and there must be a substantial compliance with all these requirements, (b)¹ and such a compliance is sufficient. (c)² If the notice or preliminary proofs are imperfect or informal, all objection may be waived by the insurers; and they will be held to have made this waiver by any act which authorized the insured to believe, that the insurers were satisfied with the proof they had received, and desired nothing more. (d)³

(b) *Worley v. Wood*, 6 T. R. 710, 2 H. Bl. 574; *Mason v. Harvey*, 8 Exch. 819, 20 Eng. L. & Eq. 541; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 513. It will be no legal justification of an omission to procure the certificate, that the persons from whom it was to be obtained wrongfully refused to give it. *Worley v. Wood*, *supra*; *Leadbetter v. Aetna Ins. Co.* 18 Maine, 265. In determining the contiguity of the magistrate to the place of the fire, whose certificate is required, the place of his business will be regarded, and a nice calculation of distances will not be made. *Turley v. North American Ins. Co.* 25 Wend. 374.

(c) *Norton v. Rensselaer Ins. Co.* 7 Cow. 645; *N. Y. Bowery Ins. Co. v. N. Y. Ins. Co.* 17 Wend. 359; *Sexton v. Montgomery Co. Ins. Co.* 9 Barb. 191. It is not necessary to state the nature of his interest in the account of the loss. *Gilbert v. N. A. Ins. Co.* 23 Wend. 43. The notice may be oral, unless required to be in writing. *Curry v. Commonwealth Ins. Co.* 10 Pick. 536. The manner of the loss, it has been *held*, need not be stated. *Catlin v. Springfield Ins. Co.* 1 Sumner, 434.

(d) See *Bodle v. Chenango Co. Ins. Co.* 2 Comst. 53; *Heath v. Franklin Ins. Co.* 1 Cush. 257; *Clark v. New England Ins. Co.* 6 id. 342; *Underhill v. Agawam*

payment should be made to the mortgagee for a loss, the company, if claiming that it was not liable to the mortgagor or owner, might either be subrogated to the mortgagee's rights without affecting the latter's right to recover the whole of his claim, or might pay the mortgagee's claim and take an assignment, does not subject the mortgagee to conditions which before the assignment related to the mortgagor, but is an independent agreement with the mortgagee. *Hastings v. Westchester Ins. Co.* 73 N. Y. 141; *Hartford Ins. Co. v. Olcott*, 97 Ill. 439; *Chamberlain v. N. H. Ins. Co.* 55 N. H. 249.

¹ *Johnson v. Phoenix Ins. Co.* 112 Mass. 49; *Edgerly v. Farmer's Ins. Co.* 48 La. 644. Innocent mistakes in the preliminary proofs will not bind the assured, *Conn. Ins. Co. v. Schwenk*, 94 U. S. 593; *McMaster v. Ins. Co. of N. A.* 55 N. Y. 222; *Mut. Ins. Co. v. Newton*, 22 Wall. 32; *Maher v. Hibernia Ins. Co.* 67 N. Y. 283; *American Ins. Co. v. Day*, 10 Vroom, 89; if the insurers are not thereby surprised, *Waldeck v. Springfield F. & M. Ins. Co.* 53 Wis. 129. That notice from the real party in interest, though not the assured, will be enough, see *Watertown Ins. Co. v. Grover, &c. Co.* 41 Mich. 131. Where the nearest magistrate not concerned in the loss had suffered by the fire, and the assured is suspected of setting it, the former cannot give a certificate. *Wright v. Hartford Ins. Co.* 36 Wis. 522. Posting the proofs within the time limited was said to be sufficient in *Badger v. Glens Falls Ins. Co.* 49 Wis. 389. See *O'Reilly v. Guardian Ins. Co.* 60 N. Y. 169, that the filing the preliminary proof may be equivalent to the notice required, while the latter will not satisfy the former.

² *Killipe v. Putnam Ins. Co.* 28 Wis. 472.

³ *Basch v. Humboldt Ins. Co.* 6 Vroom, 429; *Jones v. Mechanics' Ins. Co.* 7 Vroom, 29; *Hibernia Ins. Co. v. Meyer*, 10 Vroom, 482; *Mercantile Ins. Co. v. Holthaus*, 43 Mich. 423; *Planters' Ins. Co. v. Deford*, 38 Md. 382; *Tisdale v. Mut. Ben. Ins. Co.* 91

And a refusal to settle the claim in any way, (e)¹ or a distinct refusal on grounds other than the insufficiency of the notice, (f)² or a partial payment of the loss, (g) would be held to be a waiver of notice or preliminary proof, and an excuse for not furnishing it.³ But a rule has been applied to some * of these cases, — that a distinct declaration that nothing is waived prevents a waiver, (h) and it might be held applicable to all of them. And the submission to arbitration by the assured, and an agent of the insurers, of the amount of a loss by fire, is not a waiver of a condition in a policy of insurance requiring a particular account of the loss. (i) If the preliminary proofs are once approved of, this approval cannot be withdrawn. (j)⁴

Some policies against fire contain a provision that a suit under the policy will not be sustained unless it be commenced within a certain period from the loss.⁵ One such policy, the period being

Ins. Co. id. 440; Priest *v.* Citizens Ins. Co. 3 Allen, 602; Sexton *v.* Montgomery Co. Ins. Co. 9 Barb. 191; Clark *v.* New England Ins. Co. 6 CUSH. 342.

(e) Francis *v.* Ocean Ins. Co. 6 Cowen, 404; Tayloe *v.* Merchants Ins. Co. 9 How. 390; Allegre *v.* Maryland Ins. Co. 6 Har. & J. 408.

(f) Vos *v.* Robinson, 9 Johns. 192; Etna Fire Ins. Co. *v.* Tyler, 16 Wend. 401; McMasters *v.* Westchester Co. Ins. Co. 25 id. 379; O'Neil *v.* Buffalo Ins. Co. 3 Comst. 122; Clark *v.* N. E. Ins. Co. 6

Cush. 342; Boynton *v.* Clinton Ins. Co. 16 Barb. 254; Franklin Ins. Co. *v.* Coates, 14 Md. 285; Firem. Ins. Co. *v.* Crandall, 33 Ala. 9.

(g) Westlake *v.* St. Lawrence Co. Ins. Co. 14 Barb. 206. But see Smith *v.* Haverhill Ins. Co. 1 Allen, 297.

(h) Edwards *v.* Baltimore Ins. Co. 3 Gill, 176. See Columbian Ins. Co. *v.* Lawrence, 2 Pet. 53.

(i) Pettengill *v.* Hinks, 9 Gray, 169.

(j) Atlantic Ins. Co. *v.* Wright, 22 Ill. 462.

U. S. 238; Mason *v.* Citizens Ins. Co. 10 W. Va. 572. See Brink *v.* Hanover Ins. Co. 70 N. Y. 593; s. c. 80 N. Y. 108; Beatty *v.* Lycoming Ins. Co. 66 Penn. St. 9; Devens *v.* Mechanics' &c. Co. 83 N. Y. 168.

¹ Williamsburg Ins. Co. *v.* Cary, 83 Ill. 453; Harriman *v.* Queen Ins. Co. 49 Wis. 71; Aurora Ins. Co. *v.* Kranich, 36 Mich. 289; Roberts *v.* Cocke, 28 Gratt. 207.

² Eastern R. Co. *v.* Relief Ins. Co. 105 Mass. 570; State Ins. Co. *v.* Todd, 83 Penn. St. 272; Hibernia Ins. Co. *v.* O'Connor, 29 Mich. 241.

³ Examination of the assured on oath will have the effect of a waiver, Badger *v.* Phoenix Ins. Co. 49 Wis. 396; but material questions only need be answered, Titus *v.* Glens Falls Ins. Co. 81 N. Y. 410; Ins. Co. *v.* Weides, 14 Wall. 375. Where loss occurred in the Chicago fire on October 8th or 9th, and notice and proof of loss were given on November 13th following, as the office of the company was destroyed, and the assured did not know where to find its officers, the delay was held reasonable. Knickerbocker Ins. Co. *v.* Gould, 80 Ill. 388.

⁴ If an insurer, after a loss and an opportunity to investigate, no fraud or deception being practised upon him, agrees to pay, and the insured to receive, a certain sum in full, recovery cannot be defeated by showing a breach of warranty in the policy, though unknown to the insurer at the time of such agreement. Stache *v.* St. Paul Ins. Co. 49 Wis. 89, citing Smith *v.* Glens Falls Ins. Co. 62 N. Y. 85.

⁵ And if the loss is payable at a certain time after proof, no action is maintainable before such time. Ins. Co. *v.* Weide, 14 Wall. 375; Winneshiek Ins. Co. *v.* Schueler, 60 Ill. 465. Steen *v.* Niagara Fire Ins. Co. 89 N. Y. 315, decided that when the time for bringing an action is limited in the policy to a "term of twelve months next after the loss or damage shall occur," the limitation begins to run when the cause of action accrues, and not when the actual destruction occurred.

twelve months, was held valid. (*jj*)¹ In another, a period of sixty days and six months thereafter, was held valid. (*jk*)

A notice to an insurance company claiming for a total loss of a wooden dwelling-house, without mentioning the stone-work and bricks which were left unconsumed, is a sufficient compliance with a by-law which requires the insured, in case of partial loss, to state the amount of damage done, and the value of such parts as remain. (*k*)

In regard to the adjustment, perhaps the most important difference between fire policies and marine policies is this. Where there is a valuation in a marine policy, and insurance on only a part of that value, if there be a partial loss, the insurers pay only a proportionate part of the sum they insure; for the insured is considered as insuring himself for the other part. Thus, if the insurance be for \$5,000 on a ship valued at \$15,000, and a partial loss to the amount of \$6,000, the insurers pay but \$2,000; but under a fire policy insurers pay the whole amount lost by the fire, with no other limitation than that it shall not exceed the amount which they insure. (*l*)

It is a universal principle of the law of contracts, that every contract is avoided by material fraud. And if policies seek to strengthen or enlarge this rule, as by a provision that a policy shall be avoided by any false oath or affirmation of the insured, in respect to it, it would seem to be still a question for the jury, whether a material fraud was committed thereby; and only if there were, would they be instructed to render a verdict for the insurers. (*m*)²

* 468 * A tenant cannot require his landlord, who has insured

(*jj*) *Riddlebarger v. Hartford Ins. Co.* 7 Wallace, 386.

(*jk*) *Mayor of New York v. Hamilton, &c. Ins. Co.* 39 N. Y. 45. See also *Keine v. Home, &c. Ins. Co.* 42 Mo. 38.

(*k*) *Wyman v. People's Ins. Co.* 1 Allen, 301.

(*l*) *Liscom v. Boston Ins. Co.* 9 Met. 211; *Trull v. Roxbury Ins. Co.* 3 Cush. 267.

(*m*) *Woods v. Masterman, Ellis on Ins.* 14; *Levy v. Baillie*, 7 Bing. 349.

¹ *Tasker v. Kenton Ins. Co.* 58 N. H. 469. But a condition that differences should be decided by arbitration, and that no action could be maintained until after an award, nor unless brought within a year after the loss, was declared void, in *Leach v. Republic Fire Ins. Co.* 58 N. H. 245. See also *Phoenix Ins. Co. v. Badger*, 53 Wis. 283; *Canfield v. Watertown Ins. Co.* 55 Wis. 419.

² *Maher v. Hibernia Ins. Co.* 67 N. Y. 283; *Beck v. Germania Ins. Co.* 23 La. An. 510; *Ins. Cos. v. Weide*, 14 Wall. 375; *Clark v. Phoenix Ins. Co.* 36 Cal. 168. But a gross over-valuation of the assured's own property, though not made with intention to defraud, will avoid a policy conditioned that all fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture. *Leach v. Republic Fire Ins. Co.* 58 N. H. 245.

the buildings, to rebuild or repair them from money received under the insurance; and it may be said to be a general rule, that no third parties have any equities in respect to the proceeds of policies of fire insurance, unless they be grounded upon a contract or a trust to that effect. (n)¹

(n) *Leeds v. Cheetham*, 1 Simons, 146. See *Brown v. Quilter, Ambler*, 619.

¹ A lessee, bound to rebuild in case of fire, has no claim to be reimbursed out of the lessor's insurance money. *Ely v. Ely*, 80 Ill. 532.

* CHAPTER XIX.

OF THE LAW OF LIFE INSURANCE.

SECTION I.

OF THE TERMS OF THE CONTRACT.

A.—How the Contract is made.

INSURANCE against death is very different in its nature from insurance against marine perils or against fire. Many of the questions which arise under either or both forms of these insurances are not presented by life policies. But those which arise under this contract are determined by principles, which, if not the same with, are analogous to, those applied to marine and fire contracts.

In this, as in all cases of insurance, one party insures and another party is insured. But while marine and fire policies insure against loss of property, life policies insure only against a loss of life, caused by the death of some person. He whose life is thus insured, is often called the life-insured. He may be the same with the insured, and then the policy is payable, of course, only to the legal representatives of the insured; or the insured may insure himself against the death of some other person; and then the insured and the life-insured are two persons.

The contract is made by a policy similar in many respects to other policies; and to it as to them the general rules of law as to such contracts apply.

B.—Of Warranty and Representations.

This subject assumes in life policies an unusual importance. The application must be made as in fire policies, by a written document, in which very many questions are put, all of * 465 which * must be answered; and these questions are numerous, minute, and very wide in their scope. These answers in general, if not always, are so a part of the contract as to

be, in law, warranties ; but they may be made, according to the form of the answer, warranties of a fact, or warranties of the belief of the answer. If the answers are a simple affirmative or negative of the questions, they are warranties of the fact stated by taking the question and answer together. As for example, if the question be, Have you ever had apoplexy ? and the answer is, No, this is a warranty that the party had never had this disease. But if the answer were, " Not that I know of," or " Not to the best of my belief and knowledge," this would limit the warranty to the belief of the answer, and proof that this disease had existed would not of itself establish a breach of the warranty. It need not be said, that it would be generally proper, and always more safe, to answer in this manner ; and answers of this kind would, for the most part, be all that the insurers should require. (a) It is, however, probable, that if the answer were of this kind, and the fact inquired about were proved, the burden would be cast upon the plaintiff to discharge the answerer from the knowledge or belief of it. This might depend on the nature of the fact, as it is obvious, that some of those inquired about could hardly have happened without the knowledge of the answerer ; while others might probably be unknown to him.

From the fact that the insurers frame these questions as they please, and that they do in fact ask a vast variety of questions, embracing all the possibilities which could affect the risk, including some which it might be thought would affect it very remotely, courts and juries usually, and we think properly, construe these questions and answers quite liberally in favor of the answerer, and strictly against the insurers, unless there be a reasonable suspicion of fraud.¹

The good faith of the answers should be perfect. (b) The presence of it goes very far to protect a policy, (c) while the want of it would be an element of great power in the defence.

* We have called all the answers warranties, and we know * 466 not how they can be called less, under any definition of the law. It is certain, however, that the question of materiality is

(a) See *Stackpole v. Simon, Park, Ins.* (8th ed.) 932. (b) *Valton v. National Ins. Co.* 20 N. Y. 32.

(c) See *infra*, note (g).

¹ See *N. J. Ins. Co. v. Baker*, 94 U. S. 610; *Miller v. Mut. Ben. Ins. Co.*, 31 Ia. 216.

generally applied to them, and, when wholly immaterial, a breach is seldom permitted to discharge the insurers, as the cases are usually determined. And, as was said in reference to policies against fire, the question of materiality is, generally, submitted to the jury; but they will not be permitted to find or to regard diseases or infirmities as immaterial, which the contract regards as material. (*cc*)¹

It has been said, however, that when the policy expressly declares, as most of our life policies now do, that the policy is made upon the statements in the application for insurance, and that if they are in any particular untrue the policy shall be void, this gives to the statements the full force of warranties; and if they are untrue, the policy is thereby avoided, however immaterial the fact. (*d*)² The burden of proving material falsehood of representations is on the insurers. (*dd*)

One warranty or statement is usually made expressly a part of all life policies. It is, that the life-insured is then in good health. (*e*) This applies to the mind as well as the body; and if insanity be known and concealed, the policy would be avoided. (*f*) But in one case where the life-insured was then insane, but was wholly unconscious of it, the policy was held to be valid, although two physicians were then in attendance upon him, and knew him to be insane. (*g*)

The health of the body required to make the policy attach, does

(*cc*) *Campbell v. New England Ins. Co.* 98 Mass. 381.

(*d*) *Miles v. Conn. Ins. Co.* 3 Gray, 580; *Cazenove v. British Assn. Co.* 6 C. B. 437.

(*dd*) *Campbell v. New England Ins. Co.* 98 Mass. 381.

(*e*) Where a policy, which had been forfeited by non-payment of the annual premium, was renewed on the condition that the life-assured was "now in good

health," it was held, that the same meaning was to be attached to these terms as in the original application, and that the effect was to extend the original representations with the same effect as if made at the time of renewal. *Peacock v. N. Y. Ins. Co.* 20 N. Y. 293.

(*f*) *Lindenau v. Desborough*, 8 B. & C. 586, 3 Car. & P. 358.

(*g*) *Swete v. Fairlie*, 6 Car. & P. 1.

¹ See *Moulou v. Am. Life Ins. Co.* 101 U. S. 708; *World Ins. Co. v. Schulte*, 73 Ill. 586; *Conover v. Mass. Life Ins. Co.* 3 Dillon, 217; *Mut. Bea. Ins. Co. v. Wise*, 34 Md. 582; *Gerhauser v. No. Brit. Ins. Co.* 6 Nev. 15.

² *Powers v. North Eastern Ass.* 50 Vt. 630. *Contra, American Ins. Co. v. Day*, 10 Vroom, 89. In *Macdonald v. Law Union Ins. Co.* L. R. 9 Q. B. 328, where the policy contained a proviso that if the declaration signed by the assured, on the basis of which the insurance was effected, was "not in every respect true," "then the insurance shall be void," it was held that the insurance was avoided if any statement in the declaration was untrue in fact, although not to the knowledge of the assured; and so where false answers were fraudulently inserted without the assured's knowledge by the agent. *McCoy v. Metropolitan Ins. Co.* 133 Mass. 82. That equivocation has the force of falsehood, see *Smith v. Aetna Ins. Co.* 49 N. Y. 311.

not mean perfect and absolute health; for it may be supposed that this is seldom to be found among men. "We are all born," said Lord Mansfield, "with the seeds of mortality in us." (h) Nor can there be any other definition or rule as to this requirement of good health, than that it should mean that which would ordinarily and reasonably be regarded as good health. (i)¹

Nor should we be helped by saying that this good * health * 467 must exclude all disorders, or infirmities, which might possibly shorten life; for, as has been well said in an instructive English case, that may be said of every disorder or infirmity. (j)² But it must obviously be very difficult to determine questions like these by any general rule. And it is the usual practice of courts to leave these questions to the jury; and it may be added, that it is the usual practice of jurors to be very lenient toward the insured, provided there is no evidence of fraud.

Dyspepsia is a very common disease, and is always inquired about. Undoubtedly it sometimes kills, but generally it does not. But whether it has a tendency to shorten life, or whether in any particular case it did shorten life, it might be very difficult to say. In an English case, the court said: "If dyspepsia were a disorder which tended to shorten life within this exception (good health), the lives of half the members of the profession would be uninsurable." (k) This would probably be as true in this country as in

(h) *Willis v. Poole, Park, Ins.* 585, *Marsh. Ins.* 771.

(i) *Aveson v. Kinnaird*, 6 East, 188; *Ross v. Bradshaw*, 1 W. Bl. 312. In *Jones v. Provincial Ins. Co.* 3 C. B. (n. s.) 63, the life-insured stated, that he ordinarily enjoyed good health, and that he was not aware of any disorder or circumstance tending to shorten his life, or to render an insurance on his life more than usually hazardous. It appeared, that during the two preceding years the person had had two severe bilious attacks; and that medical men had expressed different opinions as to the effect of these attacks upon his health, but it did not appear that the unfavorable opinions had ever been communicated to him. The jury were instructed

that "if the assured honestly believed, at the time he made the declaration that the bilious attacks had no effect upon his health, and did not tend to shorten his life, or to render an insurance upon it more than usually hazardous, the fact that he was aware that he had had those attacks, even though without his knowledge they had such a tendency, would not defeat the policy." These directions were held to be correct.

(j) See note *infra*.

(k) In *Watson v. Mainwaring*, 4 Tannt. 763, *Chambre*, J., said: "All disorders have more or less a tendency to shorten life, even the most trifling; as, for instance, corns may end in a mortification; that is not the meaning of the clause; if

¹ In *Cushman v. United States Ins. Co.* 70 N. Y. 72, it was stated that a temporary ailment cannot be considered a disease within the meaning of a warranty against disease in a life insurance policy, unless it be such as to indicate a vice in the constitution, or so serious as to have some bearing upon the general health and the continuance of life, or such as, according to common understanding, would be called a disease. See also *Illinois, &c. Soc. v. Winthrop*, 85 Ill. 537.

² That good health may include malarial diseases, see *Holloman v. Life Ins. Co. 1 Woods*, 674.

England; but an American court has said: "We cannot see how a person can be sound and healthy who is predisposed to dyspepsia to such a degree as to produce bodily infirmity." (*l*)¹ We, however, cannot see that any degree of dyspepsia is not in that degree a bodily infirmity.

A strong case occurred in England, in which the insured was afflicted at times with cramps and spasms, and violent fits of the gout, but was, when the policy was made, in as good health as he had been in for a long time before. A verdict against * 468 * the insurers was sustained. But in that case the insurers were told, when making the insurance, that the insured was subject to gout. (*m*)

Consumption is more frequently than any other one disease the cause of death, both in England and in this country; and insurers always make numerous and specific inquiries respecting any tendency to it. A question is always asked, whether there has been any spitting of blood or cough. It would be absurd to answer any such questions by a general negative, or to construe such a negative literally. Probably no person ever reached adult age, without at some time spitting blood from the drawing of a tooth, or a slight wound in the mouth. The question, therefore, must mean, whether these symptoms have ever appeared in such a way, or under such circumstances, as to indicate a disease which would have a tendency to shorten life; and it is with this meaning that the question is left to the jury. It is, however, undoubtedly true, that any such symptom, unless it were certainly of no consequence, should be stated. (*n*) We have known a case

dyspepsia were a disorder that tended to shorten life within this exception, the lives of half the members of the profession would be uninsurable." In this case the jury had found that the dyspepsia was neither organic nor excessive, and the court refused to set aside the verdict for the plaintiff.

(*l*) N. Y. Life Ins. Co. v. Flack, 3 Md. 386.

(*m*) Lord *Mansfield* said: "The imperfection of language is such that we have not words for every different idea; and the real intention of parties must be found out by the subject-matter. By the present policy, the life is warranted, to

some of the underwriters, in health, to others in good health; and yet there was no difference intended in point of fact. Such a warranty can never mean that a man had not the seeds of disorder. We are all born with the seeds of mortality in us. A man, subject to the gout, is a life capable of being insured, if he has no sickness at the time to make it an unequal contract." *Willis v. Poole, Park, Ins.* 585, *Marsh. Ins.* 771.

(*n*) In *Vose v. Eagle Ins. Co.* 6 *Cush.* 42, an applicant for life insurance answered an interrogatory, whether he had ever been afflicted with a pulmonary disease, in the negative; and in answer to an

¹ *World Ins. Co. v. Schultz*, 73 Ill. 586, was to the effect that the fact that the assured within a year had the dyspepsia while ill from an abscess is not conclusive of a breach of warranty that he was not "subject to dyspepsia."

where * the life-insured was asked whether he had ever had * 469 consumption, and replied that he had not. Some years

interrogatory, whether he was then afflicted with any disease or disorder, and what, stated, that he could not say whether he was afflicted with any disease or disorder, but that he was troubled with a general debility of the system; and it was proved that the applicant was then in a consumption, the symptoms of which had begun to develop themselves five months before, and were known to him; but were not disclosed to the insurers, although sufficient to induce a reasonable belief on the part of the applicant that he had such a disease. It was held, that whether these statements amounted to a warranty or not, they were so materially untrue as to avoid the policy, although the insured, at the time of his application, did not believe that he had any pulmonary disease, and the statement made by him was not intentionally false, but, according to his belief, true. According to the opinion delivered in the case, the proposal or declaration, when forming a part of the policy, amounts to a condition or warranty which must be strictly complied with, and upon the truth of which, whether a misstatement be intentional or not, the whole instrument depends; where there is no warranty, an untrue allegation of a material fact, or the concealment of a material fact when a general question is put by the insurer at the time of effecting the policy, which would elicit it, will vitiate the policy, although such allegation or concealment be the result of accident or negligence, and not of design. This case also decides, that the fact that the agent for receiving the application and forwarding it to the directors of the company at their place of business, by whom the contract and policy are made and signed on the basis of the application, had reasonable cause to believe that the party was laboring under a pulmonary disease, does not cure the effect of the untrue statement. In Geach v. Ingall, 14 M. & W. 95, the life-assured stated, in his declaration, that he was at that time in good health, and not afflicted with any disorder, nor addicted to any habit tending to shorten life; that he had not at any time had, among other things, any spitting of blood, consumptive symptoms, asthma, cough, or other affection of the lungs. One of the terms of the policy was, that it should be void if anything stated by the assured in the declaration should be untrue. The defendants' witnesses proved, that, about four years before the policy was effected, the assured had spit blood, and had subsequently exhibited other symptoms usual in consumptive subjects; and it appeared that he died of consumption in the year 1843. The Lord Chief Justice told the jury, that it was for them to say whether, at the time of his making the statement set forth in the declaration, the assured had such a spitting of blood, and such affection of the lungs and inflammatory cough, and such a disorder, as would have a tendency to shorten his life. This was held a misdirection; for, although the mere fact of the assured having spit blood would not vitiate the policy, the assured was bound to have stated that fact to the insurance company in order that they might make the inquiry whether it was the result of the disease called spitting of blood, Alderson, B.: "Then as to the misdirection, my Lord Denman certainly does not appear to have sufficiently called the attention of the jury to the distinction between those disorders, respecting the existence of which, at the time of executing the policy, the assured was called on to make a specific declaration, and those which might have formerly existed. By 'spitting of blood' must, no doubt, be understood a spitting of blood as a symptom tending to shorten life; the mere fact is nothing. A man cannot have a tooth pulled out without spitting blood. But, on the other hand, if a person has an habitual spitting of blood, although he cannot fix the particular part of his frame whence it proceeds, still, as this shows a weakness of some organ which contains blood, he ought to communicate the fact to the insurance company; for no one can doubt that it would most materially assist them in deciding whether they should execute the policy; and good faith ought to be kept with them. So, if he had had spitting of blood only once, but that once was the result of the disease called spitting of blood, he ought to state it, and his not doing so would probably avoid the policy. Again, suppose this man had an inflammation of the lungs, which had been cured by bleeding, many physicians would perhaps say, that it was an inflammation of the lungs of so mitigated a nature as not to tend to shorten life; still that would be no answer to the case of the defendants, for it is clear that the company intended that the fact should be mentioned. As to the word 'cough,' it must be understood as a cough proceeding from the lungs, or no one could ever insure his life at all; and indeed it is so expressed in the policy,—'Cough, or other affec-

* 470 after the policy * was made he died of fever ; but the insurers proved, that some years before the policy was made, he

tion of the lungs.' Again, it is obvious that the insurance company meant to guard against the disease of dysentery. Now, a man may have had the dysentery, and been cured of it; still the office should know of it; and, indeed, that disorder may have been mentioned by name, as being one of a nature likely to return. All these instances show that it was not intended to restrict the statement of the assured to disorders having a tendency to shorten life at the moment of executing the policy ; what the company demanded was, a security against the existence of such diseases in the frame. There must, therefore, be a new trial." *Rolfe*, B. : "I have no doubt, that if a man had spit blood from his lungs, no matter in how small a quantity, or even had spit blood from an ulcerated sore throat, he would be bound to state it. The fact should be made known to the office, in order that their medical adviser might make inquiry into its cause." In *Anderson v. Fitzgerald*, 4 H. L. Cas. 484, 24 Eng. L. & Eq. 1, determined finally by the House of Lords, the assured proposed his life for insurance, and signed "a proposal," which contained his answers to twenty-seven questions. The 21st and 22d were as follows : "21. Did any of the party's near relations die of consumption, or any other pulmonary complaint ? Answer, No." "22d. Has the party's life been accepted or refused at any office ? &c. Answer, No." The proposal also contained the following agreement : "I hereby agree that the particulars mentioned in the above proposal, shall form the basis of the contract between the assured and the company; and if there be any fraudulent concealment or untrue allegation contained therein, or any circumstance material to this insurance shall not have been fully communicated to the said company, or there shall be any fraud or misstatement, all money which shall have been paid on account of this insurance shall become forfeited, and the policy be void." The policy contained a warranty on the part of the assured as to most of the facts replied to in the proposal, but those as to questions 21 and 22 were omitted therein. It then provided, that the policy should be null and void, and all moneys paid by the assured forfeited, upon his dying, in certain enumerated modes, or if anything so warranted as aforesaid shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or

shall not have been fully and fairly disclosed and communicated to the said company, or if any fraud shall have been practised upon the said company, or any false statement made to them in or about the obtaining or effecting of this insurance. The answers to questions 21 and 22 were proved to be untrue. It was held by the House of Lords, reversing the decisions of the Courts of Exchequer and Exchequer Chamber in Ireland, that the judge was wrong in directing the jury, that if they found the statements both false and material, they should find the verdict for the defendant ; and that the questions which the judge ought to have left to the jury were, first, Were the statements false ? and, secondly, Were they made in obtaining or effecting the policy ? The ground of the decision was, that the insurers had stipulated that the policy should be void, unless the assured should answer certain questions correctly, and thereby excluded the question of materiality. Lord St. Leonards, in opposition to Baron Parke and Lord Brougham, thought the words "false statement" in the connection, meant a statement untrue within the knowledge of the party making it, and not merely one which was in fact untrue,—but, on the ground that a circumstance material to the insurance had not been truly stated, concurred in the motion. See *Duckett v. Williams*, 2 Cromp. & M. 348, 4 Tyrw. 240. In this case it was agreed in the declaration signed by the assured previous to effecting the policy, that if any untrue averment was contained therein, or if the facts required to be set forth in the proposal annexed were not truly stated, the premiums should be forfeited, and the assurance absolutely null and void. The statement as to the health of the life, was untrue in point of fact, but not to the knowledge of the party making it. It was held, that the want of knowledge was immaterial, and the premiums were forfeited. It being provided in the conditions of insurance that any untrue or fraudulent allegation made in effecting the insurance will render the policy void ; it was held, that the representation by the insured that he was a farmer, whereas he was at the time a slave-taker by occupation, rendered the policy void, and it is not material that his death was not occasioned by his business of slave-taking. *Hartman v. Keystone Ins. Co.* 31 Penn State, 466, 476.

had been very weak and ill, and that a physician who attended him believed he had consumption. But another physician, who was also consulted by the patient, believed that he had not this disease; and he appeared and was thought to have recovered his health perfectly. In his answers, the life-insured gave no statement respecting this disease. The jury found for the plaintiff, and their verdict was not disturbed. It is impossible to understand the law as it * is applicable to this interesting * 471 question, except from the adjudged cases; and we give copious extracts from them in the notes.

We have seen, that in marine policies the ship, if possible, and in fire policies the building always, are examined by the insurers or their agents. This is carried much further in life policies. Not only is it asked what physician attended the life-insured,—and this question must be answered by the name of every physician consulted as such, although he were in common parlance a quack; (*o*)¹ and questions may be and often are put to the physicians named,—but life insurance companies have their own physician regularly appointed, whose business it is to make careful personal inspection of the life-insured. And as it has been said in respect to fire policies, that the examination of a building by the insurers, throws upon them much responsibility for any infirmities which they could detect, we apprehend that this principle should apply at least with equal force to life policies.

A question is now usually or always asked as to the habits of the person, in regard to the use of intoxicating liquors. This question is variously phrased; but, whatever language is used, it must be construed with reasonable reference to its intention, and this intention must be to confine the insurance to persons who are temperate; and there must always be a wide debatable ground between temperance and total abstinence. (*p*)² A negative an-

(*o*) *Morrison v. Muspratt*, 4 Bing. 60; (*p*) See *Southcombe v. Merriman*, Car. Everett v. Desborough, 5 id. 503; *Lindenau v. Desborough*, 8 B. & C. 586; *Huckman v. Fernie*, 3 M. & W. 505.

¹ That it is for the jury to say whether this question is truly answered, see *Cushman v. U. S. Ins. Co.* 70 N. Y. 72; *Scales v. Universal Ins. Co.* 42 Cal. 523.

² *Union Ins. Co. v. Reif*, 36 Ohio St. 596; *McGinley v. U. S. Ins. Co.* 77 N. Y. 495. That the jury must decide, see *Swick v. Home Ins. Co.* 2 Dillon, 160; *Mowry v. Home Ins. Co.* 9 R. I. 346; *John Hancock Ins. Co. v. Daly*, 65 Ind. 6. A single attack of delirium tremens will not invalidate a statement by the assured that he is a man of temperate habits, where his habits, "in the usual, ordinary, and every-day routine of his life," were temperate. *Ins. Co. v. Foley*, 105 U. S. 350.

swer to such a question as, Have you ever been subject to fits? would not be falsified by having had one fit. But if the question were, Have you ever had a fit? a single fit would falsify a negative. (q)¹ But even then, we apprehend, the materiality of the fact would be taken into consideration; that is, for example, the policy would not be defeated by proof that the life-insured, long years before, and when a teething child, had a fit.

There is always a general question, whether any facts * 472 exist or have existed affecting health, other than those which have been particularly inquired of. It would seem from the cases, that this question is held to cover all facts whatever, which might have this character; and it is a question for the jury whether the fact concealed was material, and whether the concealment was honest. (r) Thus, where a life-insured did not state that she was a prisoner for debt at the time of effecting the insurance, the materiality of the concealment was considered a question for the jury. (s) And in another case, which would seem to be an extreme one, the plaintiff was non-suited, because a woman whose life was insured had had a child some years before under disgraceful circumstances, and this fact was not stated. (t) In another, a man taking out a life insurance, was asked in what relation the person for whose benefit it was taken out, stood to him, and answered "wife." This was untrue, and it avoided the policy. (tt)² Even if material facts are misrepresented, but honestly, and in mere ignorance, and the insurers knew the truth, the policy is not thereby avoided. (u) Nor is it avoided by such misstatement of a fact, which, if truly stated, would diminish the risk; for then, if the insurers are deceived, it is to their own advantage. Nor is the policy avoided by a mere misrepresentation relating to a fact concerning which there is an express warranty. (v)

If the insurers defend on the ground that the insured was not

(q) *Chattock v. Shawe*, 1 Moody & R. 498. (t) *Edwards v. Barrow*, Ellis, Ins. 123.
 (r) *Lindenau v. Desborough*, 3 Car. & P. 353, 8 B. & C. 586; *Morrison v. Muspratt*, 4 Bing. 60; *Everett v. Desborough*, 5 id. 503; *Dalglish v. Jarvie*, 2 Macn. & G. 243. (u) *Equitable Life Ins. Co. v. Paterson*, 41 Ga. 338.

(s) *Huguenin v. Rayley*, 6 Taunt. 186. (v) *Carter v. Boehm*, 3 Burr. 1910. (w) *Haywood v. Rodgers*, 4 East, 590; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484, 24 Eng. L. & Eq. 6, *Parke*, B.

¹ *World Ins. Co. v. Schultz*, 73 Ill. 586; but not if the question was whether he "ever had" fits. *Aetna Ins. Co. v. France*, 94 U. S. 561. See *Wilkinson v. Conn. Ins. Co.* 30 Ia. 119.

² *Holabird v. Atlantic Ins. Co.* 2 Dillon, 166.

in good health at the time of effecting the insurance, the burden is on them to prove this. (w) If a person insures the life of another, he is bound by the misrepresentations of that other, although he is himself ignorant of their falsity. (x) But he is not bound by the concealment of facts by the life-assured, of which he himself is ignorant, which are not called for by a general or particular question, unless the life-assured is his general agent to effect the policy. (y) So it would be if the third person is himself unconscious of concealing facts. (z)

It may be added, that where a proposal is made and an agreement entered into for a life insurance, and a policy prepared, differing from the agreement, equity will relieve by reading the policy in conformity with the agreement. But this relief, of course, would not be given, if the insurers had intended to vary the agreement, and the policy was accepted by the insured with a knowledge of that variance. (a)

C.—*Of Restrictions and Exceptions in Life Policies.*

These may be regarded as coming under the law of warranty. Principles may be applied to them analogous to those applied to deviation under marine policies, the question being whether there is a change of risk. There is, however, this difference. Deviation is defined only by the law and usage. But these restrictions and exceptions are expressly and precisely stated in life policies.

The most important of these restrictions or limitations apply to place, the life-insured not being permitted to go beyond certain limits, or to certain places, or not to go to them at certain times. Although the language used in expressing these limitations must be subject to a reasonable, and it may be said a liberal, construction, positive departure from a precisely stated limitation, has been held to avoid the policy, although an exact compliance with it was impossible, and the departure from it rather lessened than increased the risk. We give below the leading cases on this restriction. (b)

(w) *Trenton Ins. Co. v. Johnson*, 4 N. J. 576.

(x) *Maynard v. Rhodes*, 5 Dowl. & R. 266, 1 Car. & P. 360.

(y) *Huckman v. Fernie*, 3 M. & W. 505.

(z) *Swete v. Fairlie*, 6 Car. & P. 1.

(a) *Collett v. Morrison*, 9 Hare, 162, 12 Eng. L. & Eq. 171.

(b) In *Wing v. Harvey*, 5 De G. M. & G. 265, 27 Eng. L. & Eq. 140, Bennett, at the instance of Wing, his creditor, pro-

* 474 * It is very common in practice, for insurers on application to give liberty to exceed these limits, either for a time or permanently; and they are equally bound by the liberty granted, whether they do or do not receive a further premium therefor. (c)¹ Where an agent, in disobedience to the rules of

cured insurance on his own life, and one condition in the policy was, that "if the party upon whose life the insurance is granted shall go beyond the limits of Europe without the license of the directors, this policy shall become void, the insurance intended to be hereby effected shall cease, and the money paid to the society become forfeited to its use." These policies were duly assigned by Bennett to Wing, and notice given to Lockwood, the general agent of the company at Bury St. Edmunds, through whom the policies had been effected. After the assignments, the premiums were regularly paid by Wing, or his brother in his behalf. In June, 1835, five years after the effecting of the last policy, Bennett infringed on the condition of the policies by going to live in Canada, where he resided till his death in 1849. Lockwood, applying to Wing for the premiums afterwards, was informed of Bennett's departure, and being inquired of whether it would be safe to pay the premiums under the circumstances, replied, that the policies would be perfectly good provided the premiums were regularly paid; and Wing thereupon paid them to Lockwood, who transmitted them to the head office of the society. To the successor of Lockwood, who died in 1847, the same inquiries were put, the same reply was received, and the premiums received and transmitted in the same manner. There was some evidence which tended to show, that the officers of the company had incidentally become informed of Bennett's residence in Canada. It was held, that whether the office had express notice of the forfeiture or not, it was waived by the act of the agents in receiving the premiums paid to them in faith of the policies continuing valid and effectual notwithstanding the departure, and transmitting them to the directors, who retained them without objection. *Knight Bruce*, L. J., said: "If the directors represented by the defendant had themselves personally received the premiums which Mr. Lockwood and Mr. Thompson received with the same knowledge they had, that would certainly have

been a waiver of the forfeiture, and the defence would have been ineffectual; but they were their agents for the purpose of receiving the premiums upon subsisting policies,—premiums paid to them upon the faith of the policies continuing valid and effectual, notwithstanding the departure and residence at Canada of the person whose life was insured,—a faith in which Lockwood, and afterwards Thompson, knowingly acquiesced, and expressly sanctioned. Those premiums having been, from time to time, transmitted to the directors, and retained by them without objection, I think, whether Lockwood or Thompson informed, or did not inform them in fact, of the true state of the circumstances in which the premiums were paid to them, the directors became, and are, as between themselves and plaintiffs, as much bound as if those premiums had been paid by the plaintiff directly to themselves, they knowing at the time, on each occasion, the place of Bennett's residence. The directors taking the money, were or are precluded from saying they received it otherwise than for the purpose and on the faith for which and on which Mr. Wing expressly paid it." See also *Bouton v. Am. Ins. Co.* 25 Conn. 542.

(c) In *Hathaway v. Trenton Ins. Co.* 11 CUSH. 448, a person whose life was insured had permission given him "to make one voyage out and home to California, in a first-rate vessel, round Cape Horn or by Vera Cruz." Being taken sick in California, he returned home by way of Panama and Chagres, and soon after died. It was held, that the policy was thereby avoided, although at the time he left California there was no usually travelled route by way of Vera Cruz, and in his then state of health, a return home by that way would have been attended with great risk and expense, and although the route taken was the shortest and the safest one. In *Bevin v. Conn. Ins. Co.* 23 Conn. 244, liberty was given "to pass by sea in decked vessels, from any port in the United States to and from any port in North and South America, Chagres ex-

¹ Permission to engage in sea service on the "prior payment any year of an additional premium" requires such a payment every year of continuance in sea service. *Ayer v. New Eng. Ins. Co.*, 109 Mass. 430.

the company, permitted an insured to reside in a prohibited district, it was held that the insured was not bound to know the rules of the company, although it was a "mutual;" and the company was estopped to deny the authority of the agent. (cc)¹

Policies are sometimes especially made to cover * what * 475 may be called war risks, or the risks of soldiers or officers in war;² or are made to cover those risks by liberty given on a common policy.

Trades or occupations deemed extra-hazardous, as employment about gunpowder, or steam-engines, are sometimes enumerated; and either altogether prohibited, or admitted upon an extra premium.

Death by the hands of justice is now excepted in all our policies. Before this provision was inserted in life policies, the question came before the courts whether this exception was not made by the policy of the law; and it would seem to be held that it was so prohibited. (d)³ We incline to think that the same ruling

cepted, and to reside in California." The insured went to Vera Cruz, and then across the country to San Blas, a distance of one thousand miles, and thence by sea to San Francisco, where he arrived in good health, and died three years afterwards. The court were not agreed on the exact construction to be put on the permit, but held, that as the defendants knew the route which the insured had gone, and afterwards received the annual premiums, they had waived their right to such a defence. In *Taylor v. Etna Ins. Co.* 13 Gray, 434, the policy permitted the insured to pass between certain ports, "on first-class decked vessels." It was held that the policy was not forfeited by the assured going as a steerage passenger in

such vessels, in the absence of any evidence to show that life was less safe in the steerage. In *Baldwin v. N. Y. Ins. Co.* 3 Bosw. 530, permission was given the life-insured to reside and travel by land or by any of the regular sea steamers in any part of the United States, "to be north of the south bounds of Virginia by the 10th of July." The person went to Florida, and on the 11th of June was seized with sickness, and was too sick to travel, and died there July 20th. Held, that the insurers were not exempt from liability. See *Notman v. Anchor Ass. Co.* 4 C. B. (n. s.) 476.

(cc) *Walsh v. Etna Ins. Co.* 30 Iowa, 133.

(d) *Amicable Society v. Bolland*, 4

¹ But where a relative of the assured, in ignorance of his death in forbidden territory, gave an agent money for a permit, which was forwarded to the company, and not returned, it was held, in *Bennecke v. Ins. Co.* 105 U. S. 355, that after a tender back by the agent of the money on learning of the death there was no waiver of forfeiture.

² That the late civil war did not put an end to existing life insurance, see *New York Ins. Co. v. Clopton*, 7 Bush, 179; *Manhattan Ins. Co. v. Warwick*, 20 Gratt. 614; *Semmes v. City Ins. Co.* 6 Blatch. 445; *s. c.* 18 Wall. 158; *Sands v. New York Ins. Co.* 50 N. Y. 626; *Cohen v. New York Ins. Co.* ib. 610; *Hancock v. New York Ins. Co.* 4 Big. L. & A. Cas. 488; *Martine v. International Ins. Co.* 53 N. Y. 339; *Hamilton v. Mutual Ins. Co.* 9 Blatchford, 234; *Weits v. Conn. Ins. Co.* 48 N. Y. 34. *Contra*, *Tait v. N. Y. Ins. Co.* 4 Bigelow Cas. 479; *Worthington v. Charter Oak Ins. Co.* 41 Conn. 372; *Dillard v. Manhattan Ins. Co.* 44 Ga. 119; *New York Ins. Co. v. Statham*, 93 U. S. 24; *Semmes v. City Ins. Co.* 36 Conn. 543; *N. Y. Ins. Co. v. Hendren*, 24 Gratt. 536.

³ Submission to an operation known to the assured to be dangerous to life, with intent to cause an abortion, without justifiable medical reasons, resulting in her death, will prevent any recovery on the ground of public policy. *Hatch v. Mutual Ins. Co.* 120 Mass. 550.

would be applied to a loss of life in consequence of a duel, though this is now always one of the express exceptions.

A most important exception, and one which has created much difficulty, is that of death by suicide. The phraseology used is sometimes "death by suicide," sometimes "death by his own hands," and sometimes "death by his own act," and probably sometimes by other equivalent words. The main question must always be, whether any prohibition of this kind covers a case of death caused directly by the act of the party, but unintentionally, and without knowledge. We should say, generally, if not universally, that the insurers would not be discharged by any act of this kind. As when, for example, a life-insured, by his own mistake, or that of a nurse or physician, took a wrong medicine or an excessive dose; or pulled out a tooth and died from the bleeding, which has sometimes followed fatally from the extraction of a tooth; or by cutting * off a corn, and so producing fatal inflammation or gangrene. It cannot be supposed that the insurers ever intend to exclude a death self-inflicted in any such way, and it might almost be doubted whether they could do so by any language.¹

* 476 A much more difficult question arises, when death is self-inflicted in a condition of and because of insanity. The authorities on this subject are conflicting. We cannot but think, however, that the law, especially if it were construed by the general principles of insurance, would say, that death by his own

Bligh (N. S.), 194; Bollande v. Disney, 3 Russ. Ch. 351. Where a policy provided that it should be void if the life-assured "should die in the known violation of a law of the State," it was held, that, to avoid it, the killing of the life-assured, in an altercation, must have been justifiable or excusable homicide, and not merely under circumstances which would make the slayer guilty of manslaughter only. Harper v. Phoenix Ins. Co. 18 Miss. 109, 19 Miss. 506. Where a slave refused to surrender to patrols, and, attempting his escape, was shot by one of them in the right side, of which wound he died in a

few minutes, this was held not to come within the cases excepted in a policy of insurance on his life of "death by means of invasion, insurrection, riot, or civil commotion, or of any military or usurped authority, or by the hands of justice." Spruill v. North Carolina Ins. Co. 1 Jones (N. C.), 126. Where the life-insured in Louisiana attempted to collect a debt by taking forcible possession of his debtor's goods, and was shot in an altercation which followed, the policy was held void. Bradley v. Mutual Benefit Life Ins. Co. 3 Lans. 341.

¹ A clause in a policy that if the assured should "die by suicide, felonious or otherwise, sane or insane," includes every case of "intentional self-destruction," but not accidental cases involving insured's negligence or carelessness, Pierce v. Traveler's Ins. Co. 34 Wis. 389. Thus the taking an overdose of medicine by an insured who was sane, through mistake or ignorance, causing death, will not avoid a policy, unless taken to destroy his life "voluntarily, knowingly, and intentionally," Penfold v. Universal Ins. Co. 85 N. Y. 317.

hands did not legally include a death which was self-inflicted, but not with the concurrence or action of a responsible mind or will. Here, however, we should say, that if the exception expressly included suicide under insanity, this provision would take effect. (e)¹

(e) In *Borradaile v. Hunter*, 5 Man. & G. 639, the policy contained a proviso, that in case "the assured should die by his own hands, or by the hands of justice, or in consequence of a duel," the policy should be void. The assured threw himself from Vauxhall Bridge into the Thames and was drowned. In a suit on the policy, *Erskine*, J., instructed the jury, that "if the assured, by his own act, intentionally destroyed his own life, and that he was not only conscious of the probable consequences of the act, but did it for the express purpose of destroying himself voluntarily, having at the time sufficient mind to will to destroy his own life, the case would be brought within the condition of the policy. But if he was not in a state of mind to know the consequences of the act, then it would not come within the condition." The jury found, that the assured "threw himself from the bridge with the intention of destroying his life; but at the time of committing the act he was not capable of judging between right and wrong." It was held (*Tindal*, C. J., dissenting), that the policy was avoided, as the proviso included all acts of intentional self-destruction, and was not limited by the accompanying provisos to acts of felonious suicide. *Erskine*, J., said: "Looking simply at that branch of the proviso upon which the issue was raised, it seems to me, that the only qualifica-

tion that a liberal interpretation of the words with reference to the nature of the contract requires, is, that the act of self-destruction should be the voluntary and wilful act of a man, having at the time sufficient power of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by that act; and that the question, whether at the time he was capable of understanding and appreciating the moral nature and quality of his purpose, is not relevant to the inquiry, further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself. It appears, indeed, to me, that, excluding for the present the consideration of the immediate context of the words in question, the fair inference to be drawn from the nature of the contract would be, that the parties intended to include all wilful acts of self-destruction, whatever might be the moral responsibility of the assured at the time; for, although the probable results of bodily disease, producing death by physical means, may be the fair subjects of calculation, the consequences of mental disorder, whether produced by bodily disease, by external circumstances, or by corrupted principle, are equally beyond the reach of any reasonable estimate. And reasons might be suggested, why those who have

¹ *John Hancock Ins. Co. v. Moore*, 34 Mich. 41, decided that a clause in a life policy, that if the assured "shall die by his own hand" the policy should be void, did not include suicide by an insane person. In *Van Zandt v. Mut. Ben. Ins. Co.* 55 N. Y. 169, it was held, that to take a case out of a proviso that a policy of life insurance should be void in case the assured should die by his own hand, on the ground of insanity, the assured must have been so mentally disordered as not to understand that the act he committed would cause his death, or he must have committed it under the influence of some insane impulse which he could not resist; it is not sufficient that the mind was so impaired that he was not conscious of the moral obliquity of the act; and in *Hathaway v. National Ins. Co.* 48 Vt. 335, *Pierpoint*, C. J., said that the jury must be satisfied that the mind of the assured, to excuse his act, "was so overthrown that he had no power to resist the insane impulse to take his life, so that the act was the direct and immediate consequence and result of his insanity; in short, that the taking of his life was an insane act, in respect to which his reason was powerless." See also *Connecticut Ins. Co. v. Groom*, 86 Penn. St. 92. As to condition in policy declaring it void in case of the death of the assured by his own hand or act, "sane or insane," see *De Gogorza v. Knickerbocker Life Ins. Co.* 65 N. Y. 232. That, in the absence of an express stipulation to the contrary, suicide by the assured will not avoid a policy for the benefit of his wife and children, see *Fitch v. American Ins. Co.* 59 N. Y. 557. See further on this question, *Bigelow v. Berkshire Ins. Co.* 93 U. S. 284; *Gay v. Union Ins. Co.* 9 Blatchford, 142; *Newton v. Mut. Ben. Ins. Co.* 76 N. Y. 426; *Knickerbocker Ins. Co. v. Peters*, 42 Md. 414.

• SECTION II.

WHAT INTEREST IS INSURABLE.

It may be said here, as in marine and life policies, that any legal or equitable interest may be insured. It is very common

the direction of insurance offices should not choose to undertake the risk of such consequences, even in cases of clear and undoubted insanity. It is well known that the conduct of insane patients is, in some degree, under the control of their hopes and fears, and that especially their affection for others often exercises a sway over their minds where fear of death or of personal suffering might have no influence; and insurers might well desire not to part with this restraint upon the mind and conduct of the assured, nor to release from all pecuniary interest in the continuance of the life of the assured, those on whose watchfulness its preservation might depend; and they might, further, most reasonably desire to exclude from all questions between themselves and the representatives of the assured, the topic of criminality, so likely to excite the compassionate prejudices of a jury, which were most powerfully appealed to on the trial of this cause." *Tindal*, C. J., held, that the terms "dying by his own hands," being associated with the terms "dying by the hands of justice or in consequence of a duel," which last cases, designated criminal acts, on the principle of *noscitur a sociis*, should be interpreted as meaning felonious self-destruction. It will be observed, the majority of the court in the above case exclude from the condition cases of mere accident, and of insanity extending to unconsciousness of the act done or of its physical consequences. In *Clift v. Schwabe*, 3 C. B. 437, which was determined in the Exchequer Chamber, in 1846, where the condition was that the policy should be void if the life-insured "should commit suicide," it was held by a majority of the court (*Rolfe*, B., *Patteson*, J., *Alderson*, B., *Parke*, B.), that the terms of the condition included all acts of voluntary self-destruction, and therefore if the life-assured voluntarily killed himself, it was immaterial whether he was or was not at the time a responsible moral agent. *Pollard*, C. B., and *Wightman*, J., dissented. So held also in *Dufaur v. Professional Life*

Ass. Co. 25 Beav. 599. On the other hand in New York, in a case decided before the above cases, it was held, that a provision in a life policy, that it is to be deemed void in case the assured shall "die by his own hand," imports a criminal act of self-destruction, and the underwriters were liable, where the assured drowned himself in a fit of insanity. *Breasted v. Farmers Loan & Trust Company*, 4 Hill, 73. The decision of the Supreme Court was affirmed in the Court of Appeals, but not with unanimity, five judges voting for an affirmance, and three for a reversal. The opinion of the majority, delivered by *Willard*, J., and the dissenting opinion of *Gardiner*, J., present the arguments on their respective sides, the latter sustaining the decisions of the English courts, 4 Seld. 299. In *Dean v. American Ins. Co.* 4 Allen, 96, the policy provided that it should be void if the assured should "die by his own hand, or in consequence of a duel, or by the hands of justice, or in the known violation of any State, national, or provincial law." The assured cut his throat with a razor, and the plaintiffs alleged, that the act whereby his death was caused was the direct result of insanity, and that his insanity was what is called suicidal impression, impelling him to take his life, and that suicide was the necessary and direct result of such insanity or disease. The court held that the defendants were not liable. The opinion was expressed, that if the death was caused by accident, by superior or overwhelming force, in the madness of delirium, or under any combination of circumstances from which it might be fairly inferred that the act of self-destruction was not the result of the will or intention of the party, adapting means to the end, and contemplating the physical nature and effects of the act, that it might be justly held a loss not excepted within the meaning of the proviso. Where a condition of the policy is, that it shall be void, if the party "shall die by his own hand in or in consequence of a duel," it is held to include the case of suicide by swal-

* for creditors to insure the life of a debtor, and for a debtor to insure his own life, and make the insurance payable to a creditor for his security. (f) But if the debt be not founded on a legal consideration, it does not sustain the policy. (g) In a recent case, M. V. & S. formed a copartnership, M. & V. furnished the capital, and S. shared equally in the profits, on account of his skill in the business; but in lieu of capital on the part of S. and as an indemnity, an insurance was effected on his own life by S., and it was agreed between the partners that should S. die during the continuance of the partnership, and unmarried, the benefit of the policy should go to the survivors of the firm. It was held, that this was not a wager policy. (h) And a person may effect insurance on his own life, in the name of a creditor, for a sum beyond the amount of the debt, the balance to enure to his family, and the policy will be valid for the whole amount insured. (i)

Courts have given a wide construction to the rule requiring interest. It may now be said, that wherever there is a positive * and real dependence of one person upon another, * 479 the person so dependent has an insurable interest in the

lowing arsenic; and the first part of the clause is to be separated from the latter, as the whole taken together would lead to an absurdity. Hartman v. Keystone Insurance Co 21 Penn. State, 466, and Cooper v. Massachusetts Ins. Co. 102 Mass. 227 In Equitable Life Ins. Co. v. Paterson, 41 Ga. 338, the insured died from laudanum accidentally taken by him when drunk, and the insurers were held.

(f) Anderson v. Edie, 1795, 2 Park on Ins. (8th ed.) 915. In this case, Lord Kenyon said. "It was singular that this question had never been directly decided before; that a creditor had certainly an interest in the life of his debtor, because the means by which he was to be satisfied might materially depend on it; and that, at all events, the death must, in all cases, in some degree, lessen the security." See comments on this case, in Ellis on Ins. p. 125. A creditor of a firm has been held to have an insurable interest in the life of one of the partners thereof, although the other partner may be entirely able to pay the debt, and the estate of the insured is perfectly solvent. Morrell v. Trenton Ins. Co. 10 Cush. 282. It seems that the purchaser of an expected devise from the expectant devisee, may insure the life of the testator. Cook v. Field, 15 Q. B. 460. A trustee may insure for the benefit of the

trust. Tidswell v. Angerstein, Peake, 151; Ward v. Ward, 2 Smale & G. 125, 23 Eng. L. & Eq. 442. If A, being indebted to B, die, and C agree to pay the debt, by instalments, in five years, B has an insurable interest in the life of C, for those five years. Von Lindensau v. Desborough, 3 C. & P. 353. So, the grantee of an annuity for one or more lives, has an insurable interest in those lives. Holland v. Pelham, 1 Crompt. & J. 575. Where A furnished funds to B to enable him to go to California, and it was agreed that A should have one-half of all the profits which should arise from gold digging by B, it was held that A had an insurable interest in B's life, and the policy was to be treated as a valued one, and it was not necessary to show that B would have dug any gold or made any profit. Miller v. Eagle Life Ins. Co. 2 E. D. Smith, 268. See also Bevin v. Conn. Ins. Co. 23 Conn. 244; Loomis v. Eagle Ins. Co. 6 Gray, 396; Morrell v. Trenton Ins. Co. 10 Cush. 282; Mitchell v. Union Ins. Co. 45 Me. 104.

(g) Dwyer v. Edie, 2 Park, Ins. 914.

(h) Walton v. National Ass. Co. 22 Barb. 9, 20 N. Y. 32. See also Trenton Ins. Co. v. Johnson, 4 N. J. 576.

(i) American Ins. Co. v. Robertshaw, 26 Penn. State, 189.

life of the other. Thus, not only may a wife insure the life of her husband, (*j*)¹ but a sister may insure the life of a brother on whom she is dependent for support. (*k*)² A father has an insurable interest in the life of his minor child. (*l*)³ A clerk may insure the life of one who has promised to employ him a certain number of years; but not the life of one from whom he has only a promise, from which he may expect an act of important kindness. (*ll*)⁴ This dependence may undoubtedly exist without any relationship. And generally it is said to be enough, if, according to the ordinary course of events, pecuniary loss or disadvantage will naturally and probably result from the death of the life-insured. (*m*)⁵

In England, insurance on the life of any person, or on any other event, wherein the person for whose use, benefit, or on whose account such policy is made, has no interest, is forbidden by law, as are also all gaming or wagering contracts. (*n*)⁶ In that country the law is now well settled, that the contract of life insurance is not a contract of indemnity, and that although the insured must have an interest at the time the insurance is effected, in order to comply with the statute, yet there is no necessity of this interest continuing, and where a creditor insures the life of his debtor, he may recover the amount insured, although the debt is paid. (*o*)⁷

(*j*) *Reed v. Royal Exch. Ass. Co.* Peake's Ad. Cas. 70; *St. John v. American Ins. Co.* 2 Duer, 429.

(*k*) *Lord v. Dall*, 12 Mass. 118.

(*l*) *Loomis v. Eagle Ins. Co.* 6 Gray, 396; *Mitchell v. Union Ins. Co.* 45 Me. 104. *Contra*, *Halford v. Kymer*, 10 B. & C. 724.

(*ll*) *Hebdon v. West*, 3 B. & S. 578.

(*m*) *Hoyt v. N. Y. Ins. Co.* 3 Bosw. 440.

(*n*) 14 Geo. 3, c. 48. In *Wainwright v. Bland*, 1 Moody & R. 481, Lord Abinger, C. B., instructed the jury, that although the policy on its face appeared to have been obtained by the life-assured, if in fact another person, not interested in

his life, found the funds of the premiums, and intended, when it was procured, to get the benefit of it by assignment or otherwise, it was the policy of that other person, and void, being an evasion of the statute. A doubt was expressed on this point by the court in *banc*, but no decision was given. 1 M. & W. 32. See also *Shilling v. Accidental Death Ins. Co.* 2 H. & N. 42, 40 Eng. L. & Eq. 465.

(*o*) *Dalby v. India Ass. Co.* 15 C. B. 365, 28 Eng. L. & Eq. 312; *Law v. London Life Policy Co.* 1 Kay & J. 223. These cases overrule *Godsall v. Boldero*, 9 East, 72, and other cases which followed it. See 18 London Jurist, 485; 19 id. 37; 39 London Law Mag. 202.

¹ A policy on their joint lives, payable to the survivor, is not avoided by their divorce and a decree of alimony to the wife. *Conn. Life Ins. Co. v. Schaefer*, 94 U. S. 457. See *Baker v. Union Life Ins. Co.* 43 N. Y. 283; *Gamba v. Covenant Life Ins. Co.* 50 Mo. 44.

² *Etna Life Ins. Co. v. France*, 94 U. S. 561, declared that in such a case it is immaterial what is the arrangement between the brother and sister for the payment of the premiums. See *Goodwin v. Mass. Life Ins. Co.* 73 N. Y. 480. But a brother has no such interest in a brother, *Lewis v. Phoenix Ins. Co.* 39 Conn. 100; nor a nephew in an uncle, *Singleton v. St. Louis Ins. Co.* 66 Mo. 63.

³ *Reserve Ins. Co. v. Kane*, 81 Penn. St. 154; *Williams v. Wash. Life Ins. Co.* 31 Ia. 541. In *Guardian Ins. Co. v. Hogan*, 80 Ill. 35, it was decided that a son has no insurable interest in his father, unless he has a reasonable expectation of pecuniary advantage from the continuance of his father's life.

In this country, wager contracts are forbidden entirely in some of our States, in others on particular subjects, and in others not at all. If, therefore, the English doctrine be assented to, that a contract of life insurance is not a contract of indemnity, it would follow, that in those States where wager contracts are not forbidden at all, or are not forbidden on the subject of insurance, no interest need be shown. (*p*)

If a man obtains insurance on his own life, as the "assured," it being declared that the policy is for the benefit of a third party, that party may maintain an action on the policy without proof of interest. (*pp*)¹

* Our American policies now frequently contain a clause, * 480 requiring a creditor, who is insured upon the life of his debtor, to transfer, on payment of a loss, an equal amount of the debt. (*q*)

A more difficult question of this kind arises thus. If the life of a debtor is insured by his creditor, and the debtor dies, and the insurers pay to the creditor that which is equal to the debt, or to a part of it, is this a payment either total or partial of the debt, of which the legal representatives of the debtor may take advantage, and to the extent of the payment resist the claim of the creditor on them? We should say, that whether the whole claim passed over by subrogation to the insurers or not, such payment would be no defence whatever to a claim against the representatives of the debtor, and there is authority to this effect. (*r*) Of

(*p*) See *Loomis v. Eagle Ins. Co.* 6 Gray, 396; *Miller v. Eagle Ins. Co.* 2 E. D. Smith, 263; *Trenton Ins. Co. v. Johnson*, 4 N. J. 576, decided in New Jersey, in which State all wagers are not contrary to law. In *Ruse v. Mut. Benefit Ins. Co.* 26 Barb. 556, 561, it is said: "We think that (*sic*) the plaintiff's application in writing for the insurance, which was accepted by the defendants, and in which the plaintiff stated that he had an interest in the life of Bugbee (the life-insured), to the full amount of the sum of \$2,000, sufficient proof of such interest as between the parties, if any proof of interest was necessary." In *Bevin v. Conn. Ins. Co.* 23 Conn. 244, there is a *dictum* to the effect that the English statutes are but declarations of the common law, and that a life policy is a contract of indemnity. Craig

v. Murgatroyd, 4 Yeates, 169, cited in the notes of the American edition to *Godsall v. Boldero*, in Smith's *Leading Cases*, as confirmatory of that case, involved a marine and not a life insurance. In New York, on the contrary, it is *held*, that where a debtor procures an insurance on his life and assigns the policy, the right of the assignee to demand and enforce the stipulated payment is no more liable to doubt or dispute than that of an executor or administrator. *St. John v. American Ins. Co.* 2 Duer, 419.

(*pp*) *Campbell v. New England Ins. Co.* 98 Mass. 381.

(*q*) *Cutler v. Rand*, 8 Cush. 89.

(*r*) *Humphrey v. Arabin, Lloyd & Goold's Cas. temp. Plunkett*, 318. See also *Henson v. Blackwell*, 4 Hare, 434.

¹ But a certificate expressed to be payable to a "friend" of the assured was decided to be against public policy, and absolutely void. *Mutual Benefit Ass. v. Hoyt*, 46 Mich. 473.

the operation of the recent rule upon this question there might be some doubt. But if the reason of it were logically carried out, it would certainly seem, that the creditor may retain, not only the whole payment, which he receives from the insurers, but the whole of his claim against the representatives of the debtor.

Where the death of the life-insured was caused by a third party, who was a stranger to the contract, and the insurers paid the loss, and brought an action against this third party, it was held, that the action could not be sustained on account of the want of any privity between the parties. (s)

If a wife is considered as a *feme sole* by the law of the * 481 State * wherein the policy was made, and she causes herself to be insured on the life of her husband, the policy is entirely beyond his reach, not only so far that he cannot transfer or cancel it, but it cannot be impeached by proof, derived from his own declarations, that his statements in regard to his health, made at the time of the insurance, were misrepresentations. (t) And if a wife insures the life of her husband, for her own benefit, and dies before the husband, the policy vests at her death in her administrator for the benefit of her children. (tt)¹ A policy of life insurance for the benefit of the widow and child of the insured, cannot be affected by his will. (tu)²

(s) Conn. Ins. Co. v. N. Y. & New Haven R. Co. 25 Conn. 265.

(t) Fraternal Ins. Co. v. Applegate, 7 Ohio State, 292. In Rison v. Wilkerson, 3 Sneed, 565, where a statute provided that any husband might effect insurance on his own life, and the same shall in all cases enure to the benefit of his widow and heirs, without in any manner being

subject to the debts of the husband, it was held, that this did not prevent the husband, who had insured his own life, without saying for whose benefit, from assigning the policy.

(tt) Swan v. Snow, 11 Allen, 224.

(tu) Gould v. Emerson, 99 Mass. 154. See also, as to assignment, Knickerbocker, &c. Ins. Co. v. Weitz, 99 Mass. 157.

¹ That, in such a case, the interest descends to her heirs, see Hutson v. Merrifield, 51 Ind. 24. A policy payable to wife and children becomes, if there are no children, the wife's property, and she may exchange it for a paid-up policy even after divorce. Phoenix Ins. Co. v. Dunham, 46 Conn. 79. If children are not mentioned, she has, in Massachusetts, an absolute life interest assignable by her for husband's debts. Newcomb v. Mutual Ins. Co. 9 Ins. Law J. 124. Where a wife insured her husband's life for the benefit of herself and children, and she and a child died before him, the latter leaving a child, the grandchild took the interest of its parent. Continental Ins. Co. v. Palmer, 42 Conn. 60.

² A person, however, who procures insurance on his life for another's benefit, and pays premiums thereon, may dispose of it by will or otherwise, to the exclusion of the beneficiary, the latter's interest, subject to such revocation, at least with insurer's consent, being actual and subsisting. Foster v. Gile, 50 Wis. 608. See De Ronge v. Elliott, 8 C. E. Green, 486.

SECTION III.

OF ASSIGNMENT AND TRANSFER.

Life policies are very frequently assigned;¹ and many are made for the purpose of assignment, to enable the insured thereby to give security to his creditor, (*u*) and the assignee recovers the whole amount insured, and not merely the consideration for the assignment. (*v*) Policies usually contain rules and provisions respecting assignment, and they are binding on the parties to the contract. If, therefore, these make an assignment of the policy a discharge of the insurers, an assignment would have this effect. (*w*) Notice and assent are usually required to give effect to an assignment; but any such requirement would be construed the more strictly against the insurers, because, as has been said by a court, all the reasons which require *the assent of underwriters to make assignments of fire policies valid, do not apply to life policies. (*x*)

In life policies, there is sometimes a clause to the effect, that an assignment, duly notified and assented to, shall protect the assignee against acts of the insured which would have discharged the

(*u*) *Ashley v. Ashley*, 3 Sim. Ch. 149; *Godsal v. Webb*, 2 Keen, 99; *Barber v. Butcher*, 8 Q. B. 863; *N. Y. Ins. Co. v. Flack*, 3 Md. 341.

(*r*) *St. John v. American Ins. Co. 2 Duer*, 419, 3 Kern. 31.

(*w*) In *New York Ins. Co. v. Flack*, 3 Md. 341, by the terms of a life insurance policy, the company agreed with "the assured, his executors, administrators," to pay the amount to his "legal representatives," after due notice and proof of death,

and at the foot of the policy were these words: "N. B. If assigned, notice to be given to the company," it was held, that the provision to pay to the "legal representative," was designed to apply to a case where the party died without having previously assigned, and was not to be construed as in any sense limiting the power of assignment.

(*x*) *New York Ins. Co. v. Flack*, 3 Md. 341.

¹ An assignment of a life policy, valid in its inception, to one having no insurable interest, has been held invalid in *Stevens v. Warren*, 101 Mass. 564; *Franklin Ins. Co. v. Sefton*, 53 Ind. 380; *Same v. Hazzard*, 41 Ind. 116; *Guardian Ins. Co. v. Hogan*, 80 Ill. 35; *Swick v. Home Ins. Co. 2 Dillon*, 166; *Lewis v. Phoenix Ins. Co.* 39 Conn. 100; *Singleton v. St. Louis Ins. Co.* 66 Mo. 63; and valid in *Clark v. Allen*, 11 R. I. 439. Money collected on the policy by an assignee who has no insurable interest can be recovered, although the assignee had agreed to pay and had paid all the fees and assessments to the underwriters. *Warnock v. Davis*, 104 U. S. 775.—A married woman beneficially interested in a policy may assign it, and the assignee may maintain an action upon it in his own name. *Archibald v. Mutual Ins. Co.* 38 Wis. 542. Under the laws of New York, creditors cannot avoid a wife's assignment for the benefit of her children of a policy on her husband's life. *Smillie v. Quinn*, 90 N. Y. 492. That an action for the possession of a life-insurance policy cannot be maintained by the payee against an assignee of the policy during the life of the person on whose life and by whom the insurance was effected, see *Bowers v. Parker*, 58 N. H. 565.

insurers had the policy remained in the hands of the insured. (y) It has been held, that without such express provision, whatever would be a forfeiture of the policy if it remained in the hands of the insured, would operate equally after the assignment. (z)

A delivery and deposit of the policy for the purpose of an assignment, would operate as such without any writing. (a) But indorsement on the policy, with notice to the insurers, has not the effect of an assignment, so long as the policy remains in the possession of the insured; because delivery of the policy is requisite. (b)¹ This, however, is not necessary, where the assignment is by a separate deed, which deed is delivered. (c) And a mere promise to assign, founded on a valuable consideration, might be good against the insured, and perhaps against his assignee in bankruptcy. (d) Any such promise would be strengthened by notice to the insurers, and assent by them.

From some cases it might be inferred, that life insurers have no *delectus personarum*, or rather, that this right has less force with them than with marine or fire insurers. If this be so, the

principal reason for holding insurers discharged by an assignment * without their leave, in the absence of all provisions about it, would not apply to life policies. (e)

(y) *Cook v. Black*, 1 Hare, 390; *Moore v. Woolsey*, 4 Ellis & B. 243, 28 Eng. L. & Eq. 255.

(z) *Amicable Society v. Bolland*, 4 Bligh (n. s.), 194.

(a) *In re Styans*, 1 Phillips, Ch. 105; *Cook v. Black*, 1 Hare, 390; *Moore v. Woolsey*, 4 Ellis & B. 243, 28 Eng. L. & Eq. 248; *Wells v. Archer*, 10 S. & R. 412; *Harrison v. McConkey*, 1 Md. Ch. 34; N. Y. Ins. Co. v. Flack, 3 Md. 341. The voluntary payment of premiums on a policy of life insurance, gives to the payer no interest in the policy. *Burridge v. Row*, 1 Young & C. Ch. 183.

(b) *Palmer v. Merrill*, 6 Cush. 282.

(c) *Fortesque v. Barnett*, 3 Mylne & K. 36.

(d) *Tibbitts v. George*, 5 A. & E. 107. See *Williams v. Thorp*, 2 Sim. 257; *Gibson v. Overbury*, 7 M. & W. 557. It is held in Louisiana, that one who has effected insurance on his life, may assign the policy, or a part of it, to a *bona fide* creditor; but such assignment will be without effect as to third persons, creditors of the insured, where there was no proof of notice to the assurers before the death of the assured, nor of the acceptance of the assignment by the transferee before that date, and the policy remained in the possession of the assignor. *Succession of Riley*, 11 Rob. La. 298.

(e) See *N. Y. Ins. Co. v. Flack*, 3 Md. 341; *Ellis on Life Ins.* 552, 553.

¹ Delivery is requisite to place the assignee in the assignor's position so as to recover the full debt due. See *Hartford Ins. Co. v. Davenport*, 37 Mich. 609. The sending to the insurer's agent, with a request to keep for a person named, is a good delivery. *Marcus v. St. Louis Ins. Co.* 68 N. Y. 625. If a husband in writing requests his wife to take a policy, and promises it to her if she keeps it up, it is a good equitable assignment. *Swift v. Railway, &c. Ass.* 96 Ill. 309. But a mere declaration in a letter that life insurance was made for the person to whom it is addressed, without any delivery of the policy, is no assignment. *In re Webb*, 49 Cal. 541. See *Alletson v. Chichester*, L. R. 10 C. P. 319.—That as between creditors and a beneficiary in possession of the policy the latter will hold the funds, see *Worthington v. Curtis*, 1 Ch. D. 419; as well as his estate, see *Smedly v. Felt*, 43 Ia. 607.

SECTION IV.

OF THE TIME WHEN A POLICY ATTACHES OR TERMINATES.

It would seem that a policy may take effect, if the bargain be completely made, although before any delivery of it the life-insured has died, and delivery was withheld in consequence. It need not be added, that the evidence must be very clear, and the circumstances very strong, to give effect to such a policy. (*f*)

English life policies are sometimes made for a short time,—perhaps a single year,—with a right of renewal. In this country, such a provision is certainly not common. In an English case, where the original insurance for a year expired on the 24th of February, and the insured had the right of renewal for another year, and on the following 4th of May he died, and in ignorance of this fact application for a renewal was made by his representatives * and assented to by the insurers on the 31st * 484 of May, the insurers were held liable. (*g*) In the renewed

(*f*) The case of the Kentucky Mut. Ins. Co. v. Jenks, 5 Port. (Ind.) 96, is of much interest on this subject. On the 27th of September, 1850, Jenks, of Lafayette Co., being then in good health, completed an application to the Kentucky Insurance Company for an insurance of \$1,500 on his life, for the benefit of his wife. The company's agent at Lafayette on that day mailed the application to the company. The application was duly approved, and a policy was issued thereon and mailed to the agent on the 2d of October, 1850. It insured the life of J. in the sum of 1,500 dollars, for five years from date, for the benefit of his wife. The policy was received by the agent on the 5th of October, 1850. On the 29th September, 1850, J. was taken sick, and lingering until the 4th October following, died. On the receipt of the policy (J. being dead), the agent immediately returned it by mail to the company. While the treaty for insurance was pending, and before J.'s application was completed, the company agreed to take the first year's premium in an advertisement of their agency, for six months, in J.'s newspaper, at Lafayette; and accordingly the agent, in August, 1850, furnished to J. the advertisement, which was published in the

paper continuously thereafter, as directed by the agent, for six months. The price of the advertisement fell short of the first year's premium 45 cents. This was a bill in chancery by J.'s widow, praying discovery of the entries upon the company's books, &c., and that the original application for the insurance, and the original policy issued thereon, should be produced, &c., that an account should be taken, &c., and for general relief. And it was held, that the contract of insurance was, at least, complete on the 2d of October, 1850, when J.'s application was approved, and the policy was mailed to him; and that there was weighty authority that the acceptance related back to the period when J. completed his application.

(*g*) Philadelphia Life Ins. Co. v. American Life Ins. Co. 23 Penn. State, 65. The second policy contained a statement, that, if the declaration made by the secretary of the company obtaining the reinsurance, was false, the policy should be void. This declaration stated, that the secretary believed the age of the life-insured did not exceed thirty years, and that "he is now in good health." This declaration was dated May 31. See also Foster v. Mentor Life Ass. Co. 3 Ellis & B. 48, 24 Eng. L. & Eq. 103.

insurance no time was stated for the beginning or the termination of the policy.

All life policies are of course terminated by the death of the life-insured. But it is sometimes difficult to determine the time of his death, or whether he died while it covered his life or after it had expired. The burden of proof is necessarily upon the representatives of the insured, to show that the death occurred within the policy. (h) Undoubtedly, after a certain period of absence and silence, there arises, by the common law of England and of this country, a presumption of death; or, to speak more accurately, the presumption of life ceases. This period is very generally said to be seven years; (i)¹ and this is adopted in the legislation of some States. (j) It must remain true, however, that when a party rests his case upon the fact of death, he must satisfy the jury of that fact by relevant and admissible evidence, strengthened by whatever presumptions the law would make; and we should have no doubt that proof as to the health and strength or habits of the person, or his probable place, or exposure to peril, would come in as a part of this evidence.

The presumption of life after seven years of absence and silence, * ceases, but it is not replaced by a presumption that death occurred at any one time more than another. It has been said that the presumption of life continues to the end of seven years, and then only gives way to a presumption of death; and that this is therefore a presumption of death at the end

(h) See *Lockyer v. Offley*, 1 T. R. 260, *Willes*, J.

(i) In *Loring v. Steineman*, 1 Met. 211, *Shaw*, C. J., said: "The only remaining question is a question of fact upon the evidence. It is a well-settled rule of law, that upon a person's leaving his usual home and place of residence for temporary purposes of business or pleasure, and not being heard of, or known to be living, for the term of seven years, the presumption of life then ceases, and that of his death arises." 2 Stark. Ev. 457; *Doe v. Jesson*, 6 East, 85. But this presumption may be rebutted by counter-evidence, *Hopewell v. De Pinna*, 2 Camp. 113; or by a conflicting presumption, *The King v. Twynning*, 2 B. & Ald. 386. This presumption is

greatly strengthened, when the departure of an individual was from his native place, the seat of his ancestors, and the home of his brothers and sisters and family connections; and still further, where it was to enter upon the perilous employment of a seafaring life; and when he has not been heard of, by those who would be most likely to know of him, for upwards of thirty years." See also *McCartee v. Camel*, 1 Barb. Ch. 455; *Smith v. Knowlton*, 11 N. H. 196; *Cofey v. Flanagan*, 1 Kelly, 538. This presumption does not arise where the party, when last heard from, had a fixed and known residence in a foreign country. *McCartee v. Camel*, *supra*; *In re Creed*, 1 Drury, Ch. 235.

(j) See 2 N. Y. Rev. Stats. c. 34, § 6.

¹ See *Hancock v. American Ins. Co.* 62 Mo. 26; *Tisdale v. Conn. Ins. Co.* 26 Ia. 170. A person who for seven years has not been heard of by those who, had he been alive, would naturally have heard of him, is presumed to be dead; but the law raises no presumption as to the precise time of his death. *Davis v. Briggs*, 97 U. S. 628.

of this period. (*k*) We think the rule must be, that if a plaintiff's case depends upon a certain time within the seven years, he must make out his case by proof attaching to that time; and as Lord *Denman* has said, "Of all the points of time the last day is the most improbable, and most inconsistent with the ground of presuming the fact of his death." (*l*)

By the civil law, where two persons perish by the same calamity, there are certain presumptions, based upon the age and sex of the parties, as to which survived the other. But these presumptions have not been adopted in England and this country. (*m*)

Notice and proof of the death would be sufficient to establish a claim on the insurers. And although the insurers have a usage in this respect, it is not binding unless it was known to the insured, and by-laws respecting it can have no effect unless they form a part of the policy. (*n*)¹

(*k*) *Smith v. Knowlton*, 11 N. H. 196; *Burr v. Sim*, 4 Whart. 150; *Bradley v. Bradley*, id. 173; *Tilly v. Tilly*, 2 Bland, Ch. 445.

(*l*) In *Knight v. Nepean*, 5 B. & Ad. 86, 2 M. & W. 894, 913. See also *The King v. Harborne*, 2 A. & E. 540; *In re Creed*, 1 Drury, Ch. 235. The English doctrine is held in New York. *McCartee v. Camel*, 1 Barb. Ch. 462. See also *Patterson v. Black*, Park on Ins. 579 (6th ed.).

(*m*) See 1 *Greenl. Ev.* § 29. In *Rex v. Hay*, 1 W. Bl. 640, where a man, his wife and daughter, set sail in a vessel which was never heard of afterwards, and it became important to ascertain which perished last, a compromise was effected on the recommendation of Lord *Mansfield*, who said there was no legal principle on which he could decide the case. 2 *Phillim.* 268, n. See also *Mason v. Mason*, 1 Meriv. 308. In some cases, the comparative age, health, strength and experience of the parties, have been regarded

as sufficient to furnish presumptions of survivorship. *Sillick v. Booth*, 1 Younge & C. Ch. 121; *Coye v. Leach*, 8 Met. 375. And where these furnish no decisive tests, the presumption that both died at the same time has been adopted. *Taylor v. Diplock*, 2 *Phillim.* 261; *Selwyn's Case*, 3 *Hagg. Ec.* 748; *Coye v. Leach*, 8 Met. 371; *Moehring v. Mitchell*, 1 Barb. Ch. 264. But by this is meant probably no more than that, as it is impossible to say which of two persons died first, the effect is the same as if they had died together. And then the party on whom is the burden of proof, of course fails. *Underwood v. Wing*, 4 *De G., M. & G.* 633, 31 Eng. L. & Eq. 293; *Wing v. Angrave*, 8 H. L. Cas. 183.

(*n*) *Taylor v. Etna Life Ins. Co.* 13 Gray, 434. In this case it was held, that, in the absence of such usage known to the insured, a physician's certificate of the death was not an essential part of the proof.

¹ Mere notice, unobjected to before trial, is sufficient. *Heath v. Franklin Ins. Co.* 1 *Cush.* 237. *Contra, O'Reilly v. Guardian Ins. Co.* 60 N. Y. 169. Probate records and inquests are but *prima facie* evidence of death. *Mut. Ben. Ins. Co. v. Tisdale*, 91 U. S. 238; *Mutual Ins. Co. v. Schmidt* (Ohio), 8 Am. L. Rec. 629.

OF THE PREMIUM.

This is usually paid in money, or by a note at once, if the insurance be for a year or less.¹ If for more than a year, it is usually payable annually; and it is common to permit the annual payment to be made quarterly, with interest from the day when the annual premium became due. (o) In any case, unpaid pre-

(o) In *Buckbee v. United States Insurance Co.* 18 Barb. 541, a policy of life insurance contained a provision, that in case the quarterly premiums should not be paid on the days specified, the policy should be void; but that in such case it might be renewed, at any time, on the production of satisfactory evidence as to the health of the insured, and payment of back premiums, &c. The premium due on the 10th December, 1851, was not paid until the 16th, when it was received by the insurers, without objection, and entered to the credit of the policy, and a receipt given for it. No evidence was produced in respect to the health of the insured, and none was required. The insured was, in fact, sick at the time, and died on the 19th January, 1852, of the disease under which he was then laboring. It appeared that it had not been the practice of the insurers to exact prompt payment of the premiums, when due; but they had allowed the same to lie over several days, and then accepted them, without objection. *Held*, that the conduct of the in-
surers had been such as to amount to a waiver of a literal compliance with the condition as to punctual payment; and that the policy not having lapsed or become void, did not require renewal upon a disclosure of the state of the insured's health, within the meaning of that condition. *Held*, also, that such waiver restored the policy to the same condition in which it would have been had the premium been paid on the precise day when it fell due. In *Ruse v. Mut. Ins. Co.* 26 Barb. 556, the insurance was for life subject to be defeated by the non-payment of the annual premium. A prospectus of the company contained the clause, "Every precaution is taken to prevent a forfeiture of the policy. A party neglecting to settle his annual premium within thirty days after it is due, forfeits the interest in the policy." *Held*, that this was a waiver of the condition in the policy, and that, if the insured died before the thirty days had expired, the party in interest might pay the premium.

¹ Any usual mode of payment is good, *Currier v. Continental Ins. Co.* 53 N. H. 538; as by a note, if accepted as payment, *Mowry v. Home Ins. Co.* 9 R. I. 346. When it is provided that a policy shall not take effect until the premium is paid, it will not take effect until that event, although all the terms are agreed on, and policy is written, provided it is not delivered, *Schwartz v. Germania Ins. Co.* 18 Minn. 448; and not even if delivered, unless such was the intention of the parties, *Bodine v. Exchange Ins. Co.* 51 N. Y. 117. A premium has been held to be paid when it is given to the insurers' expressman, *Whitley v. Piedmont Ins. Co.* 71 N. C. 480; and is then at the insurers' risk, *Currier v. Continental Ins. Co.* 53 N. H. 538. If a life policy provides that it shall not take effect until the advance premium shall have been paid during the insured's lifetime, the payment of such premium by a third person without the insured's knowledge before his death, is of no effect, though made with his money, and his administrator cannot ratify such an act. *Whiting v. Mass. Ins. Co.* 129 Mass. 240. If the insurer, after the completion of the contract, refuses to accept the premium or deliver the policy, the insured may, after loss, without tender of the intermediate premiums, recover as if the policy had issued, less the premiums. *Shaw v. Rep. Ins. Co.* 69 N. Y. 286. See *Howard v. Continental Ins. Co.* 48 Cal. 229; *Yost v. American Ins. Co.* 39 Mich. 531; *American Ins. Co. v. Klink*, 65 Mo. 78; *American Ins. Co. v. Henley*, 60 Ind. 515.

miums, whether notes have been given or not, would be deducted from a loss.¹

There is a very great diversity among life insurance companies in respect to the payment of their premiums. On the one hand, they desire to make their premiums secure, because they constitute the fund on which rests the ability of the insurers to pay for their losses. On the other hand, they desire to increase their business, by making the payments of the premium as convenient and agreeable to the insured, as they can with safety.

* These two purposes are obviously antagonistic; and insurance companies endeavor to reconcile them as best they can. And provision is often made by paying part of the premium in money and part in notes. (*p*)² The safest way for companies is of course to require payment of the whole in cash as soon as it is due. But this is also the harshest way of dealing with the insured. It is however certain that every qualification of this rule is, nearly to its extent as a qualification, a diminution of the security of the company. There may be one exception to this rule. It is, when permission is given, as it frequently is, to let an amount of premium remain as the debt of the insured, not exceeding one-third or perhaps one-half of the whole amount which the insured has previously paid in cash. For this debt is secured by

(*p*) *Insurance Co. v. Jarvis*, 22 Conn. 133.

¹ A contract of life insurance was simply suspended during the war of the Rebellion, and was revived by prompt payment of premiums with proper interest on the return of peace. *Cohen v. New York Mutual Ins. Co.* 50 N. Y. 610; *Sands v. New York Life Ins. Co.* 50 N. Y. 626. *Hillyard v. Mutual Benefit Life Ins. Co.* 6 Vroom, 415, was to the effect that the Rebellion did not determine the obligations of the defendant on a life policy, but merely suspended the payment of premiums by the assured, tender of which at the close of the war was sufficient. *a. o. 8 Vroom*, 444. In *Worthington v. Charter Oak Life Ins. Co.* 41 Conn. 372, a divided court held that a policy of life insurance, upon which no premiums were paid during the continuance of the Rebellion, but the whole amount of which and interest were tendered at the close of the war, remained in force only for the time covered by the last premium paid, and could not be revived by such tender at the close of the war. See *Cohen v. New York Mutual Ins. Co.* 50 N. Y. 610; *Sands v. New York Life Ins. Co.* 50 N. Y. 626; *Martine v. International Ins. Co.* 58 N. Y. 339.

² See *Ins. Co. v. Dutcher*, 95 U. S. 269; *Northwestern Ins. Co. v. Bonner*, 36 Ohio St. 51. A policy terminable by failure to pay a premium or any premium note when due, is determined by a failure to pay such a note, or any instalment, and the interest thereon at maturity. *Pitt v. Berkshire Ins. Co.* 100 Mass. 500; *Bigelow v. State Life Ass.* 123 Mass. 113; *Att'y-Gen. v. North American Ins. Co.* 80 N. Y. 152; *Nedrow v. Farmers' Ins. Co.* 43 Ia. 24; *Lewis v. Phoenix Ins. Co.* 44 Conn. 72; *Mason v. Citizens' Ins. Co.* 10 W. Va. 572; *Patch v. Phoenix Ins. Co.* 44 Vt. 481; *Security Ins. Co. v. Gober*, 50 Ga. 404; *Catoir v. American Ins. Co.* 4 Vroom, 487. But the insurance declares a policy in such a case void by some unequivocal act, *Mutual Ins. Co. v. French*, 80 Ohio St. 240; and if merely suspended during non-payment, any payment, though the result of a suit, will revive the policy, *American Ins. Co. v. Kliuk*, 65 Mo. 78; but without such a condition, failure to pay such a note at maturity does not avoid, *McAlister v. New England Mut. Ins. Co.* 101 Mass. 558.

the policy itself, and it would be deducted from any payment of a loss ; and it may be supposed, where companies are tolerably well conducted, that any policy is worth to them as much as one-third or one-half of what they have actually received upon it.

If the policy provides, that the risk shall terminate in case the premium charged shall not be paid in advance on or before the day at noon on which the same shall become due and payable, and the day of payment falls on Sunday, the premium is not payable until Monday, although the assured dies on Sunday afternoon. (*q*)¹

All life policies contain a provision that they shall expire, if premiums are not paid at the times and in the manner required by their rules. But these requirements may always be waived. The reception of a promissory note, would certainly be a waiver ; and an agreement in good faith between the insured and an insurance agent, that the agent shall be personally responsible to the insurers for the premiums, and that the insured should be the debtor not of the insurers but of their agent, has been held to be a payment of the premiums. (*r*)² Where an agent of an insurance company was instructed that the premium must be

* 488 * renewed within fifteen days from the time of its becoming due, and that if not paid within that time notice must be given, and if not given his account would be debited for the amount ; and, accordingly, in a case where the agent did not receive the premium until after the expiration of the fifteen days, and, not having given notice to the insurers, was debited with the amount, and the premium was marked on their books as paid on

(*q*) *Hammond v. American Ins. Co.* 10 *Gray*, 306. (*r*) *Sheldon v. Conn. Ins. Co.* 25 Conn. 207; *Bouton v. Am. Ins. Co.* id. 542.

¹ *Taylor v. Germania Ins. Co.* 3 Dillon, 282. See *Howland v. Continental Ins. Co.* 121 Mass. 499.

² *Southern Ins. Co. v. Booker*, 9 Heiskell, 606. *Contra*, where the application denies the agent's right to waive. *Greene v. Lycoming Ins. Co.* 91 Penn. St. 387. So if the agent credits a premium and is charged, it is a waiver. *Train v. Holland Ins. Co.* 62 N. Y. 598; *Union Ins. Co. v. Grant*, 68 Maine, 229. An agent cannot, however, revive a policy overdue by antedating a receipt, *Homer v. Guardian Ins. Co.* 67 N. Y. 478; nor will failure to disclaim an agent's act in receiving an overdue premium after the insured's death and to return the same constitute a waiver, *Busby v. North Amer. Ins. Co.* 40 Md. 572. An agent cannot receive a horse in payment of a premium. *Hoffman v. John Hancock Ins. Co.* 92 U. S. 161. That the acceptance of note and the giving of a renewal receipt is a complete payment of a premium on life policy, see *Michigan Life Ins. Co. v. Bowes*, 42 Mich. 19; *Tabor v. Michigan Life Ins. Co.* 44 Mich. 324. See further *Chickering v. Globe Ins. Co.* 116 Mass. 321; *Angeli v. Hartford Ins. Co.* 59 N. Y. 171; *Home Ins. Co. v. Curtis*, 32 Mich. 402; *Catolr v. American Ins. Co.* 4 Vroom, 487.

the expiration of the fifteen days, it was held, that he had no authority to receive it when he did, and that the insurers were not liable. (s)¹ In another case, the life-insured, who had paid the premium for some years, was struck with apoplexy on the day the premium was due, and died the next day; his representatives tendered the premium a few days after, but it was refused, and the insurers were held not liable on the policy. (ss)

The utmost care is always requisite on the part of the insured to pay his premium when it is due; and many policies are avoided by negligence in this respect.² It is not, however, unusual for insurers to accept and treat as a regular payment, a premium offered to them a few days after it fell due, if they are satisfied that no change whatever in the risk had occurred in the mean time. But this they are not bound to do. It is always an indulgence; and ought not to be acted on as a probability, because it is never a right.

Policies sometimes expressly allow a certain number of days for the payment of the premium, after it has fallen due. Then, it would seem that such premium might be paid within that number of days, by the representatives of the insured, although he had died within those days. (t)³ It would also seem, however, from the cases, that the language of the policy on this subject would

(s) *Acey v. Fernie*, 7 M. & W. 151. (t) *M'Donnell v. Carr, Hayes & Jones*
(ss) *Howell v. Knickerbocker Ins. Co.* (Irish), 256. But see *Mutual Ins. Co. v. Ruse*, 8 Ga. 545.
3 Rob. 232.

¹ But see *Marcus v. St. Louis Ins. Co.* 68 N. Y. 625; *Dilleber v. Knickerbocker Ins. Co.* 76 N. Y. 56.

² The insurer is bound to give notice that the premium or premium note is about to become due, if that has been the custom and habit, and the insured has relied upon it to his prejudice, *Ins. Co. v. Eggleston*, 96 U. S. 572; *Lewis v. Phoenix Ins. Co.* 44 Conn. 72; especially if the agent is notified not to call as usual, *Union Ins. Co. v. Pottker*, 33 Ohio St. 459; when a notice is necessary to inform insured of the amount due, *Home Ins. Co. v. Pierce*, 75 Ill. 426; when by change of agent the insured is ignorant of place of payment, *Southern Ins. Co. v. McCain*, 96 U. S. 84; *Braswell v. American Ins. Co.* 75 N. C. 8. But a promise of indulgence in the payment of premiums before the issuing of the policy is of no avail. *Union Ins. Co. v. Mowry*, 96 U. S. 544. In *Mayer v. Mutual Ins. Co.* 38 Ia. 304, a failure of life insurance company to send as usual a notice of the premium's coming due, or to send notice to a new address, as informed, when wont to notify by mail, and a consequent failure to pay the premium, was held not to work a forfeiture of the policy. But where a note was accepted in lieu of the payment of a premium, the policy declaring forfeiture on failure to pay the premium *ad diem*, or a substituted note at maturity, an omission of the company to give notice according to its usage, at the maturity of the note, will not prevent a forfeiture for non-payment. *Thompson v. Ins. Co.* 104 U. S. 252.

³ Where a policy was to be void unless each premium was paid within a certain number of days after it fell due, there was held to be no waiver of forfeiture by reason of a mistaken statement of the secretary of the company, made after the time allowed for payment had expired, that the premium had been attended to. *Robertson v. Metropolitan Life Ins. Co.* 88 N. Y. 541.

prevent any payment after the death of the life-insured from sustaining the liability of the insurers, if the policy indicated their intention, that the payment must be made by the life-insured personally, and therefore while living. (u)¹

Some life insurance companies now advertise that their policies are non-forfeitable; and various provisions are introduced in by-laws or policies to secure the payment of the whole or a part of the sum insured, if any premiums are paid, although subsequent premiums are unpaid.² And recent statutes of Massachusetts and some other States provide, that after certain premiums have been paid, if no more are paid, there shall be no immediate forfeiture; but the actual value of the policy shall be estimated, and applied to the payment of premiums until it is exhausted.³

Insurance against death or injury by accident is now not uncommon, companies being formed expressly for this purpose. The principles and rules of law would be the same in this form of insurance as in other forms, so far as they are applicable. In one case, at least, a construction is given which is quite liberal towards the insured. The policy was against "any accident while travelling by public or private conveyances for the transportation of passengers." While walking on a steamboat wharf to a railroad

(u) *Ward v. Blunt*, 12 East, 183. See also *Pritchard v. Merchants Ass. Soc.* 3 C. B. (n. s.) 622. Where the printed proposals allow a certain time within which the premium may be paid, after it becomes due, and they are not referred to in the policy so as to become a part of the con-

tract, the life-insured dying after the premium becomes due, the executors cannot, by a tender thereof within the time allowed by the proposals, recover on the policy. *Mutual Ins. Co. v. Ruse*, 8 Ga. 545.

¹ *Whiting v. Massachusetts Ins. Co.* 129 Mass. 240.

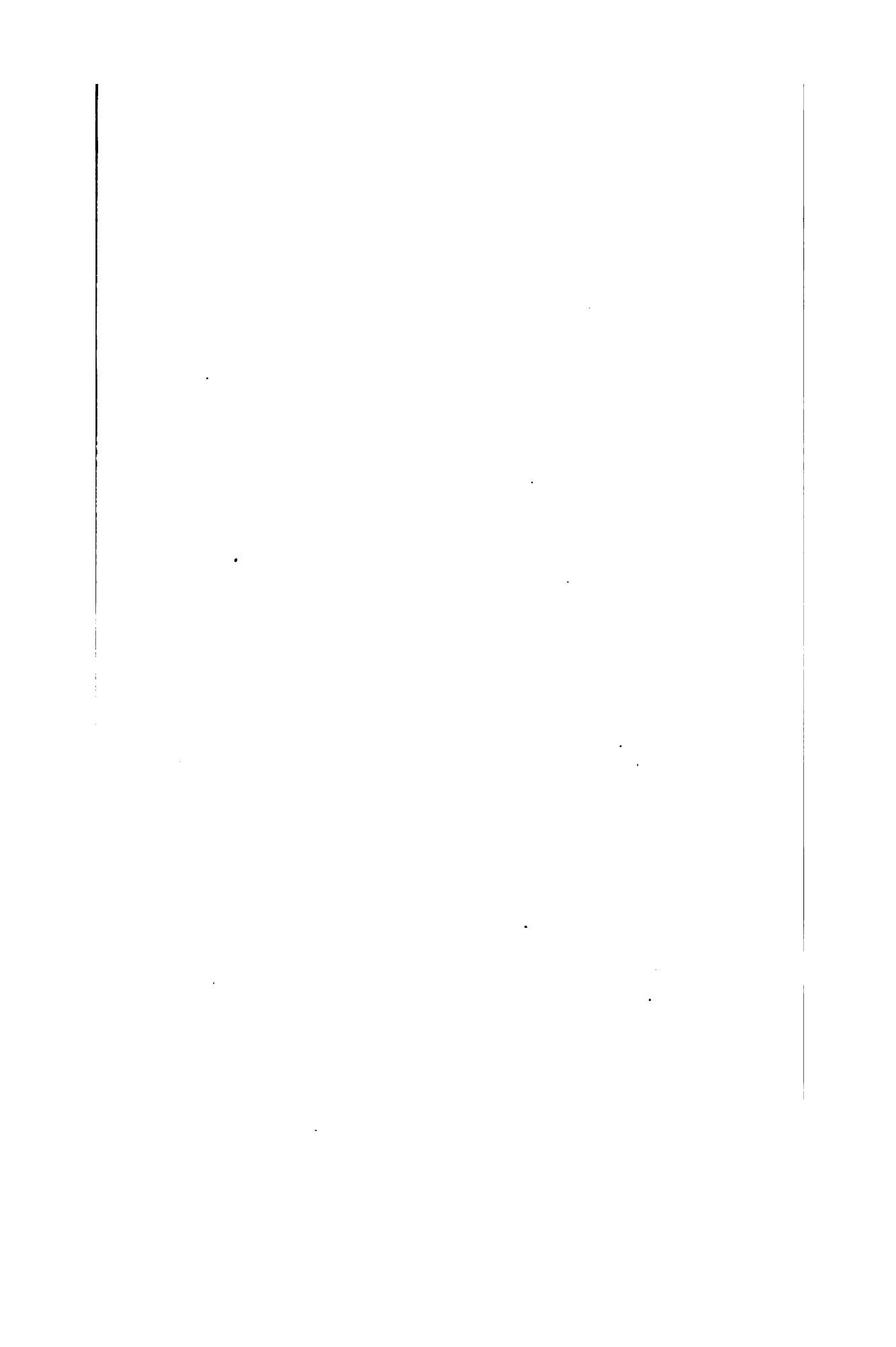
² If such a "non-forfeitable" policy provides for a surrender of the policy, and the issuance of a new one for a proportionate sum, the rights of the insured do not depend on such a surrender. *Chase v. Phoenix Ins. Co.* 67 Mass. 85. Where a policy provides that, on default in the payment of premiums, the company will pay as many fractional parts of the sum insured as complete annual payments have been made at the time of such default, each of such annual premiums secures its proportional part, *North Western Ins. Co. v. Bonner*, 36 Ohio St. 51; *Symonds v. Northwestern Ins. Co.* 23 Minn. 491; *Mound City Ins. Co. v. Twining*, 12 Kan. 475; and payment of the principal of any notes given in part payment of a premium is not necessary to make up such a "complete annual payment," *Ohde v. Northwestern Ins. Co.* 40 Ia. 357; *North Western Ins. Co. v. Little*, 56 Ind. 504; *Hull v. Northwestern Ins. Co.* 39 Wis. 397. See *Michigan Ins. Co. v. Bowes*, 42 Mich. 19; *Wilmot v. Charter Oak Ins. Co.* 46 Conn. 483.

³ In Massachusetts the statute was held applicable to an endowment policy, where the life-insured survived the term insured, and so notified the company, and the value of the policy at the time of failure to pay the premium was sufficient to extend the temporary insurance beyond such term. *Carter v. John Hancock Ins. Co.* 127 Mass. 153. See *Goodwin v. Massachusetts Ins. Co.* 73 N. Y. 480.

station, in the course of his journey, he fell and was injured. The company were held liable. (us)¹

(us) *Northrop v. Railway Passenger's Court of Appeals* reversed the decision in *Assurance Co.* 43 N. Y. 516. Here the same case,— in 2 Lansing, 166.

¹ A passenger who by a sudden jerk is thrown off the platform of a car while waiting to alight cannot recover on an accident policy conditioned on his compliance with the regulations of the railroad company, one regulation being that "passengers are not allowed to stand on the platform." *Bon v. Railway Passenger Assurance Co.* 56 Ia. 664. If accident policy forbids "wilful exposure," negligence is no defence. *Providence Life Ins. Co. v. Martin*, 32 Md. 310.

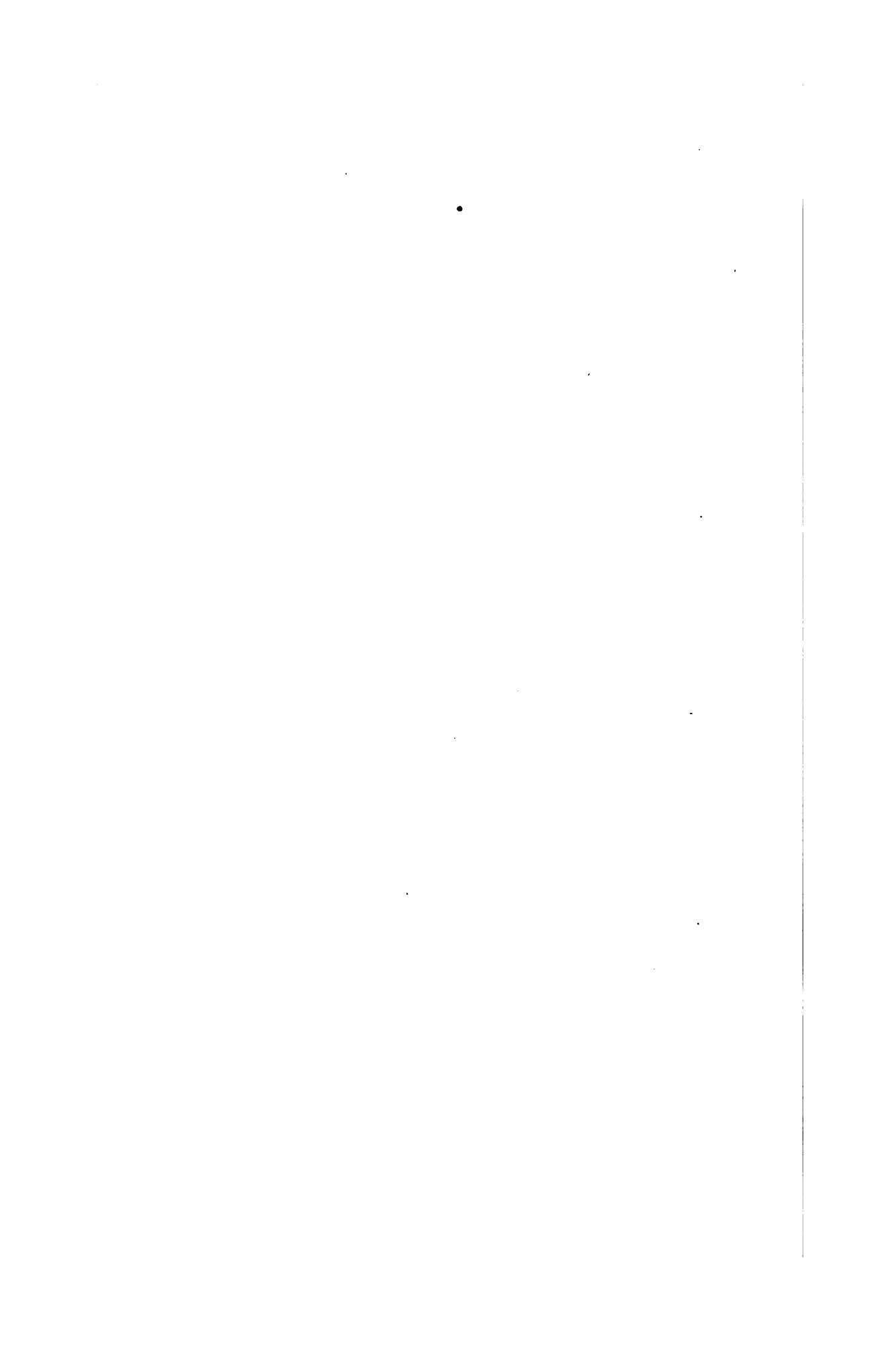


P A R T I I.

THE LAW OF CONTRACTS

CONSIDERED IN REFERENCE TO THE

OPERATION OF LAW UPON THEM.



THE LAW OF CONTRACTS.

*CHAPTER I.

* 491

CONSTRUCTION AND INTERPRETATION OF CONTRACTS. (a)

SECT. I.—*General Purpose and Principles of Construction.*

THE importance of a just and rational construction of every contract and every instrument, is obvious. But the importance of having this construction regulated by law, guided always by distinct principles, and in this way made uniform in practice, * may not be so obvious, although we think it as certain and * 492 as great. If any one contract is properly construed, justice is done to the parties directly interested therein. But the rectitude, consistency, and uniformity of all construction, enables all parties to do justice to themselves. For, then all parties, before

(a) The terms "interpretation" and "construction" are used interchangeably by writers upon the law. A distinction has been taken between them by Dr. Lieber, in his work upon "Legal and Political Hermeneutics." Interpretation as defined by him is "the art of finding out the true sense of any form of words; that is, the sense which their author intended; and of enabling others to derive from them the same idea which the author intended to convey." On the other hand, "construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text,—conclusions which are in the spirit, though not within the letter of the text." See "Legal and Political Hermeneutics," ch. 1, sec. 8; ch. 3, sec. 2; ch. 4 and ch. 5. *Interpretation* properly precedes construction, but it does not go beyond the written text. *Construction* takes place, where texts to be interpreted and construed, are to be reconciled with the rules of law, or with compacts or consti-

tutions of superior authority, or where we reason from the aim or object of an instrument, or determine its application to cases unforeseen and unprovided for. The doctrine of *cy pres* belongs to *construction*. Rules of interpretation and construction should also be carefully distinguished from *rules of law*. See the able note of Mr. Preston, in his edition of Sheppard's Touchstone, p. 88; also, per *Parke and Rose*, BB., in Keightley v. Watson, 3 Exch. 716, quoted *ante*, vol. I, pp. *17, *18. It is to be observed, also, "that when a general principle for the construction of an instrument is laid down, the court will not be restrained from making their own application of that principle, because there are cases in which it may have been applied in a different manner." Per Lord Eldon, C. J., in Browning v. Wright, 2 B. & P. 24. And see, to the same effect, the remarks of Lord Kenyon, in Walpole v. Cholmondeley, 7 T. R. 148.

they enter into contracts, or make or accept instruments, may know the force and effect of the words they employ, of the precautions they use, and of the provisions which they make in their own behalf, or permit to be made by other parties.

It is obvious, that this consistency and uniformity of construction can exist only so far as construction is governed by fixed principles, or, in other words, is matter of law. And hence arises the very first rule; which is, that what a contract means is a question of law. It is the court, therefore, that determines the construction of a contract. They do not state the rules and principles of law by which the jury are to be bound in construing the language which the parties have used, and then direct the jury to apply them at their discretion to the question of construction; nor do they refer to these rules, unless they think proper to do so for the purpose of illustrating and explaining their own decision. But they give to the jury, as matter of law, what the legal construction of the contract is, and this the jury are bound absolutely to take. (b)¹

(b) "The construction of all written instruments belongs to the court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained, as facts by the jury; and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words to be construed as words of art, or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law; for a misconstruction by the court is the proper subject, by means of a bill of exceptions, of redress in a Court of Error; but a misconstruction by the jury cannot be set right at all effectually." Per *Parke*, B., in *Neillson v. Harford*, 8 M. & W. 806, 823. In *Hutchison v. Bowker*, 5 M. & W. 535, an offer had been made by letter to sell a quantity of "good barley." The letter in reply, after stating the offer, contained the following: "of which offer we accept, expecting you will give us fine barley and good weight." It was held, that although the jury might find the mercantile meanings of "good" and "fine," as applied to barley, yet they could not go further, and find that the parties did not understand each other. The question, whether there was a sufficient acceptance, was a question to be determined by the court, upon a proper construction of the letters. And *Parke*, B., said: "The law I take to be this,—that it is the duty of the court to construe all written instruments; if there are peculiar expressions used in it, which have, in particular places or trades, a known meaning attached to them, it is for the jury to say what the meaning of these expressions was, but for the court to decide what the meaning of the contract was. It was right, therefore, to leave it to the jury to say whether there was a peculiar meaning attached to the word 'fine' in the corn market; and the jury having found what it was, the question, whether there was a complete acceptance by the written documents is a question for the judge." See *Perth Amboy Man. Co. v. Condit*, 1 N. J. 659; *Rogers v. Colt*, id. 704; *Brown v. Hatton*, 9 Fred. 319; *Wason v. Rowe*, 16 Vt. 525; *Eaton v. Smith*, 20 Pick. 150; *Hitchen v. Groom*, 5 C. B. 515; *Morrell v. Frith*, 3 M. & W. 402; *Brown v. Orland*, 36 Me. 376; *Begg v. Forbes*, C. B. 1855, 30 Eng. L. & Eq. 508; *Rapp v. Rapp*, 6 Penn. St. 45. The case of *Lloyd v. Maund*,

¹ The construction of a contract, unless there is something peculiar to the words, by reason of the custom of the trade to which the contract relates, is for the court. Per Lord Cairns, C., in *Bowes v. Shand*, 2 App. Cas. 455.

* An apparent exception occurs not unfrequently, where * 493 unusual, or technical, or official words are used, and their meaning is to be gathered from experts, or from those acquainted with the particular art to which these words refer, or from authoritative definitions. The evidence on this point may be conflicting; and then it presents a question for the jury. But the question is rather analogous to that presented by words obscurely written or half erased, and which may be read in more than one way. In all such cases, it is a question of fact for the jury, what is the word used, or what is its specific meaning in this contract; and it is a question of law, what effect this word used with this meaning has upon the construction of the contract. (c)¹ And whenever the words are of doubtful meaning the practical interpretation of the parties has much weight. (cc)

* The principles of construction are much the same at * 494 law and in equity. (d) Indeed, these principles are of

2 T. R. 760, seems *contra*, but that case was substantially overruled in *Morrell v. Frith*, 3 M. & W. 402. "If I am called on to give an opinion," said *Parke*, B., "I think the case of *Lloyd v. Maund* is not law." — Where the evidence of a contract consists in part of written evidence, and in part of oral communications, or other unwritten evidence, it is left to the jury to determine upon the whole evidence what the contract is. *Edwards v. Goldsmith*, 16 Penn. St. 43; *Bomeisler v. Dobson*, 5 Whart. 398; *Morrell v. Frith*, 3 M. & W. 404, per Lord *Abinger*. — In the case of libel, the meaning of the document forms part of the intention of the parties, and as such intention is a question for the jury, the document is submitted to them, the judge giving the legal definition of the offence. *Parmiter v. Coupland*, 6 M. & W. 108; per *Parker*, C. J., in *Pierce v. The State*, 18 N. H. 536, 562; per Lord *Abinger*, in *Morrell v. Frith*, 3 M. & W. 402. — So on a prosecution for sending a threatening letter, the jury will, upon examination of the paper, decide whether it contains a menace. *Rex v. Girdwood*, 2 East, P. C. 1120, 1 Leach's *Crown Cases*, 169.

(c) "When a new and unusual word is used in a contract, or when a word is used in a technical or peculiar sense, as

applicable to any trade or branch of business, or to any particular class of people, it is proper to receive evidence of usage, to explain and illustrate it, and that evidence is to be considered by the jury; and the province of the court will then be, to instruct the jury what will be the legal effect of the contract or instrument, as they shall find the meaning of the word, modified or explained by the usage. But when no new word is used, or when an old word, having an established place in the language, is not apparently used in any new, technical, or peculiar sense, it is the province of the court to put a construction upon the written contracts and agreements of parties, according to the established use of language, as applied to the subject-matter, and modified by the whole instrument, or by existing circumstances." Per *Shaw*, C. J., in *Eaton v. Smith*, 20 Pick. 150; *Brown v. Orland*, 36 Me. 376; *Burnham v. Allen*, 1 Gray, 496. And see preceding note.

(cc) *Chicago v. Sheldon*, 9 Wall. 50.

(d) 3 Bl. Com. 434; 1 Fonb. on Eq. 147, n. (b); *Hotham v. East India Co.* 1 Doug. 277; *Doe d. Long v. Laming*, 2 Burr. 1108; *Eaton r. Lyon*, 3 Ves. 692; *Bell v. Storie*, 1 Simons & S. 210.

¹ Where the figures "\$50" were on the margin of a note, and it was uncertain whether the writing on its face indicated fifty or sixty dollars, the court, on oral evidence, left it to the jury to decide the actual amount intended, *Paine v. Ringold*, 43 Mich. 341; and where one party said, "Go on and cultivate my farm and raise crops, and I will do what is right by you," the jury and not the court must determine whether or not the remark refers to making payments as claimed by the one so directed, *McKenzie v. Sykes*, 47 Mich. 294.

necessity very similar, whether applied to simple contracts, to deeds, or to statutes. There are differences, but in all these cases the end is the same; and that is the discovery of the true meaning of the words used. So too, whether the instrument to be construed has a seal or not, the same rules and principles of construction will be applied to it. (e)

SECTION II.

OF THE EFFECT OF INTENTION.

The first point is, to ascertain what the parties themselves meant and understood. But, however important this inquiry may be, it is often insufficient to decide the whole question. The rule of law is not that the court will always construe a contract to mean that which the parties to it meant; but rather that the court will give to the contract the construction which will bring it as near to the actual meaning of the parties as the words they saw fit to employ, when properly construed, and the rules of law will permit. In other words, courts cannot adopt a construction of any

legal instrument which shall do violence to the rules of language, or to the rules of law. (f) Words * must not be forced away from their proper signification to one entirely different, although it might be obvious that the words used, either through ignorance or inadvertence, expressed a very different meaning from that intended. Thus, if a contract spoke of "horses," it would not be possible for a court to read this word "oxen," although it might be made certain by extrinsic evidence that

(e) "The same intention must be collected from the same words of a contract in writing, whether with or without a seal." Per Lord *Ellenborough*, in *Seddon v. Senate*, 13 East, 74; *Robertson v. French*, 4 East, 130, 135; per *Tindal, C. J.*, in *Hargrave v. Snee*, 3 Moore & P. 581; per *Shaw, C. J.*, in *Kane v. Hood*, 13 Pick. 282.

(f) "Whenever," says *Wilkes, C. J.*, in *Parkhurst v. Smith, Wilkes*, 332, "it is necessary to give an opinion upon the doubtful words of a deed, the first thing we ought to inquire into is, What was the intention of the parties? If the intent

be as doubtful as the words, it will be of no assistance at all. But if the intent of the parties be plain and clear, we ought if possible to put such a construction on the doubtful words of the deed as will best answer the intention of the parties, and reject that construction which manifestly tends to overturn and destroy it. I admit, that, though the intent of the parties be never so clear, it cannot take place contrary to the rules of law, nor can we put words in a deed which are not there, nor put a construction on the words of a deed directly contrary to the plain sense of them."

it was so intended. (g). So if parties used in *a contract * 496 technical words of the law-merchant, such as average, or

(g) This is a rule which should be constantly borne in mind in putting a construction upon any legal instrument. It is admirably expounded by Lord Chief Baron *Eyre*, in the opinion delivered by him before the House of Lords in the great case of *Gibson v. Minet*, 1 H. Bl. 569, 614. One of the questions agitated in that case was, whether a bill of exchange drawn, payable to a fictitious payee, and purporting to be by him indorsed, could be construed as a bill payable to bearer. A majority of the judges who delivered opinions, argued in favor of such a construction, and urged, among other arguments, the case of deeds of conveyance, which are frequently made to operate in a manner different from what the parties intended. But the learned Chief Baron delivered a very powerful opinion against adopting the construction in question. After noticing the argument derived from deeds of conveyance, and urging that there was no analogy between them and bills of exchange, he continued: "But let it be supposed, for the sake of the argument, that there may be some analogy between deeds and bills of exchange; I ask, What are the instances in which construction and interpretation have taken so great a liberty with deeds, as to afford an argument by analogy for construing in this case a bill drawn payable to order to be a bill drawn payable to bearer? The instances which had occurred to me, as likely to be insisted upon, do in my apprehension afford no argument in favor of this position. A deed of feoffment upon consideration without livery may enure as a covenant to stand seised to the use of the intended feoffee. A deed importing to be a grant by two, one having a present, the other a future interest, may enure as the grant of the former, and the confirmation of the latter. A feoffment without livery operates nothing as a feoffment, is in truth no feoffment, but is a deed which under circumstances may operate as a covenant to stand seised to use. Why? The feoffor has by the deed agreed to transfer the seisin and his right in the subject to the feoffee. If the consideration is a money consideration, or a consideration of blood, which is more valuable than money, the law raises out of the contract an use in favor of the intended feoffee. The seisin which remains in the feoffor, because the deed is insufficient to pass it, must remain in him, bound by the use. This is the effect of

the feoffor's own agreement, plainly expressed upon the face of this deed. His agreement by his deed is in law a covenant, and by this simple process does his intended feoffment become, in construction of law, his covenant to stand seised to uses. It is a construction put upon the words of his deed, which *his words will bear*. So a deed importing a grant of an interest by two, one entitled in possession, the other in reversion, is, in consideration of law, the grant of the first and the confirmation of the second. Why? The deed imports to be the grant of a present estate by both, and it is the apparent intent of both that the grantees shall have the estate so granted; but the deed of the latter having no present interest to operate upon as a grant, nothing can pass by it as a grant. But this party has a future interest in the subject, out of which he may make good to the grantees the estate granted to him by the first grantor. This is to be done by a particular species of conveyance, called a confirmation. The words which are used in this deed, in their strict technical sense, are words of confirmation as much as they are words of grant. In the mouth of this party the law says, that they are words of confirmation, and shall enure as words of confirmation, in order to give effect to his deed, *ut res magis taleat quam pereat*. Here again the construction which the law puts upon the words of the deed is a construction *which the words will bear*. The words have several technical senses, of which this is one, and the law prefers this, because it carries into execution the clear intent of the parties, that the estate and interest conveyed by that deed shall pass. In both those cases we find words interpreted, not in their most general and obvious sense it is true; but if they are interpreted in a manner which the *jus et formâ loquendi* in conveyances will warrant, there is nothing of violence in such construction. Indeed, I do not know how it would be possible to read a single page of history in any language, without using the same latitude of construction and interpretation of words. To go one step beyond these instances: I venture to lay it down as a general rule respecting the interpretation of deeds, that all latitude of construction must submit to this restriction, namely, *that the words may bear the sense which by construction is put upon them*. If we step beyond this line, we no longer construe men's deeds, but make deeds for them." And see *Stratton v.*

agio, or grace ; these words could not be wrested from their customary and established meaning, on the ground that the parties used them in a sense which had never before been given to them. (*h*) But words will be interpreted with unusual extent of meaning, and held to be *generic* rather than *specific*, and thus made to cover things which are collateral rather than identical, if the certain meaning of the parties, and the obvious justice of the case, require this extent of signification. Thus, the word "men" will be interpreted to mean "mankind," and to include women ; (*i*) and the word "bucks" has been construed to include "does;" and the word "horses" construed to mean "mares." (*j*)¹

A distinction is to be observed between the construction of a contract and the correction of a mistake. For, if it were in proof that the parties had intended to use one word, and that another was in fact used by a mere verbal error in copying or writing, such error might be corrected by a court of equity, upon a bill filed for that purpose ; and the instrument so corrected would be looked upon as the contract which the parties had made, and be interpreted accordingly. (*k*) But this jurisdiction is confined strictly to those cases where different *language* has been used from that which the parties intended. For if the words employed were those intended to be used, but their actual meaning was totally different

from that which the parties supposed and intended them to bear, still this actual meaning would, generally if not always, be held to be their legal meaning. (*l*) Upon sufficient proof that the contract did not express the meaning of the parties, it might be set aside ; but a contract which the parties intended to make, but did not make, cannot be set up in the place of one which they did make, but did not intend to make.

As an illustration of the principle which permits a construction in some cases which it refuses in other cases, it may be said, that

Pettit, 16 C. B. 420, 30 Eng. L. & Eq. 479 ; - (*j*) State v. Dunnivant, 3 Brev. 9. The Loughor Coal and Railway Co. v. And see Packard v. Hill, 7 Cowen, 434, Williams, C. B. 1855, 30 Eng. L. & Eq. 5 Wend. 375.

496; Ingalls v. Cole, 47 Me. 530. (*k*) Adams's Doctrine of Equity, p. 169
(*h*) See Hutchison v. Bowker, 5 M. & *et seq.* W. 535. (*l*) Ibid.

(*i*) Bro. Abr. Exposition del Terms, 39.

¹ "Cattle" has been construed to include hogs, Decatur Bank v. St. Louis Bank, 21 Wall. 294 ; "timber" to include railroad ties, Kollock v. Parcher, 52 Wis. 393 ; "flax," raised for seed, not for fibre, as "grain," within the meaning of the word as used by the parties to a policy of insurance, Hewitt v. Watertown Ins. Co. 55 Ia. 323 ; and "patterns," as tools, Lovewell v. Westchester Ins. Co. 124 Mass. 418.

where the conjunctive "and" is used in a connection which is thus rendered senseless, and the substitution of "or" will establish a sense consistent with the other parts of the document, such a change is admissible by the rules of legal construction; and this rule is sometimes applied in the construction of wills. (m) If, however, the connection may have a definite meaning by retaining the conjunctive "and," though not so obvious a meaning as the substitution of "or" would give, and either meaning would be consistent with the rest of the document, the change would not be authorized. (n)

So the rules of law, as well as the rules of language, may interfere to prevent a construction in accordance with the intent of the parties. Thus, if parties agreed that one should pay the other, for a certain consideration, sums of money at various times "with interest," and it was clear, either from the whole contract or from independent evidence, that the parties meant by this "compound interest," it may be presumed (assuming that a contract for compound interest is unlawful), that no court would admit this interpretation; because, if the bargain were expressly for compound interest, it would be invalid. Nor would a contract to pay interest be avoided by evidence that the parties understood compound interest, if it were made in good faith, and for a valid consideration. The law would consider the contract as defining the principal sums due, and then would put upon the word interest its own legal interpretation.

So, too, if a manufacturer agrees to make and finish certain goods "as soon as possible," this means within a *reasonable time*, due regard being had to the manufacturer's means, * 498 his engagements, and the nature of the articles. (o)¹

It may be true, ethically, that a party is bound by the meaning which he knew the other party to intend, or to believe that he himself intended; (p) but certainly this is not always legally

(m) *Maynard v. Wright*, 26 Beav. 285.

(n) *Secombe v. Edwards*, 28 Beav. 440.

(o) *Atwood v. Emery*, 1 C. B. (N. S.) 110.

(p) "Where the terms of the promise

admit of more senses than one, the promisee is to be performed in that sense in which the promisor apprehended, at the time the promisee received it." Paley's Mor. and Pol. Philosophy, 104. Where the terms of an instrument are fairly suscep-

¹ *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D. 670, held, that to make a thing "as soon as possible" means to make it within a reasonable time, assuming that the manufacturer had at the time all reasonable appliances to enable him to proceed without delay, and that an accident, within his control, preventing his setting to work with reasonable diligence, would not excuse him.

true. Thus, in the cases already supposed, he who was to give might know that the party who was to receive (a foreigner, perhaps, unacquainted with our language), believed that the promise was for "oxen," when the word "horses" was used; but nevertheless an action *on this contract* could not be sustained for "oxen." So if he who was to pay money knew that the payee expected compound interest, this would not make him liable for compound interest as such, although the specific sums payable were made less because they were to bear compound interest. In all these cases, it is one question whether an action may be maintained *on the contract so explained*, and another very different question, whether the contract may not be entirely set aside, because it fails to express the meaning of the parties, or is tainted with fraud; and being so avoided, the parties will then fall back upon the rights and remedies that may belong to their mutual relations and responsibilities. These must be determined by the evidence in the case; and the very contract, which, *as a contract*, could not be *enforced, may perhaps be evidence of great importance as to the rights and liabilities of the parties.

* 499 It is therefore obvious that it is not enough, in every instance, to ascertain the meaning of the parties. It is, however, always true that this is of the utmost importance, and often sufficient to determine the construction. And courts of law have established various rules to enable them to ascertain this meaning, or to choose between possible meanings.

tible of the meaning in which the promisor believed they were understood by the promisee, and in which they were actually understood, the rule of Paley is as good in law as in ethics. See an application of the rule in *Potter v. Ontario and Livingston Mut. Ins. Co.* 5 Hill, 147, per *Bronson, J.* In this case, one of the conditions of a fire policy was, that in case the assured should make any other insurance on the same property, and should not with all reasonable diligence give notice thereof to the company, and have the same indorsed on the policy, or otherwise acknowledged or approved by them in writing, the policy should cease and be of no further effect. A further insurance was effected and notice given to the company. It was answered by the secretary of the

company in these words: "I have received your notice of additional insurance." *Bronson, J.*, after stating Paley's rule, as above given, says: "Now how did the defendants apprehend at the time that the plaintiff would receive their answer? If they secretly reserved the right of approval or disapproval at a future period, could they have believed that their written answer would be so received by the plaintiff? I think not. They must have intended the plaintiff should understand from the answer, that everything had been done which was necessary to a continuance of the policy, and consequently that they approved, as well as acknowledged, the further insurance." See also 1 *Duer on Ins.* 159.

SECTION III.

SOME OF THE GENERAL RULES OF CONSTRUCTION.

The subject-matter of the contract is to be fully considered. (q) There are very many words and phrases which have one meaning in ordinary narration or composition, and quite another when they are used as technical words in relation to some special subject; and it is obvious, that, if this be the subject-matter of the contract, it must be supposed that the words are used in this specific and technical sense.

So, too, the situation of the parties at the time, and of the property which is the subject-matter of the contract, and the intention and purpose of the parties in making the contract, will often be of great service in guiding the construction; because, as has been said, this intention will be carried into effect so far as the rules of language and the rules of law will permit. (qq) So the moral rule above referred to may be applicable; because a * party will be held to that meaning which he knew the * 500 other party supposed the words to bear, if this can be done without making a new contract for the parties.

Indeed, the very idea and purpose of construction imply a previous uncertainty as to the meaning of the contract; for where this is clear and unambiguous, there is no room for construction, and nothing for construction to do. A court would not, by construction of a contract, defeat the express stipulations of the parties. And if a contract is false to the actual meaning and purpose

(q) *The King v. Mashiter*, 1 Nev. & P. 326, 327. Where an executrix promised to pay a simple contract debt, "when sufficient effects were received" from the estate of the testator, it was held, that this must be understood to mean effects legally applicable to the debt in question, and that the executrix might first pay a bond debt. *Bowerbank v. Monteiro*, 4 Taunt. 844. So, where it was agreed in a charter-party to employ a captured ship, "as soon as sentence of condemnation should have passed," it was held, that a legal sentence was meant. *Unwin v. Wolseley*, 1 T. R. 674. If an annuity be granted to one, "pro consilio impenso et impendendo" (for past and future counsel), if the grantee be a physician, this shall be understood of his advice as a physician; and if he be a lawyer, of his advice in legal matters. *Shep. Touch.* p. 86. See *Littlefield v. Winslow*, 19 Me. 394, 398; *Sumner v. Williams*, 8 Mass. 162, 214; *Robinson v. Fiske*, 25 Me. 401; *Philbrook v. New England Mut. Fire Ins. Co.* 37 id. 137.

(qq) Thus, a contract to convey "a house and lot of land in Amity Street, Lynn, Mass." was held to mean a house and land owned by the vendor when the contract was made. *Hurley v. Brown*, 98 Mass. 545.

* 502 * reason is obvious. The same parties make all the contract, and may be supposed to have had the same purpose and ob-

* 503 ject * in view in all of it, and if this purpose is more clear and certain in some parts than in others, those which are obscure may be illustrated by the light of others. Thus, the condition of a bond may be considered to explain the obligatory part. (v) And the recital in a deed or agreement has sometimes great influence in the interpretation of other parts of the instrument. (w) The contract may be contained in several instruments, which, if made at the same time, between the same parties, and in relation to the same subject, will be held to constitute but one contract, (x) and the court will read them in such order of time

v. Homersham, 4 M. & S. 426. See also *Ramsden v. Hylton*, 2 Ves. 210; *Lampon v. Corke*, 5 B. & Ald. 606; *Simons v. Johnson*, 3 B. & Ad. 175; *Lyman v. Clark*, 9 Mass. 235; *Rich v. Lord*, 18 Pick. 325; *Jackson v. Stackhouse*, 1 Cowen, 122; *McIntyre v. Williamson*, 1 Edw. Ch. 34. For the construction of *sweeping clauses*, see *Moore v. Magrath*, Cowp. 9.—For the effect of recitals upon the construction of mercantile instruments, see *Bell v. Bruen*, 1 How. 169, 184; *Lawrence v. McCalmot*, 2 id. 426, 449.—In *Browning v. Wright*, 2 B. & P. 13, A, after granting certain premises in fee to B, and after warranting the same against himself and his heirs, covenanted, that, notwithstanding any act by him done to the contrary, he was seized of the premises in fee, and that he had full power, &c., to convey the same; he then covenanted for himself, his heirs, executors, and administrators, to make a cartway, and that B should quietly enjoy without interruption from himself or any persons claiming under him, and, lastly, that he, his heirs and assigns, and all persons claiming under him, should make further assurance. Held, that the intervening general words, "full power, &c., to convey," were either part of the preceding special covenant; or, if not, that they were qualified by all the other special covenants against the acts of himself and his heirs. See the admirable opinion of Lord *Eldon*. See also *Hesse v. Stevenson*, 3 B. & P. 565; *Nind v. Marshall*, 3 J. B. Moore, 703; *Broughton v. Conway*, Dyer, 240 a; *Cole v. Hawes*, 2 Johns. Cas. 205; *Whallon v. Kauffman*, 19 Johns. 97; *Barton v. Fitzgerald*, 15 East, 530; *Saward v. Antsey*, 10 J. B. Moore, 55; *Chapin v. Clemitsen*, 1 Barb. 311; *Mills v. Catlin*, 22 Vt. 98.—Where, in a statute, general words follow particular ones, the rule is to construe

them, as applicable to subjects *cujusdam generis*. Thus, in *Sandiman v. Breach*, 7 B. & C. 96, a question arose upon the Statute 29 Car. II. c. 7, which enacts "that no tradesman, artificer, workman, laborer, or other person or persons, shall do or exercise any worldly labor, business, or work of their ordinary callings, upon the Lord's day." It was contended, that under the words "other person or persons" the drivers of stage-coaches were included. Held, otherwise for the above reasons. See *The Queen v. Nevill*, 8 Q. B. 452.—For the application of this rule to deeds of conveyance where there are particular enumerations or descriptions, see *Doe v. Meyrick*, 2 Cromp. & J. 223; *Jackson v. Stevens*, 16 Johns. 110. See also *Hall v. Mayhew*, 15 Md. 551. Where there was a sale of land for a sum in gross, and the title papers upon which the purchaser relied described the quantity as being estimated to contain 482 acres and 32 perches, be the same more or less, the tract was found to contain but 378 acres. Held, that the purchaser was not entitled to an abatement for the deficiency. Parts struck out of an instrument may, it seems, be regarded in its construction. *Strickland v. Maxwell*, 2 Cromp. & M. 539. As land cannot pass as an "appurtenance" to land, so neither can a railroad pass as an appurtenance to another railroad. *Philadelphia v. Philadelphia*, &c. R. R. Co. 58 Penn. St. 253.

(v) *Coles v. Hulme*, 8 B. & C. 568.

(w) *Moore v. Magrath*, Cowp. 9; *Cholmondeley v. Clinton*, 2 B. & Ald. 625.

(x) *Coldham v. Showler*, 3 C. B. 312; *Makepeace v. Harvard College*, 10 Pick. 298; *Sibley v. Holden*, id. 249; *Odiorne v. Sargent*, 6 N. H. 401; *Raymond v. Roberts*, 2 Aikens, 204; *Strong v. Barnes*, 11 Vt. 221; *Taylor d. Atkins v. Horde*,

and priority as will carry into effect the intention of the parties, as the same may be gathered from all the instruments taken together. (y) And the recitals in each may be explained or corrected by a reference to any other, in the same way as if they were only several parts of one instrument. (z)

Another rule requires that the contract should be supported rather than defeated. (a) Thus, a deed which cannot operate * in the precise way in which it is intended to take * 504 effect, shall yet be construed in another, if in this other it can be made effectual. (b) For example, a deed intended for a release, which cannot operate as such, may still take effect as a grant of the reversion, as a surrender, or an atonement; or even

¹ Burr. 60, 117; Jackson *v.* Dunsbagh, 1 Johns. Cas. 91; Hills *v.* Miller, 3 Paige, 254; Sewall *v.* Henry, 9 Ala. 24; Applegate *v.* Jacoby, 9 Dana, 209; Cornell *v.* Todd, 2 Denio, 130; Craig *v.* Wells, 1 Kern. 315; Rutland & Burlington R. Co. *r.* Crocker, U. S. C. C., Vt. 1858, 21 Law Reporter, 201. So, also, though the instruments are not made at the same time, if they can be connected together by a reference from one to the other. Van Hagan *v.* Van Rensselaer, 18 Johns. 420; Sawyer *v.* Hammatt, 15 Me. 40; Adams *v.* Hill, 16 id. 215.

(y) Whitehurst *v.* Boyd, 8 Ala. 375; Newhall *v.* Wright, 3 Mass. 138.

(z) Sawyer *v.* Hammatt, 15 Me. 40.

(a) Smith *v.* Packhurst, 3 Atk. 135; Pollock *v.* Stacy, 9 Q. B. 1033. In Pugh *v.* Leeds, Cowp. 714, there was a power to make leases in possession, but not in reversion. A lease was granted for twenty-one years, to commence from the day of the date. Held, that "from the day," &c., was to be regarded as inclusive, and not exclusive, of the day of the date. Lord Mansfield said: "The ground of the opinion and judgment which I now deliver is, that 'from' may, in the vulgar use, and even in the strictest propriety of language, mean either *inclusive* or *exclusive*; that the parties necessarily understood and used it in that sense which made their deed effectual; that the courts of justice are to construe the words of parties so as to effectuate their deeds, and not to destroy them; more especially where the words themselves abstractedly may admit of either meaning." In Brown *v.* Slater, 16 Conn. 192, the following agreement was entered into: "Farmington, Oct. 15th, 1825. In consideration of Mrs. Nancy Hart's becoming my wife, I promise to give her at the rate of one dollar per

week, from the date of our marriage, so long as she remains my wife. Elias Brown." This contract was put in suit after the death of the husband, and the defence was, that it was extinguished by the marriage of the parties. Held, however, that the contract, being made in contemplation of marriage, and purporting to hold forth a benefit to the promissee, a court of law would construe it as providing for the payment of a sum of money to her after the termination of the coverture, the amount to be ascertained by its duration. Williams, C. J., said: "If a contract admits of more than one construction, one of which will render it ineffectual or nullify it, that construction should be adopted which will carry it into effect. For there is no presumption against the validity of contracts." See, in illustration of this principle, Broom *v.* Batchelor, 1 H. & N. 255. In Atkins *v.* Sleeper, 7 Allen, 487, it was held, that a lease "from the first day of July" begins on the second day of July.

(b) Goodtitle *v.* Bailey, Cowp. 600; Doe *v.* Salkeld, Willes, 673; Haggerston *v.* Hanbury, 5 B. & C. 101; Wallis *v.* Wallis, 4 Mass. 133; Parker *v.* Nichols, 7 Pick. 111; Russell *v.* Coffin, 8 id. 143; Brewer *v.* Hardy, 22 id. 376; Jackson *v.* Blodget, 16 Johns. 172; Rogers *r.* Eagle Fire Ins. Co. 9 Wend. 611; Barrett *v.* French, 1 Conn. 354; Bryan *v.* Bradley, 16 id. 474. "The judges in these latter times (and I think very rightly) have gone further than formerly, and have had more consideration for the substance, namely, — the passing of the estate according to the intent of the parties, than the shadow, namely, — the manner of passing it." Per Willes, C. J., in Roe *v.* Trammarr, Willes, 684. See also *ante*, p. * 495, note (g).

as a covenant to stand seised. (c) So a deed of bargain and sale, void for want of enrolment, has been held to take effect as a grant of the reversion. (d) If several grantors join in a deed, some of whom are able to convey and others not, it is the deed of him or them alone who are able. (e) And if there be several grantees, one of whom is capable of taking and the others not, it shall enure to him alone who can take. (f) So if a mortgagor and mortgagee join, it is the grant of the mortgagee and the confirmation of the mortgagor. (g) And if a charter will bear a double construction, and in one sense it can effect its purposes, and in the other not, it will receive the construction which will make it efficacious. (h) The court cannot, however, through a desire that there should be a valid contract between the parties, undertake to reconcile conflicting and antagonistic expressions, of which the inconsistency is so great that the meaning of the parties is necessarily uncertain. Nor where the language distinctly imports illegality, should they construe it in a different and a legal

* 505 sense, for this would be to make a *contract for the parties which they have not made themselves. But where there is room for it, the court will give a rational and equitable interpretation, which, though neither necessary nor obvious, has the advantage of being just and legal, and supposes a lawful contract which the parties may fairly be regarded as having made. So, for the same reason, all the parts of the contract will be construed in such a way as to give force and validity to all of them, and to all of the language used, where that is possible. (i) And

(c) *Shep. Touch.* 82; *Roe v. Tranmarr, Willes,* 682.

(d) *Smith v. Frederick,* 1 Russ. 174, 209; *Adams v. Steer, Cro. Jac.* 210; *Lynch v. Livingston,* 8 Barb. 463, 2 Seld. 422.

(e) *Shep. Touch.* 81, 82.

(f) *Shep. Touch.* 82.

(g) *Doe v. Adams,* 2 Cromp. & J. 232; *Doe v. Goldsmith,* id. 674; *Treport's case,* 6 Rep. 15.

(h) *Molyn's case,* 6 Rep. 6 a; *Churchwardens of St. Saviour,* 10 id. 67 b.

(i) Thus in *Evans v. Sanders,* 8 Port. 497, there was a promise to pay a sum of money, Jan. 1, 1836, "with interest from 1835." Held, that the expression "from 1835," in order that it might have some operation, must be construed as meaning from the first of January, 1835. This rule is well illustrated also by a case put by Rutherford, in his *Institutes of Nat-*

ural Law, b. 2, c. 7. "If a testator," says he, "bequeathes all his plate to his elder son, except one thousand ounces, which he bequeathes to his younger son, and directs that the elder shall, at a certain time, deliver to the younger one thousand ounces of the said plate, of such sort and such pieces as he pleases; this rule would determine the intention of the testator to have been, that his younger son should have the choice of the sort and the pieces. The ambiguous words — of such sort and such pieces as he pleases — would in the contrary construction be needless, and produce no effect. If the choice had been intended for the elder son, the testator would have had no occasion to add these words. For by leaving all his plate to the elder, except one thousand ounces of it, which the elder within a certain time is to deliver to the younger, the sort and pieces to be delivered would of course have been

even parts or provisions which are comparatively unimportant, and may be severed from the contract without impairing its effect or changing its character, will be suppressed as it were, if in that way, and only in that way, the contract can be sustained and enforced.

This desire of the law to effectuate rather than defeat a contract, is wise, just, and beneficial. But it may be too strong. And in some instances language is used in reference to this subject which itself needs construction, and a construction which shall greatly qualify its meaning. Thus, Lord C. J. *Hobart* said: "I do exceedingly commend the judges that are curious and almost subtle, *astute* (which is the word used in the Proverbs of Solomon in a good sense when it is to a good end), to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the act." (j) Lord *Hale* quotes and approves these words, (k) and *Willes*, C. J., quoting * *Hale's* * 506 approbation, adds his own. (l) And yet this cannot be sound doctrine; it cannot be the duty of a court that sits to administer the law, and for no other purpose, to be curious and subtle or astute, or to invent reasons and make acts in order to escape from rigid rules. All that can be true or wise in this doctrine is, that courts should make, not rigid, but wise and just rules, and should then, by their help, effectuate a contract or an instrument wherever this can be done by a perfectly fair and entirely rational construction of the language actually used. To do more than this would be to sacrifice to the apparent right of one party in one case, that steadfast adherence to law and principle, which constitutes the only protection and defence of all rights, and all parties.

Another rule requires that all instruments should be construed "*contra proferentem*;" that is, against him who gives or undertakes, or enters into an obligation. (m) This rule of construction

at the option of the elder; since the younger would by the will have had no claim but to a certain weight of plate." See also *Stratton v. Pettit*, 16 C. B. 420.

(j) *Claarickard v. Sidney*, Hob. 277.

(k) *Crossing v. Scudamore*, 1 Vent. 141.

(l) *Doe v. Salkeld*, *Willes*, 676; *Roe v. Tranmarr*, *id.* 684.

(m) *Windham's case*, 5 Rep. 7 b;

Chapman v. Dalton, *Plowd.* 289; *The Ada*, *Daveis*, 407; *Thrall v. Newell*, 19 Vt. 202; per *Alderson*, B., in *Meyer v. Isaac*, 6 M. & W. 612. This rule of construction — *verba chartarum fortius accipiantur contra proferentem* — is well illustrated by the case of *Dann v. Spurrier*, 3 B. & P. 399, in which it was held, that a lease to one, "to hold for seven, fourteen, or twenty-one years," gave to the lessee, and

is reversed in its application to the grants of the sovereign; for these are construed favorably to the sovereign, although he

* 507 is grantor. (n) The reason of the rule "*contra * proferen-*

him alone, the option at which of the periods named the lease should determine. See also *Doe v. Dixon*, 9 East, 15.—The construction of grants should be favorable to the grantee. *Throckmorton v. Tracy*, Plowd. 154, 161; *Doe v. Williams*, 1 H. Bl. 25; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 589; *Jackson v. Blodget*, 16 Johns. 172; *Melvin v. Proprietors, &c. on Mer. River*, 5 Met. 15, 27; *Cocheco Man. Co. v. Whittier*, 10 N. H. 305; *Lincoln v. Wilder*, 29 Me. 169; *Mills v. Catlin*, 22 Vt. 98; *Winslow v. Patten*, 34 Me. 25; *Pike v. Monroe*, 36 id. 309. This construction, however, must be a fair and just one; for "there is a kind of equity in grants, so that they shall not be taken unreasonably against the grantor, and yet shall with reason be extended most liberally for the grantee." Per *Saunders*, J., in *Throckmorton v. Tracy*, Plowd. 161.

(n) *Willion v. Berkley*, Plowd. 243; *Jackson v. Reeves*, 3 Caines, 293. They shall, however, "have no strict or narrow interpretation for the overthrowing of them," but a "liberal and favorable construction for the making of them available in law, *usque ad plenitudinem*, for the honor of the king." 2 Inst. 496. "And so note," saith Lord Coke, "the gravity of the ancient sages of the law to construe the king's grant beneficially for his honor, and the relief of the subject, and not to make any strict or literal construction in subversion of such grants." *Molyn's case*, 6 Rep. 6 a. See also *Churchwardens of St. Saviour*, 10 id. 67 b. Accordingly, the rule in question is of less weight than the rule that an instrument should be supported rather than defeated; and is not applied to defeat a contract entirely, but only to limit the extent of the grant; for a grantor, whether king or subject, is always held to have intended something by his grant. "It is a well-known rule, in the construction of private grants, if the meaning of the words be doubtful, to construe them most strongly against the grantor. But it is said that an opposite rule prevails in cases of grants by the king; for where there is any doubt, the construction is made most favorably for the king and against the grantee. The rule is not disputed. But it is of very limited application. To what cases does it apply? To such cases only where there is a real doubt, where the grant admits of two interpretations, one of which is more

extensive and the other more restricted; so that a choice is fairly open, and either may be adopted without any violation of the apparent objects of the grant. If the king's grant admits of two interpretations, one of which will make it utterly void and worthless, and the other will give it a reasonable effect, then the latter is to prevail; for the reason (says the common law), 'that it will be more for the *benefit* of the subject and the *honor* of the king, which is more to be regarded than his profit.' 10 Co. 67 b. And in every case the rule is made to bend to the real justice and integrity of the case. No strained or extravagant construction is to be made in favor of the king. And if the intention of the grant is obvious, a fair and liberal interpretation of its terms is enforced." Per *Story*, J., *Charles River Bridge v. Warren Bridge*, 11 Pet. 591, 597. It is laid down by Mr. Justice *Story*, that the grants of the sovereign are construed against the grantee only in cases of mere donation, and not where there is a valuable consideration; that the rule has no application in cases of legislative grants. 11 Pet. 597, 598. It is just and reasonable that the construction should be favorable to the grantee, in the case of a conveyance of lands by the sovereign for a valuable consideration; but where exclusive privileges are given to an individual or to a company, and rights conferred restrictive of those of the public or of private persons, the construction, in cases of doubt or ambiguity, is against the grantee, especially where burdens are imposed upon the public, as in the case of rates of toll imposed for the benefit of a company. In *Stourbridge Can. Co. v. Wheeley*, 2 B. & Ad. 792, where a right of taking toll was given to a company, Lord *Tenterden* used the following language: "This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this: that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public; and the plaintiffs can claim nothing which is not clearly given to them by the act." *Blakemore v. Glamorganshire Can. Nav.* 1 Mylne & K. 154, 162, per Lord *Eldon*; *Gildart v. Gladstone*, 11 East, 675, 685; *Leeds and Liverpool Can. Co. v. Hustler*, 1 B. & C. 424; *Barrett v. Stockton*, &c.

tem," is, that men may be supposed to take care of themselves ; and that he who gives, and chooses the words by which he gives, ought to be held to a strict interpretation of them, rather than he who only accepts. (*o*)¹ But the reason is not a very strong one, nor is the rule of special value. It is indeed often spoken of as one not to be favored or applied, unless other principles of interpretation fail to decide a question. (*p*) It is of course most applicable to deeds-poll ; (*q*) as, * if tenant in fee- * 508

Railway Co. 2 Man. & G. 134 ; Parker v. Great Western Railway Co. 7 id. 253 ; Mohawk Bridge Co. v. Utica & Sch. R. R. Co. 6 Paige, 554. In Priestley v. Foulds, 2 Man. & G. 194, in the case of a legislative grant to a company such as those above mentioned, Colman, J., said : "The words of the act must be considered as the language of the company, which ought to be construed *fortius contra proferentem*." — This rule of construction, "*contra proferentem*," is applied in pleading. Bac. Max. Reg. 3 ; but is not applied to wills, nor to statutes, verdicts, judgments, &c., which are not words of parties. Ib.

(*o*) Per Alderson, B., in Meyer v. Isaac, 6 M. & W. 612.

(*p*) "It is to be noted," saith Lord Bacon, "that this rule is the last to be resorted to, and is never to be relied upon but where all other rules of exposition of words fail ; and if any other come in place, this giveth place. And that is a point worthy to be observed generally in the rules of the law, that when they encounter and cross one another in any case, it be understood which the law holdeth worthier, and to be preferred ; and it is in this particular very notable to consider, that this being a rule of some strictness and rigor, doth not as it were its office, but in absence of other rules which are of more equity and humanity." Bac. Max. Reg. 3. See also Love v. Pares, 13 East, 80. So in Adams v. Warner, 23 Vt. 411, 412, Mr. Justice Redfield said : "This rule of construction is not properly applicable to any case, but one of strict *equivocation*, where the words used will bear either one of two or more interpretations equally well. In such a case if there be no other legitimate mode of determining the equi-poise, this rule might well enough decide the case. In all other cases, where this rule of construction is dragged in by way of argument, — and that is almost always where it happens to fall on the side which we desire to support, — it is used as a

mere makeweight, and is rather an argument than a reason." See also Doe v. Dodd, 5 B. & Ad. 689.

(*q*) The reason given in the books for the application of this rule to deeds-poll, and not to indentures, is that in deeds-poll the words are the words of the grantor alone, while in indentures they are the words of both parties. 2 Bl. Com. 380 ; Browning v. Beeton, Plowd. 134. The distinction seems, however, to be in a good degree without foundation. It is true that the words of a deed-poll are the words of the grantor alone, but it is not true that the words of an indenture are the words of both parties in any such sense as to make the rule in question inapplicable. See *Gaudy, arguendo*, in Browning v. Beeton, Plowd. 136. Words of exception or reservation in any instrument are regarded as the words of the party in whose favor the exception or reservation is made. Lofield's case, 10 Rep. 106 b ; Hill v. Grange, Plowd. 171 ; Blackett v. Roval Exch. Ass. Co. 2 Crompt. & J. 244, 251 ; Donnell v. Columbian Ins. Co. 2 Sumner, 366, 381 ; Palmer v. Warren Ins. Co. 1 Story, 360. And they would be construed against such party. Id. ; Cardigan v. Armitage, 2 B. & C. 197 ; Bulen v. Denning, 5 id. 842 ; Jackson v. Hudson, 3 Johns. 387 ; House v. Palmer, 9 Ga. 497 ; Jackson v. Lawrence, 11 Johns. 191. Separate covenants in an indenture on the part of the lessor and lessee, and indeed any stipulation on the part of either party to an agreement, would be regarded as the covenants and stipulations of the party bound to do the thing agreed upon, and the rule of construction "*contra proferentem*," would apply to such cases, subject to all the limitations which properly belong to it. "It is certainly true," says Lord Eldon, "that the words of a covenant are to be taken most strongly against the covenantor ; but that must be qualified by the observation that a due regard must be paid to the intention of the parties, as collected

¹ Thus an obscure contract also is to be interpreted most strongly against the party making it. Wetmore v. Pattison, 45 Mich. 439.

simple grants an estate "for life," it is held to be for the life of the grantee. (r) Where there is an indenture, the words may be taken as the words of both parties. But if in fact one gives and the other receives, the same rule applies as in case of deeds-poll. (s) As if two tenants in common grant a rent of twenty shillings, the grantee takes forty, or twenty from each; but if they reserve in a lease twenty shillings, they take only the twenty, or ten each. (t) And, in general, if a deed may enure to several different purposes, he to whom it is made may elect in what way to take it. (u) Thus, if an instrument may be either a bill or promissory note, the holder may elect which to consider it. (v) So if a carrier gives two notices limiting his responsibility, he is bound by that which is the least favorable to himself. (w) So a notice under which one claims a general lien is to be construed against the claimant. The same rule, we think, applies to the case of an accepted guaranty, though upon this point the authorities are somewhat conflicting. (x)

from the whole context of the instrument." Browning v. Wright, 2 B. & P. 22; Earl of Shrewsbury v. Gould, 2 B. & Ald. 487, 494; Barton v. Fitzgerald, 15 East, 530, 546.

(r) Co. Litt. 42 a.

(s) See *supra*, n. (q).

(t) Browning v. Beston, Plowd. 140; Throckmorton v. Tracy, id. 161; Hill v. Grange, id. 171; Chapman v. Dalton, id. 289; Shep. Touch. 98; Co. Litt. 197 a.

(u) Shep. Touch. 88; Heywood's case, 2 Rep. 38 b; Jackson v. Hudson, 3 Johns. 387; Jackson v. Blodget, 16 id. 172, 178.

(v) Eddie v. Bury, 6 B. & C. 438; Block v. Bell, 1 Moody & R. 149; Miller v. Thompson, 4 Scott, N. R. 204.

(w) Munn v. Baker, 2 Stark. 255. See also *ante*, vol. ii. p. * 252, n. (z).

(x) Some judges have been of opinion that the contract of guaranty is a contract *strictissimi juris*, and to be construed in favor of the guarantor. Thus, in Nicholson v. Paget, 1 Cromp. & M. 48, where the words were: "I hereby agree to be answerable for the payment of £50 for B, in case B does not pay for the gin, &c., which he receives from you, and I will pay the amount," the Court of Exchequer held that this was not a continuing guaranty. And Bayley, B., said: "This is a contract of guaranty, which is a contract of a peculiar description; for it is not a contract which a party is entering into for the payment of his own debt, or on his own behalf; but it is a contract which he is entering into for a third person; and we

think that it is the duty of the party who takes such a security to see that it is couched in such words as that the party so giving it may distinctly understand to what extent he is binding himself. . . . It is not unreasonable to expect from a party who is furnishing goods on the faith of a guaranty, that he will take the guaranty in terms which shall plainly and intelligibly point out to the party giving the guaranty the extent to which he expects that the liability is to be carried." And see, to the same effect, Melville v. Hayden, 3 B. & Ald. 593. On the other hand, in the latter case of Meyer v. Isaac, 6 M. & W. 605, 4 Jur. 437, the counsel for the defendant having cited Nicholson v. Paget, Parke, B., said: "Can you find any other authority in favor of that rule of construction? It certainly is at variance with the general principles of the common law, that words are always to be taken most strongly against the party using them. Here is a guaranty in the shape of a letter written by the defendant, with a view of inducing the plaintiff to give credit to a particular person. Now, a guaranty is one of that class of obligations which is only binding on one of the parties when the other chooses by his own act to make it binding on him also. This instrument only contains the words of one of the parties to it, namely, of the defendant; and does not affect the plaintiff until he acts upon it by supplying the goods." And Alanson, B., in delivering the judgment

* In cases of mutual gift or mutual promise, where * 510 neither party is more the giver or undertaker than the other, this rule would have no application. (y) Nor does it seem that it is permitted to effect the construction when a third party would be thereby injured. As if tenant in tail make a lease "for life" generally, this shall be construed to be a lease for the life of the lessor, that the reversioner may not suffer. (z) Another reason is, that a tenant in tail cannot legally grant a lease for another's life, and the rule of Lord Coke is applied; namely, that an intendment which stands with the law shall be preferred to one which is wrongful and against the law. (a) This rule, that words shall be construed "*contra proferentem*," was, says Lord Bacon, "drawn out of the depth of reason;" (b) but we have already intimated that it is among those principles of interpretation which have the least influence or value.

No precise form of words is necessary even in a specialty. (c) * Thus, words of recital in a deed will consti- * 511

of the court, said: "There is considerable difficulty in reconciling all the cases on this subject; which principally arises from the fact that they are not quite at one on the principle to be followed in deciding questions of this sort; some laying it down that a liberal construction ought to be made in favor of the person giving the guaranty; and others that it ought to be in favor of the party to whom it is given; which was the rule adopted by the Court of Queen's Bench in *Mason v. Pritchard*. Now, the generally received principle of law is, that the party making any instrument should take care so to express the nature of his own liability, as that he may not be bound beyond what it was his intention he should be, and, on the other hand, that the party who receives the instrument, and on the faith of it parts with his goods, which he would not, perhaps, have parted with otherwise, and is, moreover, not the person by whom the words of the instrument constituting the liability are used at all, should have that instrument construed in his favor. If, therefore, I were obliged to choose between the two conflicting principles which have been laid down on this subject, I should rather be disposed to agree with that given in *Mason v. Pritchard*, than with the opinion of *Bayley*, B., in *Nicholson v. Paget*." See also *Mason v. Pritchard*, 12 East, 227; *Hargrave v. Smee*, 6 Bing. 244. And see *cate*, vol. ii. p. * 21, and notes.

(y) Co. Litt. 42 a, 163 a. The condi-

tion of an obligation is considered as the language of the obligee, and so is construed in favor of the obligor. In the language of *Baldwin*, C. J., and *Fitzherbert*, J., in *Bold v. Molineux*, Dyer, 14 b, 17 a, "every condition of an obligation is as a defeasance of the obligation, as well as if the obligation were single, and after the obligee made indentures of defeasance, and it is all one, for the condition is the assent and agreement of the obligee, and made for the benefit of the obligor, and for that reason it shall always be taken most favorably for the obligor: as if a man be bound in an obligation to pay ten pounds before such a [feast] day, the obligor is not bound to pay it till the last instant of the next day preceding the feast, for he hath all that time for his liberty of payment. So is the law, if I be bound to you on condition to pay ten pounds before the feast of St. Thomas, and there are two feasts of St. Thomas, the latest feast is that before which I am bound to pay, and not sooner, for that is most for my advantage." See also *Shep. Touch.* 375, 376; *Powell on Contracts*, 396, 397; *Laughter's case*, 5 Rep. 22 a.

(z) Co. Litt. 42 a.

(a) See *ante*, p. * 500, note (r).

(b) Bac. Max. Reg. 3.

(c) "In our law," says *Catline*, Sergeant, *arguendo*, in *Browning v. Beston*, Plowd. 140, "if any persons are agreed upon a thing, and words are expressed or written to make the agreement, although

tute an agreement between the parties on which an action of covenant may be maintained. (d) And the recital in a deed of a previous agreement is equivalent to a confirmation and renewal of the agreement. (e) And words of proviso and condition will be construed into words of covenant, when such is the apparent intention and meaning of the parties. (f) And even words of reservation and exception in a lease have been held to operate as a grant of a right. (g) So a license may have effect as a grant of an incorporeal hereditament, if it be sealed and delivered, and authorizes the party to whom it is made to go on the licensor's land, and make some use of the land to his own profit. Not so if it be only a license to do some particular act, as to hunt in a man's park. The distinction between these is not always obvious; and the same license may operate as a grant as to some things, and as a mere license as to other things. (h)

they are not apt and usual words, yet if they have substance in them tending to the effect proposed, the law will take them to be of the same effect as usual words; for the law always regards the intention of the parties, and will apply the words to that which, in common presumption, may be taken to be their intent. And such laws are very commendable. For if the law should be so precise as always to insist upon a peculiar form and order of words in agreements, and would not regard the intention of the parties when it was expressed in other words of substance, but would rather apply the intention of the parties to the order and form of words, than the words to the intention of the parties, such law would be more full of form than of substance. But our law, which is the most reasonable law upon earth, regards the effect and substance of words more than the form of them, and takes the substance of words to imply the form thereof, rather than that the intent of the parties should be void." And see *Tench v. Cheese*, 6 De G., M. & G. 453, 31 Eng. L. & Eq. 392, 397, per *Cranworth*, L. C.

(d) *Severn v. Clerks*, 2 Leon. 122.

(e) *Barfoot v. Freswell*, 3 Keble, 465; *Saltoun v. Houstoun*, 1 Bing. 433; *Sampson v. Easterby*, 9 B. & C. 505.

(f) *Clapham v. Moyle*, 1 Lev. 155, 1 Keble, 842, Shep. Touch. 122; *Huff v. Nickerson*, 27 Me. 106. "Where the language of an agreement can be resolved into a covenant, the judicial inclination is so to construe it; and hence it has resulted, that certain features have ever

been held essential to the constitution of a condition. In the absence of any of these, it is not permitted to work the destructive effect the law otherwise attributes to it." *Per Bell, J., in Paschall v. Passmore*, 15 Penn. St. 295, 307.

(g) Thus, in *Wickham v. Hawker*, 7 M. & W. 68, A and B conveyed to D and his heirs certain lands, *excepting and reserving* to A, B, and C, their heirs and assigns, liberty to come into and upon the lands, and there to hawk, hunt, fish, and fowl: *Held*, that this was not in law a *reservation* properly so called, but a *new grant* by D (who executed the deed) of the liberty therein mentioned, and therefore that it might enure in favor of C and his heirs, although he was not a party to the deed. See also *Doe d. Douglas v. Lock*, 2 A. & E. 705, 743.

(h) *Wood v. Leadbitter*, 13 M. & W. 845; *Woodward v. Seeley*, 11 Ill. 157; *Cook v. Stearns*, 11 Mass. 533. The distinction between a license which is coupled with a grant, and a license which operates merely as a license, is admirably stated by Lord Chief Justice *Vaughan*, in *Thomas v. Sorrell, Vaugh.* 330, 351. "A dispensation or license," says he, "properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it has been unlawful; as a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use; to cut down a tree in a

* Even a bond may be made without the words "held * 512 and firmly obliged," although they are technical and usual. Any writing under seal which acknowledges a debt, or indicates that the maker intends to be bound to the payment of a definite sum of money, would be construed as a bond. (i)

A question, to which we have already alluded, whether parties have by a certain instrument made a lease, or only an agreement for a future lease, sometimes presents very considerable difficulty. There do not seem to be any fixed and precise rules which will always suffice to decide this question. Indeed each case must be determined upon its own merits; and little more can be said by way of rule, than that, wherever the obvious and natural interpretation of the words used would indicate the intention of the party actually in possession to divest himself thereof forthwith, in favor of the other who is to come into possession under him for a definite time, these words will constitute an actual lease for years, although the words used may be more proper to a release or covenant, or to an agreement for a subsequent lease. But if the whole instrument, fairly considered, indicates that it is only the purpose and agreement of the parties hereafter to make such a lease, then it must be construed as only such agreement, although some of the language might indicate a present lease. (j)

man's ground, and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down the tree; but as to the carrying away of the deer killed, and tree cut down, they are grants. So to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of eating, firing my wood, and warming him, they are licenses; but it is consequent necessarily to those actions that my property be destroyed in the meat eaten and in the wood burnt; so as in some cases by consequent and not directly, and as its effect, a dispensation or license may destroy and alter property."

(i) *Dodson v. Kayes*, Yelv. 193; *Core's case*, Dyer, 20 a.

(j) "It may be laid down for a rule," says Lord Chief Baron *Gilbert*, "that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for such a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for

years as effectually as if the most proper and pertinent words had been made use of for that purpose; and, on the contrary, if the most proper and authentic form of words, whereby to describe and pass a present lease for years, are made use of, yet if upon the whole deed there appears no such intent, but that they are only preparatory and relative to a future lease to be made, the law will rather do violence to the words than break through the intent of the parties; for a lease for years being no other than a contract for the possession and profits of the lands on the one side, and a recompense of rent or other income on the other, if the words made use of are sufficient to prove such a contract, in what form soever they are introduced, or however variously applicable, the law calls in the intent of the parties, and models and governs the words accordingly." *Bac. Abr. tit. Leases (K.)*. See also, for a full discussion of this subject and an analysis of the cases, *Platt on Leases*, pt. 3, ch. 4, sec. 3; *Taylor's Landlord and Tenant*, § 37 *et seq.*; and the late case of *Stratton v. Pettit*, 16 C. B. 420, 30 E. L. & E. 479.

* 513 * All legal instruments should be grammatically written, and should be construed according to the rules of grammar. But this is not an absolute rule of law. On the contrary, it is so far immaterial in what part of an instrument any clause is written, that it will be read as of any place and with any context, and, if necessary, transposed, in order to give effect to the certain meaning and purpose of the parties. (k) Still this will be done only when their certain and evident intent requires it. Inaccuracy or confusion in the arrangement of the parts and clauses of an instrument is, therefore, always dangerous; because the intent may in this way be made so uncertain as not to admit of a remedy by construction. (l) Generally, all relative words are read as referring to the nearest antecedent. (m) But this rule of grammar is not a rule of law, where the whole instrument shows plainly that a reference was intended to an earlier antecedent. (n)

So, it is a general proposition, that where clauses are repugnant and incompatible, the earlier prevails in deeds and other instruments *inter vivos*, if the inconsistency be not so great as to avoid the instrument for uncertainty. (o) But in the construc-

(k) Per *Buller*, J., in *Duke of Northumberland v. Errington*, 5 T. R. 526. Thus, if a man in the month of February make a lease for years, reserving a yearly rent payable at the feasts of St. Michael the Archangel [Sept. 29], and the Annunciation of our Lady [March 25], during the term, the law shall make transposition of the feasts, namely, at the feasts of the Annunciation and St. Michael the Archangel, that the rent may be paid yearly during the term. *Co. Litt.* 217 b. See also 1 *Jarman on Wills*, 437 *et seq.*

(l) "Note, reader," saith Lord *Coke*, "although *mala grammatica non vitiat instrumenta*, yet in *expositio instrumentorum mala grammatica, quod fieri possit, vitanda est.*" *Finch's case*, 6 Rep. 39.

(m) *Com. Dig. tit. Parols* (A. 14); *Jenk. Cent.* 180; *Bold v. Molineux*, Dyer, 14 b; *Baring v. Christie*, 5 East, 398; *Rex v. Inhabitants of St. Mary's*, 1 B. & Ald. 327.

(n) *Guier's case*, Dyer, 46 b; *Carbonel v. Davies*, 1 Stra. 394; *Staniland v. Hopkins*, 9 M. & W. 178, 192; *Gray v. Clark*, 11 Vt. 583. Where A demises to B, for the term of *his* natural life, the demise is, *prima facie*, for the life of B. But where A demised to B, *his executors and administrators*, for the term of *his* natural life, and the lease contained a covenant by A

for the quiet enjoyment of the premises by B, his executors, &c., during the natural life of A, it was held, that the word 'his' in the demising clause must be referred to A, the grantor, and not to B, though his name was the last antecedent. *Doe v. Dodd*, 5 B. & Ad. 689. In *sicre facias* against bail, the notice to the defendant was dated on the 3d day of October, 1842, and stated that the execution was returnable on the 3d Tuesday of October next. Held, that the word "next" referred to the 3d Tuesday of the month, and not to the month, and that it was sufficient. *Nettleton v. Billings*, 13 N. H. 446. See *Osgood v. Hutchins*, 6 id. 374; *Prescot v. ——*, Cro. Jac. 646; *Buckley v. Guildbank*, id. 678; *Bunn v. Thomas*, 2 Johns. 190; *Tompkins v. Corwin*, 9 Cowen, 255. The rule is, *ad proximum antecedens fiat relatio, si sententia non impedit*. *Bold v. Molineux*, Dyer, 14 b.

(o) *Shep. Touch.* 88; *Cother v. Merrick, Hardw.* 94; *Carter v. Kungstead, Owen*, 84; *Doe v. Biggs*, 2 *Taunt.* 109. In the body of a deed of settlement were these words: "£1,000 sterling, lawful money of Ireland." The Vice-Chancellor, in giving judgment in the case, said: "It being then impossible to affix a meaning to the words, 'sterling lawful money of

tion *of wills, it has been said that the latter cause pre- *514 vails, on the ground that it is presumed to be a subsequent thought or purpose of the testator, and therefore to express his last will. (p)

An inaccurate description, and even a wrong name of a person, will not necessarily defeat an instrument. But it is said that an error like this cannot be corrected by construction, unless there is enough beside in the instrument to identify the person, and thus to supply the means of making the correction. That is, taking the whole instrument together, there must be a reasonable certainty as to the person. It is also said, that only those cases fall within the rule in which the description so far *as *515 it is false applies to no person, and so far as it is true applies only to one. But even if the name or description, where erroneous, applies to a wrong person, we think the law would permit correction of the error by construction, where the instrument, as a whole, showed certainly that it was an error, and also showed

Ireland,' taken altogether, I must deal with them according to the rule of law as to construing a deed; which is, that if you find the first words have a clear meaning, but those that follow are inconsistent with them, to reject the latter." *Cope v. Cope*, 15 Sim. 118. See *White v. Hancock*, 2 C. B. 830; *Hardman v. Hardman*, Cro. Eliz. 886; *Youde v. Jones*, 13 M. & W. 534. If anything be granted generally, and there follow restrictive words, which go to destroy the grant, they are rejected as being repugnant to that which is first granted. See *Stukely v. Butler*, Hob. 168, 172, 173, F. Moore, 880. Not so, however, where the words that follow are only explanatory, and are not repugnant to the grant; as in case of a feoffment of two acres, *habendum* the one in fee, and the other in tail, the *habendum* only explains the manner of taking, and does not restrain the gift. *Jackson v. Ireland*, 3 Wend. 99, 23 Am. Jur. 277, 278. Where the condition of a bond for the payment of money is, that the bond shall be void if the money is not paid, it is held, that the condition is void for repugnancy. *Mills v. Wright*, 1 Freem. 247, *not*. *Wells v. Wright*, 2 Mod. 285; *Wells v. Tregusan*, 2 Salk. 463, 11 Mod. 191; *Vernon v. Alsop*, 1 Lev. 77, Sid. 105; *Gully v. Gully*, 1 Hawks, 20; *Stockton v. Turner*, 7 J. J. Marsh. 192. In 39 H. 6, 10 a, pl. 15, it is said by *Littleton* to have been adjudged that such a condition was good, and that a plea to an action on the bond, that the defendant had not paid the money, was a good bar. And

Priot affirmed the case, and said that he was of counsel in the matter when he was serjeant. But that decision cannot now be considered as law. Where, however, the payee of a note, at the time it was signed by the makers, and as a part of the same transaction, indorsed thereon a promise "not to compel payment thereof, but to receive the amount when convenient for the promisor to pay it," it was held, that the indorsement must be taken as part of the instrument, and that the payee never could maintain an action thereon. *Barnard v. Cushing*, 4 Met. 230. It has been laid down, that where A grants land to B, and afterwards in the same deed he grants the same land to C, the grantee first named takes the whole land. *Jenk. Cent.* 256. If the inconsistency between parts of an instrument is such as to render its meaning wholly uncertain and insensible, it will be void. *Doe v. Fleming*, 5 *Tyrw.* 1013.

(p) *Shep. Touch.* 88; *Co. Litt.* 112 b; *Paramour v. Yardley*, *Plowd.* 541; *Doe v. Biggs*, 2 *Taunt.* 109; *Constantine v. Constantine*, 6 *Ves.* 100; *Sherratt v. Bentley*, 2 *Myne & K.* 149; 1 *Jarman on Wills*, 411. "If I devise my land to J. S., and afterwards by the same will I devise it to J. D., now J. S. shall have nothing, because it was my last will that J. D. should have it." Per *Anderson*, C. J., in *Carter v. Kungstead*, *Owen*, 84. But see, as to this doctrine, *Paramour v. Yardley*, *Plowd.* 541, note (d); *Co. Litt.* 112 b, note (1); 23 *Am. Jur.* 277, 278.

with equal certainty how the error might and should be corrected. (q)¹

The law, as we have already had occasion to say in reference to various topics, frequently supplies by its implications the wants of express agreements between the parties. But it never overcomes by its implications the express provisions of parties. (r) If these are illegal, the law avoids them. If they are legal, it yields to them, and does not put in their stead what it would have put by implication if the parties had been silent. The general ground of a legal implication is, that the parties to the contract would have expressed that which the law implies, had they thought of it, or had they not supposed it was unnecessary to speak of it because the law provided for it. But where the parties do themselves make express provision, the reason of the implication fails.

If the parties expressly provided not anything different, but the very same thing which the law would have implied, now this provision may be regarded as made twice; by the parties and by the law. And as one of these is surplusage, that made by the parties is deemed to be so; and hence is derived another rule of construction, namely, that the expression of those things which the law implies works nothing. (s)

If, however, there be many things of the same class or kind, the expression of one or more of them implies the exclusion of all not expressed; and this even if the law would have implied all, if

* 516 * implied covenants are controlled and restrained within the limits of express covenants. Thus, in a lease, the

(q) See Broom's Legal Maxims, 2d ed. p. 490 *et seq.* We shall consider this subject more fully hereafter.

(r) *Expressum facit cessare tacitum.* Co. Litt. 210 a; Goodall's case, 5 Rep. 97.

(s) Therefore, if the king make a lease for years, rendering a rent payable at his receipt at Westminster, and grant the reversion to another, the grantee shall demand the rent upon the land; for the law, without express words, implies that the

lessee in the king's case must pay the rent at the king's receipt; and *expressio contraria quae tacite insunt nihil operatur.* Boroughes's case, 4 Rep. 72 b; Co. Litt. 201 b. See also Co. Litt. 191 a; Ive's case, 5 Rep. 11.

(t) This is in accordance with the maxim, *expressio unius est exclusio alterius.* Co. Litt. 210 a. See also Hare v. Horton, 5 B. & Ad. 715; The King v. Inhabitants of Sedgley, 2 id. 65.

¹ A conveyance of certain numbered lots "being all of block 25" was construed to convey "block 25," although the numbered lots were in another block, it appearing that the grantor was to convey the house and land where he resided, and that his residence was on "block 25." Sharp v. Thompson, 100 Ill. 447.

² The enumeration of particular things in a written instrument does not necessarily exclude others of a different class, however, where general terms are used broad enough to include them. Corwin v. Hood, 58 N. H. 401. As to what the phrase "fitting up the premises" includes, see Pratt v. Paine, 119 Mass. 439.

word "demise" raises by legal implication a covenant both of title in the lessor and of quiet enjoyment by the lessee. But if with the word "demise" there is an express covenant for quiet enjoyment, there is then no implied covenant for title. (*u*) So a mortgage by law passes all the fixtures of shops, foundries, and the like, on the land mortgaged; but if the instrument enumerates a part, without words distinctly referring to the residue, or requiring a construction which shall embrace the residue, no fixtures pass but those enumerated. (*v*) So where in a charter-party the shipper covenanted to pay freight for goods "delivered at A," and the ship was wrecked at B, and the defendant there accepted his goods, he was still held not bound to pay freight *pro rata itineris*; (*w*) although he would, under a common charter-party or bill of lading, be bound to pay freight for any part of the transit performed, if at the end of that part he voluntarily accepted the goods. (*x*)

Instruments are often used which are in part printed and in part written; that is, they are printed with blanks, which are afterwards filled up; and the question may occur, to which a preference should be given. The general answer is, to the written part. What is printed is intended to apply to large classes of contracts, and not to any one exclusively; the blanks are left purposely, that the special statements or provisions should be inserted, which belong to this contract and not to others, and thus discriminate this from others. And it is reasonable to suppose that the attention of the parties was more closely given to those phrases which they themselves selected, and which express the especial particulars of their own contract, than to those more general expressions which belong to all contracts of this class. (*y*)¹ But if the whole contract can be construed together, so that the written words and those printed make an * intelli-

(*u*) *Noke's case*, 4 Rep. 80 b; *Merrill v. Frame*, 4 Taunt. 329; *Line v. Stephen-*

(*x*) *Lake v. Lyde*, 2 Burr. 882; *Mitchell v. Darthez*, 2 Bing. N. C. 555.

(*v*) *Hare v. Horton*, 5 B. & Ad. 715.

(*y*) *Robertson v. French*, 4 East, 130,

(*w*) *Cook v. Jennings*, 7 T. R. 381.

per *Oakley*, C. J., in *Weisser v. Maitland*, 3 Sandf. 318.

¹ Where a contract is partly printed and partly in writing, the written matter must prevail over the printed, in case of a conflict between them. *Hill v. Miller*, 76 N. Y. 32; *Clark v. Woodruff*, 83 N. Y. 518. But where the printed part of a bill of lading read "contents unknown" and "articles, thirty bbls of eggs" was written in the margin, the carrier was held not liable to one who had paid a draft on the faith that the barrels actually contained eggs, when, without the carrier's knowledge, they really contained only sawdust. *Miller v. Hannibal, &c. R. Co.* 90 N. Y. 430.

gible contract, this construction should be adopted. (z) Because the intention of the parties is presumed to be "alive and active throughout the whole instrument, and that no averments are anywhere inserted without meaning and without use." (a)

SECTION IV.

ENTIRETY OF CONTRACTS.

The question whether a contract is entire or separable is often of great importance. Any contract may consist of many parts; and these may be considered as parts of one whole, or as so many distinct contracts entered into at one time, and expressed in the same instrument, but not thereby made one contract. No precise rule can be given by which this question in a given case may be settled. Like most other questions of construction, it depends upon the intention of the parties, and this must be discovered in each case by considering the language employed and the subject-matter of the contract.

If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. (b)¹ And the same rule holds where the price to be

(z) *Alsagar v. St. Katherine's Dock Co.* 14 M. & W. 794, 799; *Howland v. Comm. Ins. Co. Anthon.* N. P. 46; *Harpers v. Albany Mutual Ins. Co.* 17 N. Y. 394; *Cushman v. North Western Ins. Co.* 34 Me. 487; *Wallace v. Ins. Co.* 4 La. 289; *Goicoechea v. La. State Ins. Co.* 18 Mart. (La.) 51, 55; *Hunter v. General Mutual Ins. of N. Y.* 11 La. An. 139.

(a) *Goix v. Low.* 1 Johns. Cas. 341.

(b) This point is well illustrated by the case of *Johnson v. Johnson*, 3 B. & P. 162. In that case the plaintiff had purchased from the same persons two parcels of real estate, the one for £700, the other for £300, and had taken one conveyance for both. After having paid the purchase-money and taken possession, he was evicted

from the smaller parcel, in consequence of a defect in the title derived under the purchase, and thereupon brought an action for money had and received to recover back the £300, at the same time refusing to give up the parcel of land for which £700 had been paid. And the court held that he was entitled to recover. Lord Alvanley, in delivering the judgment of the court, said: "My difficulty has been, how far the agreement may be considered as one contract for the purchase of both sets of premises, and how far the party can recover so much as he has paid by way of consideration for the part of which the title has failed, and retain the other part of the bargain. This for a time occasioned doubts in my mind; for if the lat-

¹ See *Lucesco Oil Co. v. Brewer*, 66 Penn. St. 351, where the text is quoted with approval by Williams, J. See also *Quigley v. De Haas*, 82 Penn. St. 267, 273; *Scott v. Kittanning Coal Co.* 89 Penn. St. 231.

*paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire. (c) But the mere fact that

ter question were involved in this case it would be a question for a court of equity. If the question were how far the particular part of which the title has failed formed an essential ingredient of the bargain, the grossest injustice would ensue if a party were suffered in a court of law to say that he would retain all of which the title was good, and recover a proportionable part of the purchase-money for the rest. Possibly the part which he retains might not have been sold, unless the other part had been taken at the same time; and ought not to be valued in proportion to its extent, but according to the various circumstances connected with it. But a court of equity may inquire into all the circumstances, and may ascertain how far one part of the bargain formed a material ground for the rest, and may award a compensation according to the real state of the transaction. In this case, however, no such question arises; for it appears to me, that although both pieces of ground were bargained for at the same time, we must consider the bargain as consisting of two distinct contracts; and that the one part was sold for £300, and the other for £700." And see, to the same point, *Mayfield v. Wadsley*, 3 B. & C. 357. The statement in the text, that where the subject of the contract consists of several distinct and independent items, and no express agreement is made as to the consideration to be paid, the contract may be considered as severable, is well illustrated by the case of *Robinson v. Green*, 3 Met. 159. That was an action of assumpsit to recover compensation for services rendered by the plaintiff to the defendant as an auctioneer, in selling seventy-six lots of wood. The plaintiff was a licensed auctioneer for the county of Middlesex. Two of the lots of wood sold were in the county of Middlesex, and the rest were in the county of Suffolk. The defendant contended that the claim of the plaintiff was entire; that part of it was a claim for services which were illegal, in selling property out of his county; and that the contract being entire, and the consideration, as to part at least, illegal, the action could not be maintained. *Sed non allocator*, for, per *Shaw*, C. J.: "The plaintiff does not claim on an entire contract. The sale of each lot is a distinct contract. The plaintiff's claim for a compensation arises upon each several sale, and is complete on such sale. If there were an express

promise to pay him a fixed sum, as a compensation for the entire sale, it would have presented a different question. Where an entire promise is made on one entire consideration, and part of that consideration is illegal, it may avoid the entire contract. But here is no evidence of a promise of one entire sum for the whole service. It is the ordinary case of an auctioneer's commission, which accrues upon each entire and complete sale. We do not see how the question can be answered, which was put in the argument, namely, supposing the plaintiff had stopped after selling the two lots lying in South Reading, which it was lawful for him to sell, would he not have been entitled to his commission? If he would, we do not perceive how his claim can be avoided, by showing that he did something else on the same day, which was not *malum in se*, but an act prohibited by law, on considerations of public policy. The court are of opinion that the plaintiff's claim for a *quantum meruit* may be apportioned, and that he is entitled to recover for his services in the sale of the two lots." And see *Mavor v. Pyne*, 3 Bing. 285; *Perkins v. Hart*, 11 Wheat. 237, 251; *Withers v. Reynolds*, 2 B. & Ald. 882; *Sickels v. Patterson*, 14 Wend. 257; *McKnight v. Dunlop*, 4 Barb. 36, 47; *Snook v. Fries*, 19 id. 313; *Carleton v. Woods*, 8 Foster, 290; *Robinson v. Snyder*, 25 Penn. St. 208. For the law applicable to cases where property is purchased in lots at auction at separate biddings, see *ante*, vol. i. p. *495.

(c) Thus, if a ship be built upon a special contract, and it is part of the terms of that contract that given portions of the price shall be paid according to the progress of the work, namely, part when the keel is laid; part when at the light plank; and the remainder when the ship is launched; there arises a separate contract for each instalment; and therefore, when the keel is laid, or any other part of the ship for which an instalment is to be paid is completed, it has been held in England, and to some extent here, that an action lies immediately for the one party to recover the instalment, and that part of the ship becomes by the payment the property of the other party. *Woods v. Russell*, 5 B. & Ald. 942. See also *Clarke v. Spence*, 4 A. & E. 448; *Laidler v. Burlinson*, 2 M. & W. 602; *Cunningham v. Morrell*, 10 Johns. 203. But this doctrine is altogether denied in

* 519 the subject of the * contract is sold by weight or measure, and the value is ascertained by the price affixed to each pound, or yard, or bushel of the quantity contracted for, will not be sufficient to render the contract severable. (*d*)¹ And if the

Andrews v. Durant, 1 Kern. 35. See also *Wood v. Bell*, 5 Ellis & B. 772, 34 E. L. & E. 178, 6 Ellis & B. 355; *Moody v. Brown*, 34 Me. 107; 1 Parsons, Mar. Law, 76, n. 1.

(*d*) *Clark v. Baker*, 5 Met. 452. The plaintiff in this case purchased of the defendant a cargo of corn on board a schooner lying in Boston, agreeing to pay 78½ cents per bushel for the yellow corn, and 78½ cents for the white corn; the defendant warranting it to be of a certain quality. The quantity of corn was not known at the time of the purchase, but it afterwards appeared that there were between 2,000 and 3,000 bushels. The plaintiff paid the defendant \$1,200 in advance, and after having received enough of the corn to amount, at the agreed price, to \$1,067.02, refused to receive any more, on the ground that the remainder was not such as the cargo was warranted to be. This action was brought to recover the difference between the aforesaid sums of \$1,200 and \$1,067.02. The defendant objected that the contract was entire, and that the present action could not be maintained, without proof that the plaintiff offered to return the corn which he had accepted; and this objection was sustained. *Hubbard*, J., said: "The question in the present case resolves itself into this: Was there one bargain for the whole cargo, or were there two distinct contracts for the yellow and white corn, or was there a separate and independent bargain for each bushel of corn contracted for, in consequence of which the receipt of one or more bushels of the warranted quality imposed no duty upon the plaintiff to retain the residue? And we are of opinion that the contract was an entire one. The bargain was not for 2,000 or 3,000 bushels of corn, but it was for the cargo

of the schooner *Shylock*, be the quantity more or less; a cargo known to consist of two different kinds of corn; and the means taken to ascertain the amount to be paid were in the usual mode, by agreeing on the rate per bushel for the two kinds, and take the whole. . . . There is no ground, on the evidence as reported, to maintain that there were two contracts for the distinct kinds of corn; for it does not appear but that the 1,400 bushels that were retained consisted of a part of each. So that the plaintiff, to support his position, must contend as he has contended, that the bargains in this case were separate bargains for each several bushel of a given quality, and for a distinct price. But this separation into parts so minute, of a contract of this nature, can never be admitted; for it might lead to the multiplication of suits indefinitely, in giving a distinct right of action for every distinct portion. As well might a man who sold a chest of tea by the pound, or a piece of cloth by the yard, or a piece of land by the foot or by the acre, contend that each pound, yard, foot, or acre, was the subject of a distinct contract, and each the subject of a separate action." So in *Davis v. Maxwell*, 12 Met. 286, where the plaintiff agreed with the defendant to work on the farm of the latter for the period of "seven months, at twelve dollars per month," it was held that the contract was entire; that eighty-four dollars were to be paid at the end of seven months, and not twelve dollars at the end of each month; and that the plaintiff, on leaving the defendant's service without good cause before the seven months expired, was not entitled to recover anything of the defendant. See also *Baker v. Higgins*, 21 N. Y. (7 Smith) 397.

¹ The sale of a specific number of packages of an article, at a given price a package, is an entire contract: a purchaser cannot rescind it as to some packages and affirm it as to others. *Mansfield v. Trigg*, 113 Mass. 350. Per *Wells*, J.: "The entirety of the contract is not destroyed by the circumstance that the subject of the sale is of such uniform character as to be readily divisible proportionally, by weight or measure, or is contained in packages of uniform quantity and value, even with the added circumstance that the consideration is named only by way of fixing the rate or price of the unit of such division." Where several distinct articles are bought at the same time for different prices, even if of the same general description, so that a warranty of quality would apply to each, the contract is not entire, but is in effect a separate contract for each article sold, and a right of rescission exists as to each article, if the warranty in regard to it is broken. *Young & Conant Mfg. Co. v. Wakefield*, 121 Mass. 91.

consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items. (e)

*SECTION V.

*520

APPORTIONMENT OF CONTRACTS.

A contract is said to be apportionable when the amount of consideration to be paid by the one party depends upon the extent of performance by the other. The question of apportionment must be carefully distinguished from that of entirety, considered in the last section. The latter must always be determined before the former can properly arise. For the question of apportionment always addresses itself to a contract which has already been ascertained not to be single and entire.

When parties enter into a contract by which the amount to be performed by the one, and the consideration to be paid by the other, are made certain and fixed, such a contract cannot be apportioned. Thus, if A and B agree together that A shall enter into the service of B, and continue for one year, and that B shall

(e) *Miner v. Bradley*, 22 Pick. 457. In this case the defendant put up at auction a certain cow and 400 pounds of hay, both of which the plaintiff bid off for \$17, which he paid at the time. He then received the cow, and afterwards demanded the hay, which was refused by the defendant, who had used it. This action was brought to recover back the value of the hay. The defendant objected that the contract was entire; that the plaintiff could not recover back the price paid or any portion of it, without rescinding the whole contract, and that this could not be done without returning the cow. And this objection was sustained by the court. *Morion*, J., said: "There may be cases, where a legal contract of sale covering several articles may be severed, so that the purchaser may hold some of the articles purchased, and not receiving others, may recover back the price paid for them. Where a number of articles are bought at the same time, and a separate price agreed upon for each, although they are all included in one instrument of conveyance,

yet the contract, for sufficient cause, may be rescinded as to part, and the price paid recovered back, and may be enforced as to the residue. But this cannot properly be said to be an exception to the rule; because in effect there is a separate contract for each separate article. This subject is well explained and the law well stated, in *Johnson v. Johnson*, 3 B. & P. 162." The learned judge then stated that case, and continued: "Had the plaintiff bid off the cow at one price, and the hay at another, although he had taken one bill of sale for both, it would have come within the principles of the above case. But such was not the fact. And it seems to us very clear that the contract was entire; that it was incapable of severance, that it could not be enforced in part and rescinded in part; and that it could not be rescinded without placing the parties *in statu quo*." See further on the subject of entirety, *Jones v. Dunn*, 3 Watts & S. 109; *Biggs v. Wisking*, 14 C. B. 195, 25 E. L. & E. 257; *White v. Brown*, 2 Jones (N. C.), 408; *Dula v. Cowles*, id. 454.

* 521 * A enters the service accordingly, and continues half of the year, and then leaves, he will not be entitled to recover anything *on the contract.* (f) This is an old and deep-rooted principle of the common law, and though it sometimes has the appearance of harshness, it would be difficult to contend against it upon principle. We have frequently had occasion to state, that courts of justice can only carry into effect such contracts as parties have made. They cannot make contracts for them, or alter or vary those made by them. And it would seem difficult for a court, without travelling out of its true sphere, to say, that because B has agreed to pay one hundred dollars for one year's service, he has therefore agreed to pay at that rate, or any particular sum, for a shorter period. In other words, it cannot reasonably be presumed that the parties intended that the amount of consideration to be paid by B should depend upon the amount of service rendered by A, when both of these were definitely fixed by the parties. The only agreement entered into by B was to pay A the sum of one hundred dollars, when the latter should have served him one year. Therefore, until the full year's service has been rendered, the *casus fæderis* does not arise.

It is to be borne in mind, however, that this is only a rule of construction, founded upon the intention of the parties, and not a rule of law which controls intention. Therefore, if the parties wish to make a contract which shall be apportionable, there is nothing to hinder their doing so, provided they make their intention sufficiently manifest. Thus, if A and B make a contract, by virtue of which A is to enter into the service of B, at the rate of ten dollars per month, and continue so long as it shall be agreeable to both parties, such contract is clearly apportionable; for neither the extent of service nor the amount of consideration is fixed by the contract, but only a certain relation and proportion between them. And contracts have been held apportionable in which the service to be performed was specified and fixed, but the consideration to be paid was left to be implied by law. But this cannot be laid down as a general rule. (g)

(f) *Ex parte Smyth*, 1 Swanst. 387, and n. (a). We have already considered this point in an earlier part of this volume, b. iii. ch. 9, sec. 1.

(g) *Roberts v. Havelock*, 8 B. & Ad. 404. In this case a ship belonging to the

defendant having come into port in a damaged state, the plaintiff was employed and undertook to put her into thorough repair. Before the work was completed, a dispute arose between the parties, and the plaintiff refused to proceed until he

* We have seen that when parties make a contract which * 522 is not apportionable, no part of the consideration can be recovered in an action on a contract, until the whole of that for which the consideration was to be paid is performed. But it must not be inferred from this that a party who has performed a part of his side of a contract, and has failed to perform the residue, is in all cases without remedy. For though he can have no remedy on the contract as originally made, the circumstances may be such that the law will raise a new contract, and give him a remedy on a *quantum meruit*.

* Thus, if one party is prevented from fully performing * 523 his contract by the fault of the other party, it is clear that the party thus in fault cannot be allowed to take advantage of his

was paid for the work already done, and for which this action was brought. The defendant objected, that the action did not lie, inasmuch as the plaintiff had not completed his contract, and as long as that was the case, the work already done was unavailable for the purpose for which it had been required. And the case of Sinclair *v.* Bowles, 9 B. & C. 92, in which A, having undertaken for a specific sum of money to repair and make perfect a given article, and having repaired it in part, but not made it perfect, it was held, that he was not entitled to recover for what he had done, was cited as in point. But Lord Tenterden said: "I have no doubt that the plaintiff in this case was entitled to recover. In Sinclair *v.* Bowles the contract was *to do a specific work for a specific sum*. There is nothing in the present case amounting to a contract to do the whole repairs and make no demand till they are completed. The plaintiff was entitled to say that he would proceed no further with the repairs till he was paid what was already due." Mr. Smith, in his learned note to Cutler *v.* Powell, 2 Smith's Lead. Cas. 12, having stated this case, and quoted the language of Lord Tenterden, says: "From these words it may be thought that his lordship's judgment proceeded on the ground that the performance of the *whole work* is not to be considered a condition precedent to the payment of *any part of the price*, excepting when the sum to be paid and the work to be done are both specified (unless, of course, in case of special terms in the agreement expressly imposing such a condition); and certainly good reasons may be alleged in favor of such a doctrine, for when the price to be paid

is a specific sum, as in Sinclair *v.* Bowles, it is clear that the court and jury can have no right to apportion that which the parties themselves have treated as entire, and to say that it shall be paid in instalments, contrary to the agreement, instead of in a round sum as provided by the agreement; but, where no price is specified, this difficulty does not arise, and perhaps the true and right presumption is, that the parties intended the payment to keep pace with the accrual of the benefit for which payment is to be made. But this, of course, can only be when the consideration is itself of an apportionable nature; for it is easy to put a case in which, though no price has been specified, yet the consideration is of so indivisible a nature, that it would be absurd to say that one part should be paid for before the remainder; as where a painter agrees to draw A's likeness, it would be absurd to require A to pay a ratable sum on account when half the face only had been finished; it is obvious that he has then received no benefit, and never will receive any, unless the likeness should be perfected. There are, however, cases, that for instance of Roberts *v.* Havelock, in which the consideration is in its nature apportionable, and there, if no entire sum have been agreed on as the price of the entire benefit, it would not be unjust to presume that the intention of the contractors was that the remuneration should keep pace with the consideration, and be recoverable *toties quatuor* by action on a *quantum meruit*." See also Withers *v.* Reynolds, 2 B. & Ad. 882; Sickles *v.* Patterson, 14 Wend. 257; Wade *v.* Haycock 26 Penn. St. 382.

own wrong, and screen himself from payment for what has been done under the contract. The law, therefore, will imply a promise on his part to remunerate the other party for what he has done at his request; and upon this promise an action may be brought. (h)

So, too, if one party, without the fault of the other, fails to perform his side of the contract in such a manner as to enable him to sue upon it, still if the other party have derived a benefit from the part performed, it would be unjust to allow him to retain that without paying anything. The law, therefore, generally implies a promise on his part to pay such a remuneration as the benefit conferred upon him is reasonably worth; and to recover that *quantum* of remuneration, an action of *indebitatus assumpsit* is maintainable. (i)

(h) *Planché v. Colburn*, 8 Bing. 14; *Goodman v. Pocock*, 15 Q. B. 576; *Hall v. Rupley*, 10 Barr. 281; *Moulton v. Trask*, 9 Met. 577; *Hoagland v. Moore*, 2 Blackf. 167; *Bannister v. Read*, 1 Gilman, 92; *Selby v. Hutchinson*, 4 id. 319; *Webster v. Enfield*, 5 id. 296; *Derby v. Johnson*, 21 Vt. 17. So, too, if a special action on the case is brought against the party in fault to recover damages for not being permitted to perform the contract, a reasonable compensation for what has been performed may be included in the damages. *Goodman v. Pocock*, 15 Q. B. 576; *Derby v. Johnson*, 21 Vt. 18; *Clark v. Marsiglia*, 1 Denio, 317.

(i) The cases bearing upon the last proposition are, it must be confessed, very conflicting. They may be conveniently arranged in three classes:—those arising on contract of sale; those arising on contracts to do some specific labor upon the land of another, as to erect buildings, or to build roads and bridges; and those arising upon ordinary contracts for service. The leading case of the first class is that of *Oxendale v. Wetherell*, 9 B. & C. 386. That was an action of *indebitatus assumpsit* to recover the price of 130 bushels of wheat sold and delivered by the plaintiff to the defendant, at 8s. per bushel. The defendant gave evidence to show that he made an absolute contract for 250 bushels, and contended, that as the plaintiff had not fully performed his contract, he was not entitled to recover anything. But *Bayley*, J., before whom the cause was tried, was of opinion, that as the defendant had not returned the 130 bushels, and the time for completing the contract had expired

before the action was brought, the plaintiff was entitled to recover the value of the 130 bushels which had been delivered to and accepted by the defendant. A verdict was accordingly found for the plaintiff, with liberty to the defendant to move to enter a nonsuit. But, upon a motion to that effect being made, Lord *Tenterden* said: "If the rule contended for were to prevail, it would follow, that if there had been a contract for 250 bushels of wheat, and 249 had been delivered to and retained by the defendant, the vendor could never recover for the 249, because he had not delivered the whole." *Bayley*, J.: "The defendant having retained the 180 bushels, after the time for completing the contract had expired, was bound by law to pay for the same." *Parke*, J.: "Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of that part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered, after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered." So also in *Reed v. Rann*, 10 B. & C. 441, *Parke*, J., said: "In some cases, a special contract not executed may give rise to a claim in the nature of a *quantum meruit, ex gr.*, where a special contract has been made for goods, and goods sent not according to the contract are retained by the party, there a claim for the value on a *quantum*

* The particular subject of apportionment of rent has * 524 been considered in the first volume, Book II. ch. 3, sec. 8.

valeant may be supported. But then from the circumstances a new contract may be implied." And see, to the same effect, *Shipton v. Casson*, 5 B. & C. 378. So, too, in Massachusetts it has been held, that if the vendee of a specific quantity of goods sold under an entire contract, receives a part thereof, and retains it after the vendor has refused to deliver the residue, this is a severance of the entirety of the contract, and he becomes liable to the vendor for the price of such part. *Bowker v. Hoyt*, 18 Pick. 555. And we apprehend that a similar rule would be adopted by a majority of the courts in this country. But in New York, the case of *Oxendale v. Wetherell* has been entirely repudiated, and it is there held, that the vendor in such a case is not entitled to any remedy. *Champlain v. Rowley*, 13 Wend. 268, 18 id. 187; *Mead v. Degolyer*, 16 Wend. 682; *McKnight v. Dunlop*, 4 Barb. 36; *Paige v. Ott*, 6 Denio, 406; *Oakley v. Morton*, 1 Kern. 25. And so also in Ohio. *Witherow v. Witherow*, 16 Ohio, 238, *Read*, J., dissenting.—One of the most important cases in the second class is *Hayward v. Leonard*, 7 Pick. 181. In that case the plaintiff contracted in writing to build a house for the defendant, at a certain time, and in a certain manner, on defendant's land, and afterwards built the house within the time, and of the dimensions agreed on, but in workmanship and materials varying from the contract. The defendant was present almost every day during the building, and had an opportunity of seeing all the materials and labor, and objected at times to parts of the materials and work, but continued to give directions about the house, and ordered some variations from the contract. He expressed himself satisfied with a part of the work from time to time, though professing to be no judge of it. Soon after the house was done he refused to accept it, but the plaintiff had no knowledge that he intended to refuse it till after it was finished. It was held, that the plaintiff might maintain an action against the defendant on a *quantum meruit* for his labor, and on a *quantum valeant* for the materials. It may be gathered, however, from the judgment of *Parker*, C. J., that he considered that one of two things must be proved in order to entitle the plaintiff to recover:—either that there was an honest intention to go by the contract, and a substantive execution of it, with only some comparatively

slight deviations as to some particulars provided for; or that there was an assent or acceptance, express or implied, by the party with whom the plaintiff contracted. That such is now the received law, see *Smith v. First Cong. Meeting-house in Lowell*, 8 Pick. 178; *Taft v. Montague*, 14 Mass. 282; *Olmstead v. Beale*, 19 Pick. 528; *Snow v. Ware*, 18 Met. 42; *Lord v. Wheeler*, 1 Gray, 282; *Hayden v. Madison*, 7 Greenl. 76; *Jennings v. Camp*, 13 Johns. 94; *Kettle v. Harvey*, 21 Vt. 301; *Burn v. Miller*, 4 Taunt. 745; *Chapel v. Hickes*, 2 Cromp. & M. 214; *Thornton v. Place*, 1 Moody & R. 218. But see *Ellis v. Hamlen*, 3 Taunt. 52; *Sinclair v. Bowles*, 9 B. & C. 92; *Wooten v. Read*, 2 Smedes & M. 585; *Helm v. Wilson*, 4 Mo. 41; *White v. Oliver*, 86 Me. 98.—We are not aware that there are any cases upon contracts for service fully sustaining the proposition in the text, except the celebrated one of *Britton v. Turner*, 6 N. H. 481, already cited by us, *ante*, p. *38, note (k). That was an action of *indebitatus assumpsit* for work and labor performed by the plaintiff for the defendant, from March 9, 1831, to December 27 of the same year. The defendant offered evidence to prove that the work was done under a contract to work for one year for the sum of one hundred dollars, and that the plaintiff left his service without his consent and without good cause. The learned judge instructed the jury, that although all these points should be made out, yet the plaintiff was entitled to recover, under his *quantum meruit* count, as much as the labor performed was reasonably worth. And this instruction was held to be correct. *Parker*, C. J., in delivering the judgment of the court, after noticing several of the cases cited above in the second class, said: "These cases are not to be distinguished, in principle, from the present, unless it be in the circumstance, that where the party has contracted to furnish materials, and do certain labor, as to build a house in a specified manner, if it is not done according to the contract, the party for whom it is built may refuse to receive it,—elect to take no benefit from what has been performed,—and therefore if he does receive he shall be bound to pay the value; whereas, in a contract for labor, merely, from day to day, the party is continually receiving the benefit of the contract, under an expectation that it will be fulfilled, and cannot, upon the

OF CONDITIONAL CONTRACTS.

It is sometimes of great importance to determine whether there be a condition in a contract or an instrument. If, for

breach of it, have an election to refuse to receive what has been done, and thus discharge himself from payment. But we think this difference in the nature of the contracts does not justify the application of a different rule in relation to them. The party who contracts for labor merely for a certain period, does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day, if the other party commences the performance, and with knowledge, also, that the other party may eventually fail of completing the entire term. If under such circumstances he actually receives a benefit from the labor performed, over and above the damage occasioned by the failure to complete, there is as much reason why he should pay the reasonable worth of what has thus been done for his benefit, as there is when he enters and occupies the house which has been built for him, but not according to the stipulations of the contract, and which he perhaps enters, not because he is satisfied with what has been done, but because circumstances compel him to accept it such as it is, that he should pay for the value of the house. . . . If the party who has contracted to receive merchandise takes a part and uses it, in expectation that the whole will be delivered, which is never done, there seems to be no greater reason that he should pay for what he has received, than there is that the party who has received labor in part, under similar circumstances, should pay the value of what has been done for his benefit. It is said, that in those cases where the plaintiff has been permitted to recover, there was an acceptance of what had been done. The answer is, that where the contract is to labor from day to day for a certain period, the party for whom the labor is done in truth stipulates to receive it from day to day, as it is performed, and although the other may not eventually do all he has contracted to do, there has been, necessarily, an ac-

ceptance of what has been done in pursuance of the contract, and the party must have understood when he made the contract that there was to be such acceptance. If, then, the party stipulates in the outset to receive part performance from time to time, with a knowledge that the whole may not be completed, we see no reason why he should not equally be holden to pay for the amount of value received, as where he afterwards takes the benefit of what has been done, with a knowledge that the whole which was contracted for has not been performed. In neither case has the contract been performed. In neither can an action be sustained on the original contract. In both the party has assented to receive what is done. The only difference is, that in the one case the assent is prior, with a knowledge that all may not be performed, in the other it is subsequent, with a knowledge that the whole has not been accomplished. We have no hesitation in holding that the same rule should be applied to both classes of cases, especially as the operation of the rule will be to make the party who has failed to fulfil his contract, liable to such amount of damages as the other party has sustained, instead of subjecting him to an entire loss for a partial failure, and thus making the amount received in many cases wholly disproportionate to the injury. . . . We hold, then, that where a party undertakes to pay upon a special contract for the performance of labor, or the furnishing of materials, he is not to be charged upon such special agreement until the money is earned according to the terms of it, and where the parties have made an express contract, the law will not imply and raise a contract different from that which the parties have entered into, except upon some further transaction between the parties. But if, where a contract is made of such a character, a party actually receives labor or materials, and thereby derives a benefit and advantage, over and above the damage which has resulted from the breach

*instance, a deed contain a grant on condition, then, if there be a breach of condition, the grant is void, and the estate may never vest, or may be forfeited. A condition of this sort is not favored, and would not be readily implied. (j) But stipulations or agreements may be implied, upon the breach of which an action may be brought. Mutual contracts sometimes contain a condition, the breach of which by one party permits the other to throw the contract up, and consider it as altogether null. Whether a provision shall have this effect, for which purpose it must be construed as an absolute condition, is sometimes a question of extreme difficulty. It is quite certain, however, that no precise words are now requisite to constitute a condition; and perhaps that no formal words will constitute a condition, if it be obvious from the whole instrument, that this was not the intention or understanding of the parties.

*It would be difficult, and perhaps impossible, to lay down rules which would have decisive influence in determining this vexed question. Indeed, courts seem to agree of late that the decision must always "depend upon the intention of the parties, to be collected in each particular case from the terms of the agreement itself, and from the subject-matter to which it relates." (k) "It cannot depend on any formal arrangement of the words, but on the reason and sense of the thing as it is to

of the contract by the other party, the labor actually done, and the value received, furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case, one not within the original agreement, and the party is entitled to recover on his new case for the work done, not as agreed, but yet accepted by the defendant." 1 Dane's Abr. 224." But the courts of other States have thus far shown little disposition to adopt the views of the learned judge. Thus, in Eldridge v. Rowe, 2 Gilman, 91, the court held, upon a similar state of facts, that the plaintiff was not entitled to recover. And Young, J., said: "It is no objection to say that the defendant has received the benefit of his labor, this being a case, where, from its nature, the defendant could not separate the products of his labor from the general concerns of his farm, and ought not, therefore, to be responsible to any extent

whatever for not doing that which was impossible." See also Miller v. Goddard, 34 Me. 102; Olmstead v. Beale, 19 Pick. 529; Davis v. Maxwell, 12 Met. 286; Swanzey v. Moore, 22 Ill. 63. Hansell v. Erickson, 28 Ill. 267, in which case it is also held, that a contract to work a given number of months at a fixed price per month, is an entire contract, extending over the whole number of months. See also, *ante*, p. *88, note (g), and p. *40, note (f). — Difficult questions frequently arise in the classes of cases considered in the present note, as to the measure of damages, and the right of the defendant to have deducted from the amount otherwise recoverable the damage sustained by him in consequence of the breach of the contract. These questions will be considered under their appropriate heads in the subsequent part of this treatise.

(j) See *ante*, p. *510, n. (y).

(k) Per Tindal, C. J., in Glaholm v. Hays, 2 Man. & G. 266.

be collected from the whole contract." (*l*) It is said that where the clause in question goes to the whole of the consideration, it shall be read as a condition. (*m*) The meaning of this must be, that if the supposed condition covers the whole ground of the contract, and cannot be severed from it, or from any part of it, a breach of the condition is a breach of the whole contract, which gives to the other party the right of avoiding or rescinding it altogether. But where the supposed condition is distinctly separable, so that much of the contract may be performed on both sides as though the condition were not there, it will be read as a stipulation, the breach of which only gives an action to the injured party. (*n*) But it is not safe to assert, that which is sometimes said to be law, (*o*) that where in case of a breach the party cannot have his action for damages, there the doubtful clause must be read as a condition, because otherwise the party injured would be without remedy. For if "the reason and sense of the thing," or the rational and fair construction of the contract, leads to the conclusion that the parties did not agree nor intend that there should be this condition, then there is none; and if a party be in this way injured and remediless, it is his own fault, in that he neither inserted in his contract a condition, the breach of which would discharge him from all obligation, nor a stipulation, for the breach of which he might have his action. (*p*) So is he remediless if he cannot procure the performance of a condition of which he permitted the insertion. Thus it is held that if money is to be paid by insurers, or by others, when a certain certificate is presented, the money is not payable in the absence of the certificate, although it be unreasonably withheld. (*pp*)

(*l*) Per Lord *Ellenborough*, in *Ritchie v. Atkinson*, 10 East, 296. And see *Northampton Gas Light Co. v. Parnell*, 15 C. B. 680, 29 Eng. L. & Eq. 281.

(*m*) *Boone v. Eyre*, 1 H. Bl. 278, note (*a*).

(*n*) See *Hemans v. Picciotto*, 1 C. B. (*n. s.*) 646.

(*o*) See *Pordage v. Cole*, 1 Wms. Saund. 319.

(*p*) See *infra*, p. *529, note (*r*).

(*pp*) *Coles v. Turner*, L. R. 1 C. P. 878; *Mills v. Bayley*, 32 L. J. Ex. 179; *Scott v. Corporation of Liverpool*, 28 L. J. C. 280.

* SECTION VII.

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OF MUTUAL CONTRACTS.

It is a similar question — sometimes indeed the very same question — whether covenants are mutual, in such sense that each is as a condition precedent to the other. And also whether covenants or agreements be dependent or independent. (q) By the very definition of them, if they are dependent, that is, if each depends on the other, the failure of one destroys and annuls the other. Or, if this dependence is not mutual, but one of them rests upon the other by a dependence which is not equally shared by the other, if that contract upon which this dependence rests is broken and defeated, the other by reason of its dependence is annulled and destroyed also. But they may be wholly independent, although relating to the same subject, and made by the same parties, and included in the same instrument. In that case they are two separate contracts. Each party must then perform what he undertakes, without reference to the discharge of his obligation by the other party. And each party may have his action against the other for the non-performance of his agreement, whether he has performed his own or not. Now the law has no preference for one kind of contract over another; nor does it, by its own implication and intendment, make one rather than the other, and still less does it require *one rather than the other. * 529 It may indeed be safely said, that this question in each particular case will be determined by inferring, with as much cer-

(q) In *Kingston v. Preston*, cited in *Jones v. Barclay*, Doug. 690, Lord *Mansfield* said: "There are three kinds of covenants: 1. Such as are called *mutual* and *independent*, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are *conditions and dependent*, in which the performance of one depends upon the prior performance of another, and therefore, until this prior condition

is performed, the other party is not liable to an action on his covenant. 3. There is also a third sort of covenants, which are *mutual conditions* to be performed at the same time; and in these, if one party was ready, and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act." See also *Mason v. Chambers*, 4 Litt. 253; and Mr. *Durnford's* note to *Acherley v. Vernon, Willes*, 157.

tainty as the case permits, the meaning and purpose of the parties, from a rational interpretation of the whole contract. (r)¹

(r) In ancient times the decision of questions of this kind depended rather upon nice and subtle constructions put upon the language of a contract, than upon the evident sense and intention of the parties, as gathered from a rational consideration of the whole instrument, and the subject-matter of the agreement. Thus, in 15 H. 7, 10, pl. 17, it was ruled by *Fineux*, C. J., that if one covenant with me to serve me for a year, and I covenant with him to give him £20, if I do not say *for the cause aforesaid*, he shall have an action for the £20, although he never serves me; otherwise it is if I say that he shall have £20 *for the cause aforesaid*. So if I covenant with a man that I will marry his daughter, and he covenants with me that he will make an estate to me and his daughter, and the heirs of our two bodies begotten, if I afterwards marry another woman, or his daughter marries another man, yet I shall have an action of covenant against him to compel him to make the estate; but if the covenant were that he would make the estate to us two *for the cause aforesaid*, in that case he would not make the estate until we were married. And such was the opinion of the whole court. But Lord *Holt*, in the great case of *Thorp v. Thorp*, 11 Mod. 455, and Lord Chief Justice *Willes*, in *Acherley v. Vernon*, Willes, 153, advanced more rational ideas upon the subject. And in *Kings-ton v. Preston*, already cited, Lord *Mansfield* declared that the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties. Mr. Serjeant *Williams* in his elaborate note to *Pordage v. Cole*, 1 Wms. Saund. 310, has given the five following rules, collected with great care and accuracy from the decided cases. 1. "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or *may* happen *before* the thing which is the consideration of the money, or other act is to be performed; an action may be brought for the money, or for not doing such other act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make the performance a con-

dition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act." See *Pordage v. Cole*, 1 Wms. Saund. 319; *Thorp v. Thorp*, 12 Mod. 460, 1 Salk. 171, per *Holt*, C. J.; *Peeters v. Opie*, 2 Saund. 350, per *Hale*, C. J.; *Wilks v. Smith*, 10 M. & W. 365; *Eastern Counties Railway Co. v. Philip-son*, 16 C. B. 2; *Mayor of Norwich v. Norfolk Railway Co.* 4 Ellis & B. 397; *Northampton Gas Light Co. v. Parnell*, 15 C. B. 630, 29 E. B. & E. 229; *Under-hill v. The Saratoga & W. R. R. Co* 20 Barb. 455; *Edgar v. Boies*, 11 S. & E. 445; *Stevenson v. Kleppinger*, 5 Watts, 420; *Lowry v. Mehaffy*, 10 id. 387; *Goldsborough v. Orr*, 8 Wheat. 217; *Robb v. Montgomery*, 20 Johns. 15. The principle of this rule has been misapplied in various cases, as in *Terry v. Duntze*, 2 H. Bl. 389. In that case A covenanted to build a house for B, and finish it on or before a certain day, in consideration of a sum of money which B covenanted to pay A by instalments as the building proceeded. It was held, that the finishing of the house was not a condition precedent to the payment of the money; that A might maintain an action of debt against B for the whole sum, though the building was not finished at the time appointed, on the ground that part of the money was to be paid before the house could be completed. This case was followed in *Seers v. Fowler*, 2 Johns. 272, and *Havens v. Bush*, id. 387. But in *Cunningham v. Morrell*, 10 Johns. 208, *Seers v. Fowler*, and *Havens v. Bush*, were overruled, and the authority of *Terry v. Duntze* repudiated. *Cunningham v. Morrell* was followed in *McLure v. Rush*, 9 Dana, 64, and in *Allen v. Sanders*, 7 B. Mon. 698, overruling the earlier cases of *Craddock v. Aldridge*, 2 Bibb, 15, and *Mason v. Chambers*, 4 Litt. 263. And see to the same effect *Kettle v. Harvey*, 21 Vt. 301; *Lord v. Belknap*, 1 Cush. 279; *Tompkins v. Elliot*, 5 Wend. 436.—In the case of contracts for the purchase and sale of real estate, where the purchaser covenants to pay the purchase-money by instalments, and the vendor covenants to convey by deed, either on the last day of

¹ A. contracted to deliver certain coal in twelve equal monthly instalments to B., who took less than the first instalment at the time agreed, whereupon A. rescinded the contract. Held, in an action by B. against A., that B.'s breach in taking less than the stipulated quantity during the first month did not entitle A. to rescind the contract. *Simpson v. Crippin*, L. R. 8 Q. B. 14.

*SECTION VIII.

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OF THE PRESUMPTIONS OF LAW.

There are some general presumptions of law which may be considered as affecting the construction of contracts. Thus it

payment, or on some day previous, the covenants to pay the instalments falling due before the day appointed for conveying by deed, are independent of the covenant to convey, and an action may be maintained for such instalments, without showing any conveyance or offer to convey; but the conveyance or offer to convey, is a condition precedent to the right to insist upon the payment of an instalment falling due either on or after the day of conveyance. *Grant v. Johnson*, 1 Seld. 247, reversing the judgment of the Supreme Court in the same case, in 6 Barb. 387. In this case the plaintiff agreed to sell to the defendant a piece of land, and covenanted to give possession of the land on the first of November, 1845, and to convey by deed on the first of May, 1846. And the defendant covenanted to pay \$950, as follows, namely: \$200 on the first of April, 1846, \$200 on the first of April, 1847, \$275 on the first of April, 1848, and \$275 on the first of April, 1849. The plaintiff gave the defendant possession of the premises, and the defendant paid the first instalment according to the terms of the agreement. The present action was brought to recover the second instalment; and the court held, that the conveyance by deed was a condition precedent to the payment of any instalment after the first; and therefore the plaintiff was not entitled to recover without averring a performance or tender of performance of such condition. So in *Bean v. Atwater*, 4 Conn. 3, A and B, on the 6th of August, 1816, entered into articles of agreement, whereby A, in consideration of the covenants to be performed and payments to be made by B, granted and sold to B certain tracts of land, and covenanted to confirm them to him by deed in fee-simple on the first of June, 1817; and B covenanted to pay therefor the sum of 4,000 dollars, of which 500 dollars were to be paid immediately, 500 dollars on the first of January, 1817, 500 dollars on the first of June, 1817, 500 dollars on the first of January, 1818,

1,000 dollars on the first of January, 1819, and the residue on the first of January, 1820. For the performance of these stipulations the parties bound themselves respectively, in the penalty of 8,000 dollars. In an action brought by A against B for the money, it was held, that the covenant of the defendant, so far as it related to the two first instalments, was independent, and the plaintiff was entitled to recover the sum due thereon, without averring or proving performance of the covenant on his part; but that, so far as it related to the instalment payable on the first of June, 1817, and the subsequent instalments, performance by the plaintiff was a condition precedent to his right of recovery. And see to the same effect *Leonard v. Bates*, 1 Blackf. 172; *Kane v. Hood*, 18 Pick. 281. But see *Weaver v. Childress*, 8 Stew. 361. — 2. "When a day is appointed for the payment of money, &c., and the day is to happen after the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance." *Thorp v. Thorp*, 12 Mod. 460, 1 Salk. 171; *Bean v. Atwater*, 4 Conn. 9; *Dey v. Dox*, 9 Wend. 129; *Morris v. Silter*, 1 Denio, 59; *Rider v. Pond*, 18 Barb. 179. — 3. "Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration." The leading case upon this point is *Boone v. Eyre*, 1 H. Bl. 273, note (a). The plaintiff, in that case, conveyed to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of £500, and an annuity of £160 per annum for life; and covenanted that he had good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted, that the plain-

* 581 * is a presumption of law that parties to a simple contract intended to bind not only themselves, but their personal

tiff well and truly performing all and every thing on his part to be performed, he, the defendant, would pay the annuity. The action was brought for the non-payment of the annuity. Plea, that the plaintiff was not at the time of making the deed legally possessed of the negroes, and so had not a good title to convey. General demurral to the plea. Lord Mansfield: "The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea be allowed, any one negro, not being the property of the plaintiff, would bar the action." Upon this case Serjeant Williams remarks as follows: "The *whole* consideration of the covenant on the part of B the purchaser to pay the money was the conveyance by A the seller to him of the *equity of redemption* of the plantation, and also the stock of negroes upon it. The excuse for non-payment of the money was, that A had broke his covenant as to *part* of the consideration, namely, the stock of negroes. But, as it appeared that A had conveyed the equity of redemption to B, and so had in part executed his covenant, it would be unreasonable that B should keep the plantation, and yet refuse payment, because A had not a good title to the negroes. Per Ashurst, J., 6 T. R. 578. Besides, the damages sustained by the parties would be unequal, if A's covenant were held to be a condition precedent. Duke of St. Albans v. Shore, 1 H. Bl. 179. For A on the one side would lose the consideration-money of the sale, but B's damage on the other might consist perhaps in the loss only of a few negroes. So where it was agreed between C and D, that in consideration of £500 C should teach D the art of bleaching materials for making paper, and permit him, during the continuance of a patent which C had obtained for that purpose, to bleach such materials according to the specification; and C, in consideration of the sum of £250 paid, and on the further sum of £250 to be paid by D to him, covenanted that he would with all possible expedition teach D the method of bleaching such materials, and D covenanted that he would on or before the 24th of February,

1794, or sooner, in case C should before that time have taught him the bleaching of such materials, pay to C the further sum of £250. In covenant by C against D, the breach assigned was the non-payment of the £250. Demurrer, that it was not averred that C had taught D the method of bleaching such materials; but it was held by the court, that the *whole* consideration of the agreement being that C should *permit* D to *bleach materials*, as well as *teach* him the method of doing it; the covenant by C to teach formed but *part* of the consideration, for a breach of which D might recover a recompense in damages. And C having in part executed his agreement, by transferring to D a right to exercise the patent, he ought not to keep that right without paying the remainder of the consideration, because he may have sustained some damage by D's not having instructed him; and the demurrer was overruled. Campbell v. Jones, 6 T. R. 570. Hence, it appears that the reason of the decision in these and other similar cases, besides the inequality of the damages, seems to be, that where a person has received a *part* of the consideration for which he entered into the agreement, it would be unjust that because he has not had the *whole*, he should therefore be permitted to enjoy that part without either paying or doing anything for it. Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the *whole* consideration. And hence, too, it seems, it must appear upon the record that the consideration was *executed in part*; as in Boone v. Eyre, above mentioned, the action was on a deed, whereby the plaintiff had conveyed to the defendant the equity of redemption of the plantation, for the defendant did not deny the plaintiff's title to convey it. So in Campbell v. Jones, the plaintiff had transferred to the defendant a right to exercise the patent. Therefore, if an action be brought on a covenant or agreement contained in articles of agreement, or other executory contract where the *whole* is future, it seems necessary to aver performance in the declaration of the *whole*, or at least of *part* of that which the plaintiff has covenanted to do; or at least it must be admitted by the plea that he has performed it. As where A, by articles of agreement, in consideration of a sum of money, to be paid to

representatives ; * and such parties may sue on a contract, * 532

him by B on a certain day, covenants to convey to B on the same day a house, together with the fixtures and furniture therein, and that he was lawfully seized of the house, and possessed of the fixtures and furniture. In an action against B for the money, A must aver that he conveyed either the whole of the premises, or at least the house, to B; or it must be admitted by B in his plea that A did convey the house, but was not lawfully possessed of the furniture or fixtures." For further illustration of this principle, see *Fothergill v. Walton*, 2 J. B. Moore, 630; *Stavers v. Curling*, 3 Bing. N. C. 855; *Franklin v. Miller*, 4 A. & E. 599; *Fishmongers Co. v. Robertson*, 5 Man. & G. 131, 198; *Storer v. Gordon*, 3 M. & S. 308; *Ritchie v. Atkinson*, 10 East, 295; *Havelock v. Geddes*, id. 555; *Jonassohn v. Great Northern Railway Co.* 10 Exch. 434, 28 Eng. L. & Eq. 481; *Gould v. Webb*, 4 Ellis & B. 933, 30 Eng. L. & Eq. 331; *Mill-Dam Foundry v. Hovey*, 21 Pick. 417; *Tileston v. Newell*, 18 Mass. 406; *Bennet v. Pixley*, 7 Johns. 249; *Obermyer v. Nichols*, 6 Binn. 159; *Morrison v. Galloway*, 2 Harris & J. 461; *Todd v. Summers*, 2 Gratt. 167; *Lewis v. Weldon*, 3 Rand. 71; *McCullough v. Cox*, 6 Barb. 386; *Payne v. Bettisworth*, 2 A. K. Marsh. 427; *Keenan v. Brown*, 21 Vt. 86; *Tompkins v. Elliot*, 5 Wend. 496; *Grant v. Johnson*, 5 Barb. 161, 6 id. 337, 1 Seld. 247; *Pepper v. Haight*, 20 Barb. 429. "If," says *Shaw*, C. J., in *Knight v. The New England Worsted Co.* 2 Cush. 286, "a party promise to build a house upon the land of another, and to dig a well on the premises, and to place a pump in it; and the owner of the land covenants reasonably to supply all materials and furnish a pump; it is very clear that the stipulation to furnish materials is dependent, and constitutes a condition; because the builder cannot perform on his part until he has the materials. So to put a pump into the well. But the stipulation to dig a well is not conditional, because it goes to a small part only of the consideration, and does not necessarily depend on a prior performance, on the part of the owner, and because a failure can be compensated in damages, and the remedy of the owner is by action on the contract." — 4. "But where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred." *Duke of St. Albans v. Shore*, 1 H. Bl. 270; *Graves v. Legg*, 9 Exch. 709, 25 Eng. L. & Eq. 552; *Grey v. Frier*, 4 Clark & F. 565, 28 Eng. L. & Eq. 27; *Dakin v. Wil-*

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liams, 11 Wend. 67. — 5. "Where two acts are to be done *at the same time*, as where A covenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay A a sum of money *on the same day*, neither can maintain an action without showing performance of, or an offer to perform his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale." See the numerous cases cited by *Sergeant Williams*; and also *Campbell v. Gittings*, 19 Ohio, 347; *Williams v. Healy*, 3 Denio, 363; *Gazley v. Price*, 16 Johns. 267; *Dunham v. Pettee*, 4 Seld. 508; *Lester v. Jewett*, 1 Kern. 453. — Where a party agreed on the payment by another of certain sums of money to a third person, to assign certain certificates of sale of land, and it was held, that the covenants were independent, and that in a suit by the party bound to assign, a general averment of readiness on his part to perform was sufficient. *Slocum v. Despard*, 8 Wend. 615. See *Northrup v. Northrup*, 6 Cowen, 296; *Champion v. White*, 5 Cowen, 509; *Robb v. Montgomery*, 20 Johns. 16. But see *Parker v. Parmele*, 20 Johns. 130; *Adams v. Williams*, 2 Watt & S. 227; *Halloway v. Davis*, Wright, 129. Justice would seem to require that such stipulations should be considered as dependent. *Leonard v. Bates*, 1 Blackf. 172, note; per *Shaw*, C. J., in *Kane v. Hood*, 13 Pick. 281. — 6. It may also be laid down as a rule, that stipulations or promises may be dependent from the nature of the acts to be performed, and the order in which they must necessarily precede and follow each other. "When the act of one party must necessarily precede any act of the other, as where one stipulates to manufacture an article from materials to be furnished by the other, and the other stipulates to furnish the materials, the act of furnishing the materials necessarily precedes the act of manufacturing, and will constitute a condition precedent without express words." Per *Shaw*, C. J., in *Mill-Dam Foundry v. Hovey*, 21 Pick. 439; *Thomas v. Cadwallader*, Willes, 496; *Knight v. New England Worsted Co.* 2 Cush. 286. In *Combe v. Greene*, 11 M. & W. 480, the plaintiff demised a dwelling-house and premises to the defendant, and the defendant covenanted that he would expend £100 in improvements and additions to the dwelling-house, under the direction of some competent surveyor to be appointed by the plaintiff. Held, that the appointment of a surveyor was a condition precedent to the defendant's

although not named therein. (s) Hence, as we have seen, * 583 executors, * though not named in a contract, are liable, so far as they have assets, for the breach of a contract which was broken in the lifetime of their testator. And if the contract was not broken in his lifetime, they must not break it, but will be held to its performance, unless this presumption is overcome by the nature of the contract; as where the thing to be done required the personal skill of the testator himself. (t) So, too, if several persons stipulate for the performance of any act, without words of severality, the presumption of law is here that they intended to bind themselves jointly. (u) But this presumption also might be rebutted by the nature of the work to be done, if it were certain that separate things were to be done by separate parties, who could not join in the work. (v)

It is also a legal presumption, that every grant carries with it whatever is essential to the use and enjoyment of the * 584 grant. (w) * But this rule applies perhaps more strongly to grants of real estate than to transfers of personal property. Thus, if land be granted to another, a right of way to the land will go with the grant. (x) But it has been held, where

liability to expend the £100. In *Miller v. Pittsburg & Cleveland R. R. Co.* 40 Penn. St. 237, there was a subscription to the stock of a railroad company, on the express condition that the road should be located and constructed along a prescribed route. The road was so located, and the subscriber paid one or more instalments on his shares, but neglected to pay the balance as the calls were made. Before the construction was completed, the company suspended operations. An action was brought by the company for the balance of the subscription. Held, that the road having been located as stipulated, though not completed, the company was entitled to recover. But see *Macintosh v. The M. C. Railway Co.* 14 M. & W. 548.

(s) *Siboni v. Kirkman*, 1 M. & W. 418, 428; *Quick v. Ludborrow*, 3 Bulst. 80; *Marshall v. Broadhurst*, 1 Crompt. & J. 403.

(t) See *ante*, vol. i. pp. * 127, * 181.

(u) See *ante*, vol. i. p. * 11, n. (a).

(v) See the case of *Slater v. Magraw*, 12 Gill & J. 265, cited *ante*, vol. i. p. * 11, n. (a); *De Ridder v. Schermerhorn*, 10 Barb. 638; *Brewsters v. Silence*, 4 Seld. 207. See also *Erskine's Institute*, b. 3, tit. 3, sec. 22.

(w) *Liford's case*, 11 Rep. 52; *Co. Lit.*

56 a; *Pomfret v. Riccroft*, 1 Wms. Saund. 823, n. (6). Where an act of parliament empowered a railway company to cross the line of another company, by means of a bridge, it was held, that the first-mentioned company had consequently the right of placing temporary scaffolding on the land belonging to the latter, if the so placing it were necessary for the purpose of constructing the bridge; for *ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest*. *Clarence Railway Co. v. Great North of England Railway Co.* 13 M. & W. 706. See also *Hinchliffe v. Earl of Kinnoul*, 5 Bing. N. C. 1; *Dand v. Kinscote*, 6 M. & W. 174; *Broom's Legal Maxims*, 362, 2d ed.

(x) *Pomfret v. Riccroft*, 1 Wms. Saund. 823, n. (6); *Howton v. Frearson*, 8 T. R. 50; *Collins v. Prentice*, 16 Conn. 39. It must be strictly a way of necessity, and not of mere convenience. *Nichols v. Luce*, 24 Pick. 102; *Allen v. Kincaid*, 2 Fairf. 155; *Stuyvesant v. Woodruff*, 1 N. J. 134; *Trask v. Patterson*, 29 Me. 499. The right of way is suspended or destroyed whenever the necessity ceases. *Pierce v. Selleck*, 18 Conn. 321; *Holmes v. Goring*, 2 Bing. 76. Where a parcel of land is sold for a specific purpose, and conveyed without reservation, the law will not impossibly in favor of the vendor a right of way

goods were sold on execution, and left on the land of the judgment debtor, that the purchaser acquired no absolute right to go on the land of the seller for the purpose of taking the goods. (y) But it has also been held, that where goods of the plaintiff were sold on distress for rent, which were on plaintiff's land, and one of the conditions to which he was a party permitted defendant to enter from time to time and take the goods away, this was a license by the plaintiff, and was irrevocable, because coupled with an interest. (z)¹ It may perhaps be inferred from the cases and *dicta* on this subject, that as real rights go with a grant of real property where they are essential to its proper use, so such personal rights, or even personal chattels, would go with the transfer of personal property, as were absolutely necessary for the use and enjoyment of the things sold; for it might well be presumed to have been the intention and understanding of the parties that they should pass together. (a) And we should be even inclined to say, that if one sold goods on his land, especially * under * 535 seal, and there was nothing in the contract or the circumstances to show that the buyer was to come into possession otherwise than by entering upon the land and taking them, it would be presumed that this was intended, and that the sale operated as a license to do this in a reasonable time and a reasonable way, which the seller could not revoke. (b)²

of necessity over or through such land, inconsistent with the object of the purchase. *Seeley v. Bishop*, 19 Conn. 128.

(y) *Williams v. Morris*, 8 M. & W. 488.
(z) *Wood v. Manley*, 11 A. & E. 34.

(a) If one grant trees growing in his wood, the grantees may enter and cut down the trees and carry them away. *Reniger v. Fogossa*, *Plowd.* 16; *Liford's case*, 11 Rep. 52; *Shep. Touch.* 89. By a grant of the fish in a pond, a right of coming upon the banks and fishing for them is granted. *Reniger v. Fogossa*, *Plowd.* 16, *Shep. Touch.* 89; *Lord Darcy v. Askwith*, Hob. 284. A rector may enter into a close to carry away the tithes over the usual way, as incident to his

right to the tithes. *Cobb v. Selby*, 5 B. & P. 466.

(b) Perhaps, however, it would be found difficult to support this proposition in its full extent, unless the grant was made by deed. It would seem that such a license, in order to be irrevocable, must amount to a grant of an interest in land, which can only be by deed. "It certainly strikes one as a strong proposition, to say that such a license can be irrevocable, unless it amount to an interest in land, which must therefore be conveyed by deed." Per *Parke*, B., in *Williams v. Morris*, 8 M. & W. 488. See also *Gale and Whatley on Easements*, p. 18 *et seq.*

¹ *Poor v. Oakman*, 104 Mass. 309. Such a license must be given by one having authority to give it, *Nelson v. Garey*, 114 Mass. 418; and entry thereunder must be peaceable, *Churchill v. Hulbert*, 110 Mass. 42.

² One who is allowed to put his goods on the land of another under a license revocable at the pleasure of the owner is entitled to a notice of revocation, and a reasonable time afterwards to remove the goods. *Mellor v. Watkins*, L. R. 9 Q. B. 400; *Cornish v. Stubbs*, L. R. 5 C. P. 334.

Where anything is to be done, as goods to be delivered, or the like, and no time is specified in the contract, it is then a presumption of law that the parties intended and agreed that the thing should be done in a reasonable time. (c) But what is a reasonable time is a question of law for the court. (d) They will consider all the facts and circumstances of the case in determining this, and if any facts bearing upon this point are in question, it will be the province of the jury to settle those facts, although the influence of the facts when they are ascertained, upon the question of reasonableness, remains to be determined by the court. In general, it may be said, that questions of reasonableness, other than that of time, are questions of fact for the jury.

SECTION IX.

OF THE EFFECT OF CUSTOM OR USAGE.

A custom which may be regarded as appropriate to the contract and comprehended by it, has often very great influence in the construction of its language. (e) The general reason

(c) *Crocker v. The Franklin H. & F. Man. Co.* 3 Sumner, 530; *Ellis v. Thompson*, 3 M. & W. 445; *Greaves v. Ashlin*, 3 Camp. 428; *Sawyer v. Hammatt*, 15 Me. 40; *Howe v. Huntington*, id. 350; *Atkinson v. Brown*, 20 Me. 67. And see *Attwood v. Emery*, cited *ante*, p. *498, note (o).

(d) *Attwood v. Clark*, 2 Greenl. 249; *Kingaley v. Wallace*, 14 Me. 57; *Murry v. Smith*, 1 Hawks, 41. For certain exceptions to this rule, see *Howe v. Huntington*, 15 Me. 350. See also *Hill v. Hobart*, 16 Me. 184.

(e) That evidence may be given of a custom or usage of trade to aid in the construction of a contract, either by fixing the meaning of words where doubtful, or by giving them a meaning wholly distinct from their ordinary and popular sense, is a well established doctrine. Thus, where it was represented to underwriters, on a policy of insurance, that the ship insured was to sail "in the month of October," evidence was admitted to show that the expression "in the month of October," was well understood amongst men used to commercial affairs to signify some time between the 25th of that month and the 1st or 2d of the suc-

ceeding month. *Chaurand v. Angerstein, Peake*, N. P. 48. So, also, custom or usage may be admitted to show, that a "whaling voyage" includes the taking of sea-elephants, on the beaches of islands and coasts, as well as whales. *Child v. Sun Mutual Ins. Co.* 3 Sandf. 26. So also as to the meaning of "cotton in bales." *Taylor v. Briggs*, 2 C. & P. 525, and *Outwater v. Nelson*, 20 Barb. 29, as to the phrase "on freight." Evidence may also be admitted, that the word "days" in a bill of lading means working days, and not running days. *Cochran v. Retberg*, 3 Esp. 121. Evidence may also be given of the mercantile meaning of the terms "good" and "fine," as applied to barley. *Hutchison v. Bowker*, 6 M. & W. 535; *Whitmore v. Coats*, 14 Mo. 9. So also as to the meaning of the word "privilege," in an agreement with the master of a ship. *Birch v. Depeyster*, 4 Camp. 385. In *Evans v. Pratt*, 3 Man. & G. 750, evidence was admitted to show that "across a country," in a memorandum respecting a race, means that the riders are to go over all obstructions, and are not at liberty to use a gate. See *Sleight v. Hartshorne*, 2 Johns. 581, as to the meaning of

of * this is obvious enough. If parties enter into a contract, by virtue whereof something is to be done by one or both, and this * thing is often done in their neighborhood, or by persons of like occupation with themselves, and is always done in a certain way, it must be supposed that they intended it should be done in that way. The reason for this supposition is nearly the same as that for supposing that the common language which they use is to be taken in its common meaning. And the rule that the meaning and intent of the parties govern, wherever this is possible, comes in and operates. Hence an established custom may add to a contract stipulations not contained in it; on the ground that the parties may be supposed to have had these stipulations in their minds as a part of their agreement, when they put upon paper or expressed in words the other part of it. (f)¹ So custom may control and vary

"sea-letter." *Astor v. Union Ins. Co.* 7 Cowen, 202, as to the meaning of "furs." See also *Haynes v. Holliday*, 7 Bing. 587; *Read v. Granberry*, 8 Ired. 108; *Barton v. McKelway*, 2 N. J. 174; *Robertson v. Jackson*, 2 C. B. 412; *Moore v. Campbell*, 10 Exch. 322, 26 Eng. L. & Eq. 522; *Vail v. Rice*, 1 Seld. 155. So in the case of a contract to sell "mess pork of Scott & Co.," evidence was admitted to show that this language in the market meant pork *manufactured* by Scott & Co. *Powell v. Horton*, 2 Bing. N. C. 668. Where a contract was worded thus: "Sold 18 pockets Kent hops, at 100s.," it was permitted to be shown that by the usage of the hop trade, a contract so worded was understood to mean 100s. per cwt. and not per pocket. *Spicer v. Cooper*, 1 Q. B. 424. See also *Bowman v. Horsey*, 2 Moody & R. 85. So evidence has been admitted to show that "rice" is not considered as corn within the memorandum of a policy of insurance. *Scott v. Bourdillion*, 5 B. & P. 213. See also *Clayton v. Gregson*, 5 A. & E. 302, as to the meaning of the word "level" among miners. Also *Cuthbert v. Cumming*, 11 Exch. 405, 30 Eng. L. & Eq. 604, as to the phrase "full and complete cargo." And see *Grant v. Maddox*, 16 M. & W. 787; *Brown v. Byrne*, 3 Ellis & B. 708, 26 Eng. L. & Eq. 247. So as to the meaning of "in regular turns of loading," *Liedemann v. Schultz*, 14 C. B. 38, 24 Eng. L. & Eq. 805. Owing to the loose and inaccurate

manner in which policies of insurance are drawn, a class of cases has sprung up, almost peculiar to this instrument, in which evidence is admitted of usages between the underwriters and the assured, affixing to certain words and clauses a known and definite meaning. Thus, in *Brough v. Whitmore*, 4 T. R. 206, on evidence of the practice of merchants and underwriters, it was held, that provisions, sent out in a ship for the use of the crew, were protected by a policy on the ship and furniture. Lord Kenyon, in giving judgment, said: "I remember it was said many years ago, that if Lombard street had not given a construction to policies of insurance, a declaration on a policy would have been had on general demurrer; but that the uniform practice of merchants and underwriters had rendered them intelligible." In *Coit v. Commercial Ins. Co.* 7 Johns. 385, evidence was received of a usage among underwriters and merchants restricting the term "roots" in the memorandum of a policy to such articles as were in their nature perishable, and excluding sarsaparilla. See also *Allegre v. Maryland Ins. Co.* 2 Gill & J. 136; *s. c.* 6 Harris & J. 408; *Macy v. Whaling Ins. Co.* 9 Met. 364; *Eyre v. Marine Ins. Co.* 5 Watts & S. 116; 1 *Duer on Ins.* 185; *Humphrey v. Dale*, 7 Ellis & B. 265; *Cuthbert v. Cumming*, 11 Exch. 405, 30 Eng. L. & Eq. 604.

(f) "It has long been settled," says

¹ On this ground in transactions in stocks through brokers who are members of the stock exchange, its rules and usages become part and parcel of such transac-

* 588 the meaning of * words; (g) giving even to such words

Parke, B., in *Hutton v. Warren*, 1 M. & W. 475, "that in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contract in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed, and this has been done upon the principle of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages." Thus, a usage among printers and book-sellers, that a printer, contracting to print a certain number of copies of a work, is not at liberty to print from the same types while standing an extra number for his own disposal, is admissible. *Williams v. Gilman*, 8 Greenl. 276. So, where bought and sold notes were given on a sale of tobacco, in an action for the price of the tobacco, it was permitted to be shown, that, by the established usage of the tobacco trade, all sales were by sample, though not so expressed in the bought and sold notes. *Syers v. Jonas*, 2 Exch. 111. See also *Hodgoon v. Davies*, 2 Camp. 530; *The Queen v. Inhabitants of Stoke-upon-Trent*, 5 Q. B. 303; *Connor v. Robinson*, 2 Hill (S. C.), 364; *Whittaker v. Mason*, 2 Bing. N. C. 869.—Where goods are consigned to an agent for sale, with general instructions to remit the proceeds, it is a sufficient compliance with such instructions if the

agent remit by bill of exchange, without indorsing or guaranteeing it, provided such is the usage at the agent's place of business. *Potter v. Morland*, 3 Cush. 384. See *Putnam v. Tillotson*, 18 Met. 517. But see *Gross v. Criss*, 3 Gratt. 262.—The influence of *local customs* is particularly manifest in the cases that arise between landlord and tenant. "The common law does so little to prescribe the relative duties of landlord and tenant, since it leaves the latter at liberty to pursue any course of management he pleases, provided he is not guilty of waste, that it is by no means surprising that the courts should have been favorably inclined to the introduction of those regulations in the mode of cultivation, which custom and usage have established in each district to be the most beneficial to all parties." Per *Parke, B.*, in *Hutton v. Warren*, 1 M. & W. 476; *Leigh v. Hewitt*, 4 East, 154. In *Wiggleworth v. Dallison*, Doug. 201, the tenant was allowed an away-going crop, although there was a formal lease under seal. "The custom," says Lord *Mansfield*, "does not alter or contradict the agreement in the lease, it only superadds a right which is consequential to the taking, as a heriot may be due by custom, although not mentioned in the grant or lease." So also a custom to remove fixtures may be incorporated into a lease. *Van Ness v. Packard*, 2 Pet. 137. "Every demise between landlord and tenant, in respect to matters in which the parties are silent, may be fairly open to

(g) Thus, in an action on a policy of insurance on a voyage "to any port in the Baltic," evidence was admitted to prove, that in mercantile contracts the Gulf of Finland is considered as within the Baltic. *Uhde v. Walters*, 3 Camp. 16. So,

also, that Mauritius is considered as an East India Island, although treated by geographers as an African Island. *Robertson v. Money, Ryan & M.* 75. *Robertson v. Clarke*, 1 Bing. 445.

tions. *Bowring v. Shepherd*, L. R. 6 Q. B. 309. In an action against fruit brokers, who contracted for a "principal," but did not name him, evidence of a custom in the London fruit trade, that if the brokers did not give the names of their principals in the contract, they were to be held personally liable, is admissible; and also evidence of a similar custom in the London Colonial market, being evidence in a similar trade in the same place, and as tending to corroborate the evidence as to the existence of such a custom in the fruit trade. *Fleet v. Murton*, L. R. 7 Q. B. 126; *Hutchinson v. Tatham*, L. R. 8 C. P. 482. Where a master claimed freight on the gross weight of cotton delivered, a custom that it should be collectible only on net weight was admissible, the charter-party containing no words of exclusion. *McPherson v. Cox*, 86 N. Y. 472. A custom among merchants to charge interest on capital invested in business is not admissible in favor of the defendant in an action by a salesman on an agreement that he should receive a certain portion of the net profits. *Paine v. Howells*, 90 N. Y. 660.

as those of number a sense entirely different from that which

explanation by the general usage and custom of the country, or of the district where the land lies." Per *Story*, J., id. 148. See also *Senior v. Armytage*, Holt, N. P. 197; *Webb v. Plummer*, 2 B. & Ald. 750; *Holding v. Pigott*, 7 Bing. 465; *Roberts v. Barker*, 1 Cromp. & M. 808; *Wilcox v. Wood*, 9 Wend. 346. — The common carrier is bound to deliver goods according to the usage of the business in which he is engaged. *Hyde v. Trent and Mersey Nav. Co.* 5 T. R. 389. See also *ante*, p. *187, *et seq.* — Before an "incident" can be "annexed" to a contract, the contract itself, as made, must be proved. *Doe v. Eason*, 11 Ired. 568. — The cases we have been noticing are those in which the custom or usage of trade has been brought in to affect the construction of written instruments. There is another class of cases in which the usage is not brought in to vary the construction of the contract, but to "substitute in the particular instance a rule resulting from the usage, in place of that which the law, not the contract of the parties, would prescribe." 1 *Duer* on Ins. 200. Thus, in the case of a policy of insurance, if the risks and premium are entire, and the policy has once attached, so that the insurer might in any case be liable for a total loss, the law entitles him to retain the whole of the premium. By particular usages, however, the insurer may in such cases be obliged to return a part of the premium. *Long v. Allan*, 4 Doug. 276. Where it is the usage of the underwriter to settle according to the adjustment of general average in a foreign port, such usage will be permitted to affect the rights of the parties, although the adjustment in the foreign port is different from what it would have been at the home port. 2 *Phillips* on Ins. (3d ed.) p. 163 *et seq.*; *Powers v. Whitmore*, 4 M. & S. 141. See also *Vallance v. Dewar*, 1 Camp. 503. — In *Halsey v. Brown*, 3 Day, 346, evidence was admitted of a custom of merchants in Connecticut and New York, that the freight of money received by the master is his perquisite, and that he is to be personally liable on the contract, and not the owners of the vessel. This case is cited and approved in *Renner v. Bank of Columbia*, 9 Wheat. 591. See also *The Paragon*, Ware, 322; *Ougler v. Jennings*, 1 Camp. 506, n.; *Barber v. Brace*, 3 Conn. 9; *Stewart v. Aberdein*, 4 M. & W. 211; *M'Gregor v. Ins. Co. of Penn.* 1 Wash. C. C. 39; *Trott v. Wood*, 1 Gal. 448; *Cope v. Dodd*, 18 Penn. St. 87; *Cutter v. Powell*, 6 T. R. 820; *Baitt v.*

Mitchell, 4 Camp. 146. — Where bills or notes are made payable at certain banks, it is to be presumed that the parties intend that demand shall be made and notice given according to the usages of such banks, although the general rules of the law-merchant may be superseded thereby. Thus, by the usage of the banks of the city of Washington, four days' grace may be allowed. Demand made and notice given in accordance with such usage will be binding on the indorser, even when ignorant of the usage. *Mills v. Bank of United States*, 11 Wheat. 431. See also *Renner v. Bank of Columbia*, 9 Wheat. 581; *Bank of Washington v. Triplet*, 1 Pet. 25; *Adams v. Otterback*, 15 How. 539; *Chicopee Bank v. Eager*, 9 Met. 588; *Planters Bank v. Markham*, 5 How. Miss. 397; *Lincoln and Kennebec Bank v. Page*, 9 Mass. 165; *Bank of Columbia v. Fitzhugh*, 1 Harris & G. 239; *Blanchard v. Hilliard*, 11 Mass. 85. In the case of *The Bridgeport Bank v. Dyer*, 19 Conn. 186, the Bridgeport Bank on Monday, the 1st of June, cashed for D a check drawn on the Manhattan Co. in New York city. On Thursday the 4th, in accordance with the established usage of the Bridgeport Bank, it was sent by the captain of a steamboat to New York. In an action brought by the Bridgeport Bank against D, as indorser of such check, it was held, that such usage was sufficient evidence of an agreement between the parties not to insist upon the rule of law regarding the transmission of checks. See also *Kilgore v. Bulkley*, 14 Conn. 363; and generally as to the usages of banks, and their binding force upon parties, *Jones v. Fales*, 4 Mass. 245; *Pierce v. Butler*, 14 Mass. 303; *City Bank v. Cutter*, 3 Pick. 414; *Dorchester and Milton Bank v. New Eng. Bank*, 1 Cush. 177; *Bank of Utica v. Smith*, 18 Johns. 290; *Cookendorfer v. Preston*, 4 How. 817. — In the case of *Pollock v. Stables*, 12 Q. B. 766, it was held, that if a party authorizes a broker to buy shares for him in a particular market, where the usage is, that when a purchaser does not pay for his shares within a given time, the vendor giving the purchaser notice, may sell, and charge him with the difference; and the broker, acting under the authority, buys at such market in his own name; such broker, if compelled to pay a difference on the shares through neglect of his principal to supply funds, may sue the principal for money paid to his use. And it is not necessary, in such action, to show that the principal knew of the custom.

* 539 they commonly bear, * and which indeed by the rules of language, and in ordinary cases, would be expressed by another word. (h)

This influence of custom was first admitted in reference to mercantile contracts. And indeed almost the whole of the law-merchant, if it has not grown out of custom sanctioned by courts and thus made law, has been very greatly modified in that way. For illustration of this, we may refer to the law of bills and notes,

insurance, and contracts of shipping generally. And al-

* 540 though doubts have been expressed whether it was wise * or safe to permit express contracts to be controlled, or, if not controlled, affected by custom in the degree in which it seems now to be established that they may be; (i) this operation of custom

See *Bayliffe v. Butterworth*, 1 Exch. 425; *Sutton v. Tatham*, 10 A. & E. 27; *Mitchell v. Newhall*, 16 M. & W. 308; *Moon v. Guardians of Whitney Union*, 3 Bing. N. C. 814; *Stewart v. Aberdeen*, 4 M. & W. 211. And oral evidence has been admitted to show that, according to mercantile usage, a written contract to deliver 50 tons "best palm oil," with inferior oil if any at a fair allowance, is satisfied if the oil delivered contains a substantial portion of "best" oil. *Lucas v. Bristol*, 96 Eng. C. L. 907.

(h) Thus, in the case of *Smith v. Wilson*, 3 B. & Ad. 728, where the lessee of a rabbit-warren covenanted to leave on the warren 10,000 rabbits, the lessor paying for them £60 per thousand, it was held, that parol evidence was admissible to show, that by the custom of the country where the lease was made, the word *thousand*, as applied to rabbits, denoted *one hundred dozen*, or *twelve hundred*. In *Hinton v. Locke*, 5 Hill, 487, *Bronson*, J., said, that he should have great difficulty in subscribing to this case, on the ground that the custom sought to be incorporated into the contract was "a plain contradiction of the express contract of the parties." But the usage admitted in *Hinton v. Locke*, and sanctioned by *Bronson*, J., seems to be nearly in equal opposition to the terms of the contract affected by it. The defendant, in that case, had promised to pay the plaintiff, who was a carpenter, twelve shillings *per day* for every man employed by him in repairing the defendant's house. Evidence was held admissible to show, that by a universal usage among carpenters, ten hours' labor constituted a *day's work*. So that the plaintiff was entitled to charge *one and one fourth day*, for every twenty-four hours within which the

men worked twelve hours and one half. *Bronson*, J., said: "Usage can never be set up in contravention of the contract; but when there is nothing in the agreement to exclude the inference, the parties are always presumed to contract in reference to the usage or custom which prevails in the particular trade or business to which the contract relates; and the usage is admissible for the purpose of ascertaining with greater certainty what was intended by the parties. The evidence often serves to explain or give the true meaning of some word or phrase of doubtful import, or which may be understood in more than one sense, according to the subject-matter to which it is applied. Now here, the plaintiff was to be paid for his workmen at the rate of twelve shillings *per day*; but the parties have not told us by their contract what they meant by a *day's work*. It has not been pretended that it necessarily means the labor of twenty-four hours. How much, then, does it mean? Evidence of the usage or custom was let in to answer that question."

(i) Per Lord *Eldon*, in *Anderson v. Pitcher*, 2 B. & P. 188; per Lord *Denman*, *Trueman v. Loder*, 11 A. & E. 589, 597; *Hutton v. Warren*, 1 M. & W. 466. In *Rogers v. Mechanics Ins. Co.* 1 Story, 608, 608, Mr. Justice *Story* uses the following language: "I own myself no friend to the indiscriminate admission of evidence of supposed usages and customs in a peculiar trade and business, and of the understanding of witnesses relative thereto, which has been in former times so freely resorted to; but which is now subjected by our courts to more exact and well-defined restrictions. Such evidence is often, very often, of a loose and indeterminate nature, founded upon very vague and im-

is now fixed by law, and extended to a vast variety of contracts; and indeed to all to which its privileges properly apply. And qualified and guarded as it is, it seems to be no more than reasonable. In fact, it may be doubted whether a large portion of the common law of England and of this country rests upon any other basis than that of custom. The theory has been held, that the actual foundation of most ancient usages was statute law, which the lapse of time has hidden out of sight. This is not very probable as a fact. The common law is every day adopting as rules and principles the mere usages of the community, or of those classes of the community who are most conversant with the matters to which these rules relate; and it is certain that a large proportion of the existing law first acquired force in this way. At all events, even as to all law, whether common or statute, that rule must be admitted which is as sound as it is ancient, and which Lord Coke emphatically declares: *optimus interpres legum consuetudo.* (j)

It is obvious that the word "custom" is used in many senses, or rather that it embraces very many different degrees of the same meaning. By it may be understood, either that ancient and universal, and perfectly established custom, which is in fact law; or only a manner of doing some particular thing, in a small neighborhood, or by a small class of men, for a few years; or any measure of the same kind of meaning within these two extremes. Nor is it material what the custom is in * 541 this respect, provided it falls within the reason of the rule which makes it a part of the contract. And it comes within this reason only when it is *so far* established, and so far known to the parties, that it must be supposed that their contract was made in reference to it. For this purpose, the custom must be established and not casual, uniform and not varying, general and not personal, and known to the parties. (k)¹ But the degree

perfect notions of the subject; and therefore it should, as I think, be admitted with a cautious reluctance and scrupulous jealousy, as it may shift the whole grounds of the ordinary interpretation of policies of insurance and other contracts." See also remarks of the same learned judge, in the Schooner *Reeside*, 2 Sumner, 567; *Hone v. Mutual Safety Ins. Co.*

1 Sandf. 187; per *Tilghman*, C. J., in *Stoever v. Whitman*, 6 Binn. 419; per *Gibson*, C. J., in *Snowden v. Warder*, 3 Rawle, 101; *Bolton v. Colder*, 1 Watts, 368.

(j) 2 Inst. 18.
(k) Usage or custom must be established. Those customs which can be incorporated into contracts, on the ground

¹ A custom in a particular market that a broker who has purchased and is purchasing goods of a particular kind, in his own name, may take portions of those goods and sup-

* 542 in which * these characteristics must belong to the custom, will depend in each case upon its peculiar circumstances. Suppose a contract to be entered into for the making of an article which has not been made until within a dozen years, and only by a dozen persons. Words are used in this contract, and their meaning is uncertain; but it is proved that these words

that the parties must have contracted in reference to them, differ from the local customs of the common law in the length of time they must have existed to be valid. "The true test of a commercial usage is its having existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made in reference to it." Per *Curiam*, in *Smith v. Wright*, 1 Caines, 48. In *Noble v. Kennaway*, 2 Doug. 510, where the usage established by evidence had existed for three years, Lord *Mansfield* said: "It is no matter if the usage has only been for a year." So, a usage as to the measurement of *morus multicaulis* trees has been incorporated into a contract, although the trade in such trees has existed only for a short time. *Barton v. McKelway*, 2 N. J. 165. See also *Dorchester and Milton Bank v. New England Bank*, 1 *Cush.* 177; *Taylor v. Briggs*, 2 C. & P. 525. But see *Robertson v. Jackson*, 2 C. B. 412; *Singleton v. Hilliard*, 1 *Strob.* 208; *Lewis v. Marshall*, 7 *Man. & G.* 729; *Hayward v. Middleton*, 3 *McCord*, 121; *Rapp v. Palmer*, 3 *Watts*, 178.—Usage must be uniform. It must constantly be observed in the same manner. In *Wood v. Wood*, 1 C. & P. 59, a usage was attempted to be shown relative to the return of cloths sent for inspection. Some of the witnesses spoke of three days as the time within which the buyer was to say whether he would buy them or not; others spoke of a week, and one of a month, as the time. The judge instructed the jury, that such a usage, to be binding, must be uniform, and that the usage proved was not so. The jury found accordingly. The usage must not be fluctuating and dependent upon price. *Lawrence v. M'Gregor*, Wright, 193. The observance of the usage must not be occasional. *The Paragon, Ware*, 322; *Rushforth v. Hadfield*, 7 East, 224. See also *Trott v. Wood*, 1 *Gallis*. 448; *Martin v. Delaware*

Ins. Co. 2 Wash. C. C. 254; *Rapp v. Palmer*, 3 *Watts*, 178. Single isolated instances, unaccompanied with proof of general usage will be insufficient to establish a custom. *Cope v. Dodd*, 13 *Penn. St.* 33; *United States v. Buchanan*, 8 *How.* 88, 102.—Usage must be *general*. In order that a custom may be incorporated into an agreement, by force of its existence, it must be shown to be so general, that a presumption of knowledge on the part of the parties arises. It must be *general* as opposed to *local*, for local usages cannot be brought in to affect the construction of written instruments, unless the knowledge of the parties is found. *Bartlett v. Pentland*, 10 *B. & C.* 760, 770; *Gabay v. Lloyd*, 3 *id.* 793; *Scott v. Irving*, 1 *B. & Ad.* 605; *Stevens v. Reeves*, 9 *Pick.* 198; *Clayton v. Gregson*, 5 *A. & E.* 802. A usage, however, may be local in the sense of being confined to a particular port or place, and yet general in reference to the persons engaged in the trade in question. *Baxter v. Leland*, 1 *Blatchf. C. C.* 526. Where a usage between insurers and insured is offered in evidence, it must be the usage of the port where the policy is effected. *Rogers v. Mechanics Ins. Co.* 1 *Story*, 607; *Child v. Sun Mutual Ins. Co.* 8 *Sandf.* 26.—The usage must be *general* as opposed to *partial*, or personal. Where it has reference to the commercial meaning of a word, or to a usage of trade proper, that is, to a particular manner of doing a thing, it must be general among all those merchants, in the same country, by whom the word is used, or who are engaged in the trade in question. *Martin v. Delaware Ins. Co.* 2 *Wash. C. C.* 254; *Trott v. Wood*, 1 *Gallis*. 448; *Macy v. Whaling Ins. Co.* 9 *Met.* 354, 365; *Wood v. Wood*, 1 C. & P. 59. See also as to the necessity that evidence to establish usage must be definite and certain, *Oelrichs v. Ford* 28 *How.* 49.

ply them to principals, who have employed him in his character of broker to buy such goods for them, is one of a peculiar nature, and cannot be supported as against a principal not proved to have been acquainted with it when he gave his order; and the mere fact of employing a broker to execute a commission as a broker, in a market where such a usage prevails, will not make the principal liable under it. *Robinson v. Mollett*, L. R. 7 *H. L.* 802.

have been used and understood in reference to this article, always, by all who have ever made it, in one way, and that both parties to the contract knew this; then this custom will be permitted to explain and interpret the words of the parties. But if the article had been made a hundred years, in many countries, and by multitudes of persons, the same evidence of this use of the words, by a dozen persons for a dozen years, might not be sufficient to give to this practice all the force of custom. Other facts must be considered; as how far the meaning sought to be put on the words departs from their common meaning as given by the dictionary, or by general use, and whether other makers of this article used these words in various senses, or used other words to express the alleged meaning. Because the main question is always this: Can it be said that both parties *must* have used these words in this sense, and that each party had good reason to believe that the other party so understood them?

Nor is it necessary that the word sought to be interpreted by custom should be, of itself, ambiguous. (*l*) For not only will custom explain an ambiguity, but will change the sense of a word from one which it bears almost universally, to another which is entirely different. Thus, words of number are of all others least ambiguous; but, as we have seen, custom will * interpret one thousand to mean one hundred dozen, or * 543 twelve hundred. (*m*) And so usage has been permitted to show, that the word "bale" means, in a certain trade, not an ordinary bale, but a package of a peculiar description. (*n*)

Custom and usage are very often spoken of as if they were the same thing. But this is a mistake. Custom is the thing to be proved, and usage is the evidence of the custom. (*o*) Whether a

(*l*) See *ante*, p. * 539, n. (*k*). Where words or clauses are doubtful in their meaning, much slighter evidence of usage will suffice to fix and determine their meaning. 1 Duer on Ins. 254. Where goods on board a vessel are insured "until discharged and safely landed," a resort to usage seems necessary to fix the meaning of the clause "until discharged and safely landed," the mode of discharge being dependent upon the usual course of the trade, and hence slighter evidence will be required. Noble v. Kenneway, 2 Doug. 510. Such is also the case where the usage of the port of departure is followed in taking in the cargo of a ship.

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Kingston v. Knibbs, 1 Camp. 508, n. See also Barton v. McKelway, 2 N. J. 165. This was an action on a contract to deliver a number of *morus multicaulis* trees, of "not less than one foot high." It was held, that it might be shown, that by the universal usage and custom of all dealers in that article, the length was measured to the top of the ripe wood, rejecting the green immature top. See also Moxon v. Atkins, 3 Camp. 200.

(*m*) See *ante*, p. * 539, n. (*k*).

(*n*) Gorrisen v. Perrin, 2 C. B. (n. s.) 681. See also Jones v. Clarke, 2 H. & N. 726.

(*o*) Per Bayley, J., in Kead v. Rann,

10 B. & C. 440.

custom exists is a question of fact. (*p*)¹ But in the proof of this fact questions of law of two kinds may arise. One, whether the evidence is admissible, which is to be settled by the common principles of the law of evidence. The other, whether the facts stated are legally sufficient to prove a custom. If one man testified that he had done a certain thing once, and had heard that his neighbor had done it once, this evidence would not be given to the jury for them to draw from it the inference of custom if they saw fit, because it would be legally insufficient. But if many men testified to a uniform usage within their knowledge, and were uncontradicted, the court would say whether this usage was sufficient in quantity and quality to establish a custom, and if they deemed it to * 544 be so, * would instruct the jury, that, if they believed the witnesses, the custom was proved. The cases on this subject are numerous. But no definite rule as to the proof of custom can be drawn from them, other than that derivable from the reason on which the legal operation of custom rests; namely, that the parties must be supposed to have contracted with reference to it.

(*p*) The custom must be established by the evidence of witnesses who speak directly to the fact of the existence of the custom. In *Lewis v. Marshall*, 7 Man. & G. 729, evidence was offered to show that the terms "cargo" and "freight" would be considered to comprise steerage passengers and the net profit arising from their passage-money. *Tindal*, C. J., said: "The character and description of evidence admissible for that purpose, is the fact of a general usage and practice prevailing in the particular trade or business, not the judgment or opinion of the witnesses; for the contract may be safely and correctly interpreted with reference to the fact of usage; as it may be presumed that such fact is known to the contracting parties, and that they contract in conformity thereto. But the judgment or opinion of the witnesses called, affords no safe guide for interpretation, as such judgment or opinion is confined to their own knowledge." "The custom of merchants or mercantile usage does not depend upon the private opin-

ions of merchants as to what the law is, or even upon their opinions publicly expressed,—but upon their *acts*." Per *Walworth*, Ch., in *Allen v. Merchants Bank*, 22 Wend. 222. See *Edie v. East India Co.* 2 Burr. 1228; *Syers v. Bridge, Doug.* 527, 580; *Crofts v. Marshall*, 7 C. & I. 697; *Winthrop v. Union Ins. Co.* 2 Wash. C. C. 7; *Rogers v. Mechanics Ins. Co.* 1 Story, 603, 607. Although a witness testifies generally to the fact of the usage, yet if he is unable to state a particular instance of the observance of the usage, his evidence should be rejected. Per Lord *Mansfield*, in *Syers v. Bridge, Doug.* 530; 1 *Duer on Ins.* 183. See *Vail v. Rice*, 1 Seld. 155. On the other hand, particular instances in which a certain meaning has been given to certain words, or a certain course followed, are of no avail in establishing a custom, when unaccompanied by evidence direct to the fact of usage. *Cope v. Dodd*, 18 Penn. St. 38; *Duvall v. Farmers Bank of Maryland*, 9 Gill & J. 31.

¹ *Jones v. Hoey*, 128 Mass. 585, decided that a usage may be established by the testimony of one witness. *Gray*, C. J. "There can be no doubt, at the present day, that the circumstance that but one witness testifies to a usage is important only as bearing upon the credibility and satisfactoriness of his testimony in point of fact, and does not affect its competency or its sufficiency as matter of law." See *Borrowman v. Drayton*, 2 Ex. D. 15, to the effect that "cargo" means the entire quantity of goods loaded on board a vessel on freight for a particular voyage. See *Ireland v. Livingston*, L. R. 2 Q. B. 99; 5 Q. B. 516; 5 H. L. 395, 410.

As a general rule, the knowledge of a custom must be brought home to a party who is to be affected by it. But if it be shown that the custom is ancient, very general and well known, it will often be a presumption of law that the party had knowledge of it; (*q*) although, if the custom appeared to be more recent, and less generally known, it might be necessary to establish by independent proof the knowledge of this custom by the party. (*r*) And one of the most common grounds for inferring knowledge in the parties, is the fact of their previous similar dealings with each other. (*s*) The custom might be so perfectly ascertained and *universal, that the party's actual ignorance could *545 not be given in proof, nor assist him in resisting a custom. If one sold goods, and the buyer being sued for the price, defended on the ground of a custom of three months' credit, the jury might be instructed that the defence was not made out, unless they could not only infer from the evidence the existence of the custom, but

(*q*) Where a custom is found to be general and notorious, and to have the other requisites of a valid custom, it is a conclusion of law that the parties must have contracted with reference to it, and their knowledge is conclusively presumed. In *Clayton v. Gregson*, 5 A. & E. 302, an arbitrator found, that according to the custom and understanding of miners throughout a certain district, the words "level," "deeper than," and "below," in a lease, had certain meanings, which were in favor of one of the parties to the suit. Some of the parties to the lease did not live within the district. *Held*, that the existence of the custom stated, within such district, did not raise a conclusion of law that the covenanting parties used the terms according to such custom, but was only evidence from which a jury might draw that conclusion. *Littledale*, J., said: "If the arbitrator had followed the words of the order, and found that the word 'level' (which is capable of many different meanings), meant, 'according to the custom and understanding of miners' so and so; judgment might have been given for the defendant; there would have been a result in law in his favor. But the finding is limited to a particular district; which is as much as to say that the word which has a particular signification in this district may mean differently in others; and if that be so, it cannot follow as an inference of law, that in the present contract it was used in the sense pointed out. It ought therefore to be shown, as a mat-

ter of fact, that the parties so used it." See also *Stevens v. Reeves*, 9 Pick. 198; *Hinton v. Locke*, 5 Hill, 439; *Deshler v. Beers*, 32 Ill. 68. But see *Winsor v. Dilaway*, 4 Met. 221.

(*r*) *Clayton v. Gregson*, 5 A. & E. 302; *Scott v. Irving*, 1 B. & Ad. 605; *Stevens v. Reeves*, 9 Pick. 198; *Stewart v. Aberdein*, 4 M. & W. 211; *Goodnow v. Parsons*, 36 Vt. 46.

(*s*) As that one of the parties was accustomed to effect insurance at a certain place or with a certain company. *Gabay v. Lloyd*, 3 B. & C. 793; *Bartlett v. Pentland*, 10 B. & C. 760; *Palmer v. Blackburn*, 1 Bing. 61. Or that parties were accustomed to transact business at a certain bank. *Bridgeport Bank v. Dyer*, 19 Conn. 136. Or that the parties reside at the place where the usage exists. *Bartlett v. Pentland*, 10 B. & C. 760; *Clayton v. Gregson*, 5 A. & E. 303; *Stevens v. Reeves*, 9 Pick. 198. Evidence may be given of former transactions between the same parties for the purpose of explaining the meaning of the terms used in a written contract. *Bourne v. Gatliff*, 11 Clark & F. 45, 70. But see *Ford v. Yates*, 2 Man. & G. 549, where evidence was rejected, that by the usual course of dealing between the parties, hops were sold on a credit of six months. The written contract was silent upon the subject. Previous dealings of parties are admissible, to give a more extended lien than that given by the common law. *Rushforth v. Hadfield*, 7 East, 224. See *Loring v. Gurney*, 5 Pick. 15.

a knowledge of it by the plaintiff. But if the buyer had given a negotiable note at three months, no ignorance of the seller would enable him to demand payment without grace, even where the days of grace were not given by statute. In such a case, the reason of the law of custom — that the parties contracted with reference to it — seems to be lost sight of. But in fact the custom in such a case has the force of law; (*t*) an ignorance of which cannot be supposed, and, if it be proved, it neither excuses any one, nor enlarges his rights.

No custom can be proved, or permitted to influence the construction of a contract, or vary the rights of parties, if the custom itself be illegal. For this would be to permit parties to break the law because others had broken it; and then to found their rights upon their own wrong-doing. (*u*)

Neither would courts sanction a custom, by permitting its operation upon the rights of parties, which was in itself wholly unreasonable. (*v*) In relation to a law, properly enacted, this

* 546 * inquiry cannot be made in a country where the judicial and the legislative powers are properly separated. But in reference to custom, which is a *quasi* law, and has often the effect of law, but has not its obligatory power over the court, the character of the custom will be considered; and if it be altogether foolish, or mischievous, the court will not regard it; and if a contract exist which only such a custom can give effect to, the contract itself will be declared void.

(*t*) It may, however, be superseded by a custom allowing four days' grace. *Mills v. Bank of United States*, 11 Wheat. 431; *Cookenderfer v. Preston*, 4 How. 317.

(*u*) See 1 Duer on Ins. 272. Also *Wallace v. Fouche*, 27 Miss. 266.

(*v*) A usage among the owners of vessels at particular ports, to pay bills drawn by masters for supplies furnished to their vessels in foreign ports, cannot bind them as acceptors of such bills. "A usage, to be legal, must be reasonable as well as convenient; and that usage cannot be reasonable which puts at hazard the property of the owners at the pleasure of the master, by making them responsible as acceptors on bills drawn by him, and which have been negotiated on the assumption that the funds were needed for supplies or repairs; and no evil can flow from rejecting such a usage." Per *Hubbard*, J., in *Bowen v. Stoddard*, 10 Met. 375. So a usage among plasterers, to charge half the size of the windows at the price agreed on for work and materials, is unreasonable and void. *Jordan v. Meredith*, 8 Yeates, 318. See also *Thomas v. Graves*, 1 Const. R. 308; *Spear v. Newell*, cited in *Burton v. Blin*, 28 Vt. 159; *Bryant v. Commonwealth Ins. Co.* 6 Pick. 181. For instances in which usages have been held reasonable, see *Clark v. Baker*, 11 Met. 186; *Thomas v. O'Hara*, 1 Const. R. 308; *Williams v. Gilman*, 3 Greenl. 276; *Bridgeport Bank v. Dyer*, 19 Conn. 136; *Connor v. Robinson*, 2 Hill (S. C.), 854; *Cuthbert v. Cumming*, 11 Exch. 406, 30 Eng. L. & Eq. 604. Whether a usage is reasonable would seem to be a question of law. 1 Duer on Ins. 269. See remarks of *Tindal*, C. J., in *Bottomeley v. Forbes*, 5 Bing. N. C. 127. And see *Bowen v. Stoddard*, 10 Met. 375. The question of the reasonableness of a usage was left to the jury by Lord *Eldon*, in *Ougier v. Jennings*, 1 Camp. 506, note (*a*).

Lastly, it must be remembered that no custom, however universal, or old, or known, unless it has actually passed into law, has any force over parties against their will. Hence, in the interpretation of contracts, it is an established rule, that no custom can be admitted which the parties have seen fit expressly to exclude. (w) Thus, to refer again to the custom of allowing grace on bills and notes on time, there is no doubt that the parties may agree to waive this; and even the statutes which have made this custom law permit this waiver. And not only is a custom inadmissible which the parties have expressly excluded, but it is equally so if the parties have excluded it by a necessary implication; as by providing that the thing which the custom affects shall be done in a different way. For a custom can no more be set up against the clear intention of the parties than against their express agreement; and no usage can be incorporated into a contract, which is inconsistent with the terms of the contract. (x)

(w) *Knox v. The Ninetta, Crabbe*, 534. See *infra*, n. (x).

(x) In the case of the schooner *Reeside*, 2 Sumner, 567, it was attempted to vary the common bill of lading, by which goods were to be delivered in good order and condition, *the danger of the seas only excepted*, by establishing a custom, that the owners of packet vessels between New York and Boston should be liable only for damage to goods occasioned by their own neglect. But, per *Story*, J., "the true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words, in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible, to supersede, or vary, or control, a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted, by a usage or

custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties." See *Blackett v. Royal Exch. Ass. Co.* 2 Cromp. & J. 244; *Hall v. Janson*, 4 Ellis & B. 500; *Foley v. Mason*, 6 Md. 37; *Hinton v. Locke*, 5 Hill, 437; *Grant v. Maddox*, 15 M. & W. 737; *Yates v. Pym*, 6 Taunt 446; *Keener v. Bank of United States*, 2 Barr, 237; *M'Gregor v. Ins. Co. of Penn.* 1 Wash. C. C. 89; *Sweet v. Jenkins*, 1 R. I. 147; *Linsley v. Lovely*, 28 Vt. 128; *Bliven v. N. E. Screw Co.* 23 How. 420; *Fay v. Strawn*, 32 Ill. 295. A custom, that a tenant on quitting shall leave the manure to be expended upon the land, he being entitled to be paid for the same, is excluded by an express stipulation in the lease that the tenant "should not sell or take away any of the manure." The tenant is not entitled to recover the value of the manure so left. "It is altogether idle," said Lord *Lyndhurst*, C. B., "to provide for one part of that which was sufficiently provided for by the custom, unless it was intended to exclude the other part." *Roberts v. Barker*, 1 Cromp. & M. 808. See also *Webb v. Plummer*, 2 B. & Ald. 746. A custom of the country, by which the tenant of a farm, cultivating it according to the course of good husbandry, is entitled on quitting

* 547 * Where the terms of a contract are plain, usage, even under that very contract, cannot be permitted to affect materially the construction to be placed upon it; but when it is ambiguous, usage for a long time may influence the judgment of the court, by showing how it was understood by the original parties to it. (y)¹

SECTION X.

OF THE ADMISSIBILITY OF EXTRINSIC EVIDENCE IN THE INTERPRETATION OF WRITTEN CONTRACTS.

It is very common for parties to offer evidence external to the contract, in aid of the interpretation of its language.

* 548 The * general rule is, that such evidence cannot be admitted to contradict or vary the terms of a valid written contract; or, as the rule is expressed by writers on the Scotch law, "writing cannot be cut down or taken away by the testimony of witnesses." (z) There are many reasons for this rule. One is, the general preference of the law for written evidence over unwritten; or, in other words, for the more definite and certain evidence over that which is less so; a preference which not only makes written evidence better than unwritten, but classifies that which is written. For if a negotiation be conducted in writing, and even if there be a distinct proposition in a letter, and a distinct assent, making a contract; and then the parties reduce this contract to writing, and both execute the instrument, this

to receive from the landlord or incoming tenant a reasonable allowance for seeds and labor bestowed on the arable land in the last year of the tenancy, and is bound to leave the manure for the landlord, if he will purchase it, — is not excluded by a stipulation in the lease under which he holds, that he will consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as shall not be so spread on the land for the use of the landlord, on receiving a reasonable price for it. *Hutton v. Warren*, 1 M. & W. 466. See also *Senior v. Armytage*, Holt,

N. P. 197; *Syers v. Jonas*; 2 Exch. 111. If the legislature has given to a particular word denoting quantity a definite meaning, no evidence of usage can be given to show that it is used in a different sense. *Smith v. Wilson*, 3 B. & Ad. 728. See *Helm v. Bryant*, 11 B. Mon. 64; and note to *Wiggleworth v. Dallison*, 1 Smith's Lead. Cas. 308, b. (y) *Boldero v. East India Co.* 26 Beav. 316.

(z) *Tait on Ev.* 326. See further *Herring v. Boston Iron Co.* 1 Gray, 184; *Renard v. Sampson*, 2 Kern. 561.

¹ Local usage cannot change a warehouse receipt from a bailment to a sale. *Led yard v. Hibbard*, 48 Mich. 421.

instrument controls the letters, and they are not permitted to vary the force and effect of the instrument, although they may sometimes be of use in explaining its terms. Another is, the same desire to prevent fraud which gave rise to the statute of frauds; for as that statute requires that certain contracts shall be in writing, so this rule refuses to permit contracts which are in writing to be controlled by merely oral evidence. But the principal cause alleged in the books and cases is, that when parties, after whatever conversation or preparation, at last reduce their agreement to writing, this may be looked upon as the final consummation of their negotiation, and the exact expression of their purpose. And all of their earlier agreement, though apparently made while it all lay in conversation, which is not now incorporated into their written contract, may be considered as intentionally rejected. (a) The parties write the contract when they are ready to do so, for * the very purpose of * 549 including all that they have finally agreed upon, and excluding everything else, and make this certain and permanent. And if every written contract were held subject to enlargement, or other alteration, according to the testimony which might be offered on one side or the other as to previous intention, or collateral facts, it would obviously be of no use to reduce a contract to writing, or to attempt to give it certainty and fixedness in any way. (b)

It is nevertheless certain, that some evidence from without must be admissible in the explanation or interpretation of every contract. If the agreement be, that one party shall convey to the other, for a certain price, a certain parcel of land, it is only by extrinsic evidence that the persons can be identified who

(a) *Preston v. Merceau*, 2 W. Bl. 1249; *Harnor v. Groves*, 15 C. B. 667, 29 Eng. L. & Eq. 220; *Carter v. Hamilton*, 11 Barb. 147; *Troy Iron and Nail Factory v. Corning*, 1 Blatchf. C. C. 467; *Meres v. Ansel*, 8 Wilson, 275; *Hakee v. Hotchkiss*, 23 Vt. 231; *Vermont Central R. R. Co. v. Estate of Hills*, id. 681. "Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination. But if the contract be in the end reduced into writing, nothing which is not found in the writing can be con-

sidered as a part of the contract." Per Abbott, C. J., in *Kain v. Old*, 2 B. & C. 634. See also *Vandervort v. Smith*, 2 Caines, 155; *Mumford v. M'Pherson*, 1 Johns. 414; *Pickering v. Dowson*, 4 Taunt. 786.

(b) "It would be inconvenient that matters in writing, made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory." *Countess of Rutland's case*, 5 Rep. 28 a; *Carter v. Hamilton*, 11 Barb. 147; *Rogers v. Atkinson*, 1 Ga. 12; *Wynn v. Cox*, 5 id. 873.

claim or are alleged to be parties, and that the parcel of land can be ascertained. It may be described by bounds, but the question then comes, where are the streets, or roads, or neighbors, or monuments referred to in the description; and it may sometimes happen that much evidence is necessary to identify these persons or things. Hence, we may say, as the general rule, that as to the *parties* or the *subject-matter* of a contract, extrinsic evidence may and must be received and used to make them certain, if necessary for that purpose. (c)¹ But as to the * 550 * terms, conditions, and limitations of the agreement, the written contract must speak exclusively for itself. Hence, too, a false description of person or thing has no effect in defeating a contract, if the error can be distinctly shown and perfectly corrected, by other matter in the instrument. (d)

(c) "When there is a devise of the estate purchased of A, or of the farm in the occupation of B, nobody can tell what is given till it is shown by extrinsic evidence what estate it was that was purchased of A, or what farm was in the occupation of B." Per Sir *William Grant*, in *Sanford v. Raikes*, 1 Meriv. 663. And see *Jackson v. Parkhurst*, 4 Wend. 369; *Abbot v. Massie*, 8 Ves. 148; *McCullough v. Wainwright*, 14 Penn. St. 171; *Newton v. Lucas*, 6 Sim. 54; *Jackson v. Sill*, 11 Johns. 201. "Speaking philosophically," says *Rolfe*, B., "you must always look beyond the instrument itself to some extent, in order to ascertain who is meant; for instance, you must look to names and places. There may indeed be no difficulty in ascertaining who is meant, when a person who has five or six names, and some of them unusual ones, is described in full, while on the other hand, a devise simply to John Smith would necessarily create some uncertainty." *Clayton v. Lord Nugent*, 18 M. & W. 207. See also *Owen v. Thomas*, 3 Mylne & W. 853. Whether parcel or not, or appurtenant or not, is always matter of evidence. Per *Buller*, J., in *Doe v. Burt*, 1 T. R. 704; *Doe v.*

Webster, 12 A. & E. 442; *Waterman v. Johnson*, 13 Pick. 261; per *Barbour*, J., in *Bradley v. Wash. A. & G. Steam Packet Co.* 18 Pet. 89, 97; per Lord *Ellenborough* in *Goodtitle v. Southern*, 1 M. & S. 301; *Wilson v. Robertson*, Harp. Eq. 56.

(d) *Bac. Max. Reg. 25. Falsa demonstratio non nocet.* *Thomas v. Thomas*, 6 T. R. 671. "If the thing described is sufficiently ascertained, it is sufficient, though all the particulars are not true; as if a man conveys his house in D, which was R. Cotton's when it was Thomas Cotton's." *Com. Dig. Fait* (E 4). Where one devised all his "freehold houses in Aldersgate street," he having only leasehold houses there, the leasehold were held to pass. *Day v. Trig*, 1 P. Wms. 286. See also *Doe v. Cranstoun*, 7 M. & W. 1; *Nelson v. Hopkins*, 21 Law J. (n. s.) Ch. 410, 11 Eng. L. & Eq. 66. Where premises are sufficiently described otherwise, any reference to the quantity of land may be rejected, as *falsa demonstratio*. *Llewellyn v. Earl of Jersey*, 11 M. & W. 183; *Shep. Touch.* 248. So where there was a bequest to "John and Benedict, sons of J. S." who had two sons, James and Benedict, it was held that James might take. *Dowset*

¹ Evidence is admissible merely to show what was the condition of the document when it became a contract between the parties, or of the paper when the parties agreed that it should be an agreement between them. *Stewart v. Eddowes*, L. R. 9 C. P. 311. Where land is bounded in a deed on the "continuation of the Odlin road, so called," there being in fact no such continuation, evidence is admissible that the parties understood the phrase to refer to a preliminary survey staked out, but never completed. *Tyler v. Fickett*, 73 Me. 410. Where a county offered a prize for a building plan, and by a resolution accepted the plaintiff's, evidence is inadmissible to show a usage among architects to receive payment in addition for making the plan, and for superintendence of the work, without proof that the building was ever erected. *Tilley v. County of Cook*, 103 U. S. 155.

A written contract, of which the memorandum satisfies the statute of frauds, is open to evidence to show that certain essen-

v. Sweet, Ambl. 175. See *Connolly v. Pardon*, 1 Paige, 291; *Doe v. Galloway*, 5 B. & Ad. 43; *Duke of Dorset v. Lord Hawarden*, 8 Curteis, 80; *Tudor v. Terrel*, 2 Dana, 47; *Gynes v. Kemsley, Freem. K. B. 298*; *Chamberlain v. Turner, Cro. Car. 129*; *Doe v. Parry*, 18 M. & W. 858; *Goodtitle v. Southern*, 1 M. & S. 299; *Beaumont v. Fell*, 2 P. Wms. 140.—The characteristic of cases falling under the maxim *falsa demonstratio non nocet*, is, that the description, so far as it is false, applies to no subject at all, and so far as it is true, to one subject only. Per *Alderson*, B., in *Morrell v. Fisher*, 4 Exch. 591, 604; *Wigram on Wills*, sec. 183. This rule is considered *ante*, p. *515.—The case of *Beaumont v. Fell*, 2 P. Wms. 140, if it can be sustained at all, must be sustained as falling under the maxim *falsa demonstratio non nocet*. Before stating the case, it may be well to remark, that evidence may always be given that a testator was accustomed to call particular individuals by peculiar names, other than those by which they were commonly known, and a devise or bequest may take effect in favor of such person who is designated in the devise or bequest by a nickname, provided the application of the nickname is sufficiently certain. *Baylin v. Attorney-General*, 2 Atk. 239; per *Lord Abinger*, in *Doe v. Hiscocks*, 5 M. & W. 368; *Rishton v. Cobb*, 5 Mylne & C. 145; *Lee v. Pain*, 4 Hare, 261, 252; *Parsons v. Parsons*, 1 Ves. 288; per *Rolfe*, B., in *Clayton v. Lord Nugent*, 13 M. & W. 207; *White v. Bradshaw*, 16 Jur. 738, 13 Eng. L. & Eq. 296; *Powell v. Biddle*, 2 Dall. 70. In *Beaumont v. Fell*, there was a devise of a legacy of £500 to "Catharine Earnley." No person of that name claimed the legacy. It was claimed by Gertrude Yardley. It appeared that the testator's voice, when he gave instructions for writing his will, was very low, and hardly intelligible; that the testator usually called Gertrude Yardley by the name of *Gatty*, which the scrivener might easily mistake for *Katy*. The scrivener not well understanding who the legatee was, owing to the feebleness of the voice of the testator, the testator referred him to J. S. and wife, who afterwards declared that Gertrude Yardley was the person intended. So far as this case sanctions the admission of evidence of intention, it is now of no authority. See *supra*, note (a). The only ground, perhaps, upon which the case can be sustained,

is that "Earnley" might be rejected as *falsa demonstratio*, and that "Catharine" was a sufficiently certain designation of the individual called "Gatty" by the testator. Per *Lord Abinger*, in *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 371. The case of *Selwood v. Mildmay*, 3 Ves. 306, has been regarded as falling under the maxim, "*falsa demonstratio*." In this case a testator gave to his wife the interest and proceeds of £1,250, "part of my stock in the 4 per cent annuities of the Bank of England, for and during the term of her natural life, together with all such dividends as shall be due upon the said £1,250 at the time of my decease." At the time he made his will he had no stock in the 4 per cent annuities, but he had had some, which he had sold out, and had invested in Long Annuities. The Master of the Rolls, Sir R. P. Arden, said: "It is clear the testator meant to give a legacy, but mistook the fund. He acted upon the idea that he had such stock. The distinction is this; if he had had the stock at the time, it would have been considered specific, and that he meant that identical stock; and any act of his destroying that subject would be a proof of *animus revocandi*; but if it is a denomination, not the identical *corpus*, in that case, if the thing itself cannot be found, and there is a mistake as to the subject out of which it is to arise, that will be rectified." According to the view taken of this case by *Tindal*, C. J., in *Miller v. Travers*, 8 Bing. 244, the parol evidence as to the condition of the testator's property was received, for the purpose of showing that the testator, when he used the erroneous description of 4 per cent stock, meant to bequeath the long annuities, which he had purchased with the produce of the 4 per cent stock; and the result of the cause was to substitute another specific subject, in the place of a specific legacy which the will purported to bequeath;—to substitute the long annuities which the testator had and did not purport to give, for the 4 per cent bank annuities, which he had not and did purport to give. But it would seem difficult to support the decree on this ground. The true view of the case seems to be that taken by *Lord Langdale*, in *Lindgren v. Lindgren*, 9 Beav. 368, namely, that the parol evidence as to the condition of the testator's property showed that a general and not a specific legacy was intended. After stating, in

tials of the actual contract are not in the memorandum, if the

the language of the decree, that the evidence was admitted "to prove, not that there was a mistake, for that was clear, but to show how it arose," his lordship continued: "It is very necessary to observe, that in the case of *Selwood v. Mildmay*, the evidence was received only for the purpose stated by the Master of the Rolls in his judgment, and not, as it has been erroneously supposed, for the purpose of showing that the testator, when he used the erroneous description of 4 per cent stock, meant to bequeath the long annuities, which he had purchased with the produce of the 4 per cent stock, and that the result of the cause was, not to substitute another specific subject in the place of a specific legacy which the will purported to bequeath;—not to substitute the long annuities, which the testator had and did not purport to give, for the 4 per cent bank annuities, which he had not and did purport to give. The absence of the fund purported to be given, showing that a specific legacy was not intended, other evidence was admitted to show how the mistake arose; and this being clearly shown, it was held, that the legatees were entitled to payment out of the general personal estate." And see to the same effect, *Sawrey v. Rumney*, 16 Jur. 1110, 16 Eng. L. & Eq. 4. In *Wrotesley v. Adams*, Plowd. 191, it is laid down that, "there is a diversity where a certainty is added to a thing that is uncertain, and where to a thing certain. For if I release all my right in all my lands in Dale, which I have by descent on the part of my father, and I have lands in Dale by descent on the part of my mother, but no lands by descent on the part of my father, there the release is void, and so the words of certainty, namely, which I have by descent on the part of my father, being added to the general words which were uncertain, are of effect. But if the release had been of Whiteacre in Dale, which I have by descent on the part of my father, and I had it not by descent on the part of my father, but otherwise, yet the release is good, for the thing was certainly expressed by the first words, in which case the addition of another certainty is not necessary, but superfluous." In *Doe v. Parkin*, 5 Taunt. 321, there was a devise of "all my messuages, &c., in T., and now in my own occupation." The testator had two messuages in T., of which he occupied only one. Held, that only that one passed by the devise. In this case there was certainty added to what

was uncertain. See per *Parke*, J., in *Doe v. Galloway*, 5 B. & Ad. 51. Words of *certainty*, however, as they are called in Plowden, following *general* or *uncertain* words, will not be construed as restrictive where the effect of doing so would be to render the *general* or *uncertain* words wholly inoperative, and where the *certain* words may be rejected as *falsa demonstratio*. A testator devised to J. S. "all those my three messuages, with the gardens, close of land, and *all other my real estate*, whatsoever, situate at Little Heath, in the parish of F., now in the occupation of myself, and A and B." At the date of the will, and at the death of the testator, he was possessed of three messuages with gardens, and a close of land, at Little Heath, which were in the occupation of himself, and A and B. He had also the reversion in a house and garden, situate at Little Heath, which was in the occupation of C, who was entitled to it for life. He had no other property in the parish of F. Held, that the house and garden in the occupation of C passed under the general devise to J. S. *Doe v. Carpenter*, 16 Q. B. 181, 1 Eng. L. & Eq. 307. See also *Nightingall v. Smith*, 1 Exch. 879. In *Morrell v. Fisher*, 4 Exch. 591, there was a devise to the following effect: "All my leasehold farmhouse, homestead, lands, and tenements at Headington, containing about 170 acres, held under Magdalen College, Oxford, and now in the occupation of B, as tenant to me." B occupied a farm at Headington, which was leased to the testator by Magdalen College, and there were two parcels of land also held by the testator under Magdalen College, and situated at Headington, but not in the occupation of B. Held, that the description of the lands being in the possession of B could not be rejected as *falsa demonstratio*, and consequently the two parcels did not pass under the devise. In this case *Alderson*, B., in delivering the judgment of the court, said: "The question is not what the testator intended to have done, but what the words of the clause mean, after applying to it the established rules of construction. One of these rules is, '*Falsa demonstratio non nocet*,' another is, '*Non accipi debent verba in demonstrationem fulsam, qua competunt in limitationem veram*.' The first rule means, that if there be an adequate and sufficient description, with convenient certainty of what was meant to pass, a subsequent erroneous addition will not vitiate it. The characteristic of cases within the rule is, that the descrip-

effect of the evidence is, not to vary the written contract, but to show that no such contract was ever made. (*dd*)

* Where the language of an instrument has a settled *551 legal meaning, its construction is not open to evidence. Thus, a * promise to pay money, no time being expressed, *552 means a promise to pay it on demand, and evidence that a payment at a future day was intended, is not admissible. (*e*)¹ If there be a written contract, to deliver a certain quantity of an article every year for five years, the party has by construction of law the whole of each year wherein to deliver the quantity of that year, and evidence is not admissible to prove that it was to be delivered in certain quantities at certain times. (*ee*) And in

tion, so far as it is false, applies to no subject at all; and so far as it is true, applies to one only. The other rule means, that if it stand doubtful upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood. If, therefore, there is some land wherein all the demonstrations are true, and some wherein part are true and part false, they shall be intended words of true limitation to pass only those lands wherein the circumstances are true. Whether these maxims, or rather the first, has been correctly acted upon in some of the decided cases, in which the courts have professed, or intended so to do, need not now be inquired into. They certainly are acknowledged rules of construction. Is there then, in the present case, an adequate and sufficient description of the subject of the devise, so as to enable us to treat the description of the land being in the possession of Burrows, as a false demonstration, and rejected according to the first rule? Now, if we read the language of the devise in its ordinary and obvious sense, it is a gift first of 'all his leasehold farm-house, homestead, lands, and tenements at Headington, held under Magdalen College, and occupied by Burrows.' There is no doubt that the farm-house passed, for it was a 'leasehold, and in the occupation of Burrows;' and if there was one acre, and one only, of that character, and that was not in the possession of Burrows, that would have passed, and the description would have been rejected as inapplicable

to any such. The will then professes to give all the testator's lands and tenements at Headington, leasehold under the college, containing about 170 acres, in the possession of Burrows. The description by acreage defines nothing, for it is inapplicable to any subject [whether the two parcels were added or not, the amount would have been very different from 170 acres], and therefore that may be rejected, and then there is nothing to define any lands in particular. The second maxim then applies, and all the demonstrations here being true as to the rest of the land, exclusive of these two parcels, and part only being true as to these parcels, they do not pass." See also *Doe v. Bower*, 3 B. & Ad. 453; *Bac. Max. Reg.* 18; *Doe v. Hubbard*, 16 Q. B. 227; *Newton v. Lucas*, 6 Sim. 54.

(*dd*) *Coddington v. Goddard*, 16 Gray, 436.

(*e*) *Warren v. Wheeler*, 8 Met. 97; *Atwood v. Cobb*, 16 Pick. 227; *Ryan v. Hall*, 18 Met. 520; *Thompson v. Ketcham*, 8 Johns. 189; *Barry v. Ransom*, 2 Kern. 462. But a promise to do something other than to pay money, no time being expressed, means a promise to do it within a reasonable time. *Warren v. Wheeler*, 8 Met. 97. And in such a case, it seems that a contemporaneous verbal agreement that the matter stipulated for in a written agreement should be done at a particular time, would be admissible as bearing upon the question of reasonable time. *Per Shaw, C. J., in Atwood v. Cobb*, 16 Pick. 231. And see *Barringer v. Sneed*, 8 Stew. 201; *Simpson v. Henderson, Moody & M.* 300.

(*ee*) *Curtiss v. Howell*, 39 N. Y. 211.

¹ And an averment that a note was "duly protested for non-payment" will not include notice to indorsers. *Cook v. Warren*, 88 N. Y. 37.

* 553 * Massachusetts, one who puts his name on the back of a note (not being a payee) at the time it was made, is not permitted to introduce proof that his contract was conditional only. (*f*)

There are reasons, although perhaps no direct authority, for applying to the construction of contracts a distinction which is taken in respect of wills. If the presumption is *against* the apparent and natural effect of an instrument, it may be rebutted by parol evidence; but not so if the legal presumption is with the instrument. As if a testator gives two legacies to the same party, in such a way that the presumption of law is that they are but one legacy, evidence is receivable to show that the testator said what he meant, and that a double gift was intended. But if they are so given that the law holds that what is twice given was meant to be twice given, evidence is not receivable to show that but a single gift was intended. (*g*)

Where the agreement between the parties is one and entire, and only a part of this is reduced to writing, it would seem that the residue may be proved by extrinsic evidence. (*h*)¹ And if there are contemporaneous writings between the same parties, so far in relation to the same subject-matter that they may be deemed part and parcel of the contract, although not referred to in it, they may be read in connection with it; (*i*) but not so as

(*f*) *Wright v. Morse*, 9 Gray, 337.

(*g*) *Hall v. Hill*, 1 Con. & L. 120, 1 Drury & W. 94. See also Spence on the Equitable Jurisdiction of the Court of Chancery, vol. i. p. 666 *et seq.*, where this point is fully examined, and the authorities cited.

(*h*) In *Jeffery v. Walton*, 1 Stark. 267, in an action for not taking proper care of a horse, hired by the defendant of the plaintiff, the following memorandum, made at the time of hiring, was offered in evidence: "Six weeks at two guineas — Wm. Walton, jun'r." Lord *Ellenborough* regarded the memorandum as incomplete, but conclusive as far as it went. "The written agreement," said he, "merely regulates the time of hiring, and the rate of payment, and I shall not allow any evidence to be given by the plaintiff, in contradiction of these terms, but I am of opinion that it is competent to the plaintiff to give in evidence supplementary matter as a part of the agreement." See

Knapp v. Harden, 6 C. & P. 745; *Deshon v. Merchants Ins. Co.* 11 Met. 199; *Edwards v. Goldsmith*, 16 Penn. St. 48; *Coates v. Sangston*, 5 Md. 121; *Knight v. Knott*, 8 Rich. Law, 35. Also *Heatherley v. Record*, 12 Texas, 49.

(*i*) In *Colbourn v. Dawson*, 10 C. B. 765, 4 Eng. L. & Eq. 378, the plaintiffs wrote to the defendant: "We are doing business with B, and require a guaranty to the amount of £200, and he refers us to you." Defendant wrote in answer: "I have no objection to become security for B, and subjoin a memorandum to that effect." The memorandum subjoined was: "I hereby engage to guarantee to Messrs. Colbourn, iron-masters, £200 for iron received from them for B, as annexed." Held, that these three documents should be read together, and that the words, "we are doing business," taken with the rest, showed that the consideration for the defendant's undertaking was that the plaintiff should continue to sup-

¹ Also a collateral undertaking. *Chapin v. Dobson*, 78 N. Y. 74, where the authorities are collated and reviewed.

* to affect a third party who relied upon the contract, and * 554 knew nothing of these other writings.

Recitals in an instrument may be qualified or contradicted by extrinsic evidence, if the law of estoppel does not prevent. So the date of an instrument, (j) or if there be no date, the time when it was to take effect, which may be other than the day of delivery; (k) or the amount of the consideration paid, (l) may be varied by testimony; but if a note given for land is sued, the promisor cannot show in defence that the deed described a less quantity of land than had been stipulated. (m) And an instrument may be shown to be void and without legal existence or efficacy, as for want of consideration, (n) or for fraud, (o) or duress, or any incapacity of the parties, (p) or any illegality in the agreement. (q) In the same way extrinsic evidence may show a total discharge of the obligations of the contract; or a new agreement substituted for the former, which it sets aside; (r) * or that the time when, (s) or the place * 555 where, (t) certain things were to be done, had been changed by the parties; or that a new contract, which was additional and supplementary to the original contract, had been made (u);¹ or that damages had been waived, (v) or that a new

ply B with goods, and that there was therefore a good consideration. See also Hunt v. Frost, 4 CUSH. 54; Hanford v. Rogers, 11 Barb. 18; Shaw v. Leavitt, 3 Sandif. Ch. 168; Gammon v. Freeman, 31 Me. 243; Kenyon v. Nichols, 1 R. I. 411.

(j) Breck v. Cole, 4 Sandif. 79; Abrams v. Pomeroy, 18 Ill. 138; Hall v. Cazenove, 4 East, 477. Where, however, the date is referred to in the body of the instrument, as fixing the time of payment, as where there is a promise to pay money or to do some act "in sixty days from date," the date cannot be altered or varied by parol evidence. Joseph v. Bigelow, 4 CUSH. 82.

(k) Davis v. Jones, 17 C. B. 626.
(l) Clifford v. Turrell, 1 Younge & C. Cas. in Ch. 138; Rex v. Scammonden, 3 T. R. 474; Belden v. Seymour, 8 Conn. 304. As to the effect of a recital in a deed of conveyance of the payment of the consideration-money, as evidence of such payment, the English and American authorities differ, the former holding such recital to be conclusive evidence, and the latter only *prima facie*. See the cases collected and arranged in 1 Gr. Ev. § 26, n. (1).

(m) Bennett v. Ryan, 9 Gray, 204.

¹ But a subsequent agreement not referring to, or able by its terms to be connected with, a contract does not vary the latter. Gavigan v. Evans, 45 Mich. 597.

(n) Erwin v. Saunders, 1 Cowen, 249; Foster v. Jolly, 1 Cromp. M. & R. 708. The case of Bowers v. Hurd, 10 Mass. 427, so far as it contains a contrary doctrine, has been overruled. See Hill v. Buckminster, 5 Pick. 291; Parish v. Stone, 14 id. 198.

(o) Erwin v. Saunders, 1 Cowen, 249; Van Valkenburgh v. Roun, 12 Johns. 837.

(p) Mitchell v. Kingman, 5 Pick. 431. Subscribing witnesses to a deed derive from their being witnesses no authority to give their opinion as to the competency of the party to contract, by reason of sanity or other capacity; the execution of the deed being all that is attested by them, 40 Penn. St. 474.

(q) Collins v. Blantern, 2 Wilson, 347.

(r) Munroe v. Perkins, 9 Pick. 298; Goss v. Lord Nugent, 5 B. & Ad. 58; Davis v. Tallcott, 2 Kern. 184.

(s) Keating v. Price, 1 Johns. Cas. 22; Dearborn v. Cross, 7 Cowen, 48; Neil v. Cheves, 1 Bailey, 637; Cuff v. Penn, 1 M. & S. 21.

(t) Robinson v. Batchelder, 4 N. H. 40.

(u) Jeffery v. Walton, 1 Stark. 267.

See also Emerson v. Slater, 22 How. 28.

(v) Flemming v. Gilbert, 3 Johns. 528.

consideration, in addition to the one mentioned, has been given, if it be not adverse to that named in the deed. (w) And if no consideration be named, one may be proved. (x)

A receipt for money is peculiarly open to evidence. It is only *prima facie* evidence either that the sum stated has been paid, or that any sum whatever was paid. (y) It is in fact not regarded as a contract, and hardly as an instrument at all, and has but little more force than the oral admission of the party receiving. But this is true only of a simple receipt. It often happens that a paper which contains a receipt, or recites the receiving of money or of goods, contains also terms, conditions, and agreements, or assignments. Such an instrument, as to everything but the receipt, is no more to be affected by extrinsic evidence than if it did not contain the receipt; but as to the receipt itself, it may be varied or contradicted by extrinsic testimony, in the same manner as if it contained nothing else. (z)

If a contract refer to principles of science, or art, or use, the technical phraseology of some profession or occupation, or common words in a technical sense, or the words of a foreign language, their exact meaning may be shown, as we have already

remarked, by the testimony of "experts," who are persons

- * 556 * possessing the peculiar knowledge and skill requisite for the interpretation of the contract. (a)¹ It may be added,

(w) *Clifford v. Turrell*, 1 Younge & C. Cas. in Ch. 188; *Bedell's case*, 7 Rep. 183 a; *Shaw v. Leavitt*, 8 Sandf. Ch. 163, 173; *Villers v. Beaumont, Dyer*, 146 a; *Doe d. Milburn v. Salkeld*, Willes, 677.

(x) *Pott v. Todhunter*, 2 Collyer, 76.

(y) *Dutton v. Tilden*, 18 Penn. St. 46; *Bell v. Bell*, 12 Penn. St. 235; *Kirkpatrick v. Smith*, 10 Humph. 188; *Cole v. Taylor*, 2 N. J. 59; *Fuller v. Crittenden*, 9 Conn. 401; *Straton v. Rastall*, 2 T. R. 366; *Ryan v. Rand*, 6 Foster, 12.

(z) Where in a receipt money was acknowledged to have been received "for safe keeping," it was held, that no evidence was admissible to show that the money was not deposited for safe-keeping, but was in discharge of a debt. *Tisoe v. Graeter*, 1 Blackf. 363. See also *Egleston v. Knickerbacker*, 6 Barb. 468; *Smith v. Brown*, 3 Hawks, 580; *May v. Bab-*

cock, 4 Ohio, 348; *Stone v. Vance*, 6 Ham. (Ohio) 246; *Wood v. Perry, Wright (Ohio)*, 240; *Graves v. Harwood*, 9 Barb. 477; *Wayland v. Moseley*, 5 Ala. 480; *O'Brien v. Gilchrist*, 34 Me. 544.

(a) *Goblet v. Beechey*, 3 Sim. 24; *Wigram on Wills*, Appendix, No. 1; *Masters v. Masters*, 1 P. Wms. 425; *Norman v. Morrell*, 4 Ves. 769; *Shore v. Wilson*, 9 Clark & F. 511; *Cabarga v. Seeger*, 17 Penn. St. 514. The court may always inform itself by means of books and treatises as to the meaning of the terms used in an instrument, especially where that instrument is ancient, or uses scientific terms. Per *Tindal*, C. J., in *Shore v. Wilson*, 9 Clark & F. 568; per *Eyre*, C. B., in *Attorney-General v. Plate Glass Co.* 1 Anst. 89, 44. In *Remon v. Hayward*, 2 A. & E. 666, it is said, that a question arising at *Nisi Prius*, before Lord Den-

¹ Where the defendant wrote, "I want to buy, say 100 shares Union Pacific stock on margin," the plaintiff, in an action to recover a balance due, may show by experts the technical meaning of the words "on margin," and a usage among brokers to hold one so buying personally liable in case the security deposited for "margin" proves insufficient. *Hatch v. Douglas*, 48 Conn. 116.

that the testimony of the experts is so far a matter for the jury, that if it be contradictory and conflicting, or uncertain, it is to be weighed by them. But the legal effect of the words or phrases, when their meaning is ascertained by experts, belongs to the construction of the contract, and is for the court. (b)

Questions depending upon the construction or interpretation of a contract sometimes arise between third parties, who had no privity or participation in the original contract, and nothing to do with the language used in it. In such cases much of the reason which prohibits the introduction of extrinsic evidence fails, and with it the prohibition fails. It would be obviously unjust to hold these parties responsible for words which neither of them selected or adopted, or had any power to exclude or to qualify. They may therefore show by extrinsic evidence what the agreement between the original parties, which purports to be expressed by the written contract, * really was, so far as * 557 this is necessary to establish their actual rights, and to do full justice between them. (c)¹ A simple illustration of this may be found in the rule, that if the two promisors of a note are sued, neither can defend by proving that the one signed only as

man, from the obscurity of the handwriting, what the words of a written instrument produced in evidence really were, his lordship decided the question himself, and refused to have it put to the jury.

(b) In *Armstrong v. Burrows*, 6 Watts, 266, where the only matter in dispute was as to the date of a receipt given by the plaintiff, the date being illegible, the court upon the trial assumed an exclusive right to decipher the instrument, and to determine the date, upon the evidence given. Upon error, *Gibson*, C. J., in reversing the judgment of the court below, said: "That the court assumed an exclusive right to decipher the contested letters is both true and fatal. It doubtless belongs to it to interpret the meaning of written words; but this extends not to the letters, for to interpret and to decipher are different things. A writing is read before it is expounded, and the ascertainment of the words is finished before the business of exposition begins. If the reading of the judge were not matter of fact, witnesses would not be heard

in contradiction of it; and though he is supposed to have peculiar skill in the meaning and construction of language, neither his business nor learning is supposed to give him a superior knowledge of figures or letters. His right to interpret a paper written in Coptic characters would be the same that it is to interpret an English writing; yet the words would be approached only through a translation. The jury were, therefore, not only legally competent to read the disputed word, but bound to ascertain what it was meant to represent." See *Cabarga v. Seeger*, 17 Penn. St. 514; *Jackson v. Ransom*, 18 Johns. 107; *Sheldon v. Benham*, 4 Hill, 129; *Dana v. Fiedler*, 2 Kern. 440.

(c) *Rex v. Scammonden*, 3 T. R. 474; *Rex v. Laindon*, 8 T. R. 379; *Taylor v. Baldwin*, 10 Barb. 582; *Krider v. Lafferty*, 1 Whart. 303. The parties to an instrument may show the true character of the transaction between them in controversies with strangers. *Strader v. Lambeth*, 7 B. Mon. 589; *Reynolds v. Magness*, 2 Ired. 28; *Venable v. Thompson*, 11 Ala. 147.

¹ For a case where parol evidence was admitted to vary an insurance policy on the ground that the parties to the suit were not parties to the instrument, see *Lowell Manuf. Co. v. Safeguard Ins. Co.* 88 N. Y. 591.

surety, and that the other was the principal. But if one of them pays the note and sues the other for contribution, the defendant may show in bar to the action that he signed only as surety for the plaintiff.

The rule in relation to extrinsic evidence prohibits the admission of oral testimony "to contradict or vary" the terms of a valid written contract. (*d*) Therefore, there is nothing in this rule to prevent the introduction of such testimony for the purpose of *explaining* the contract. But here a distinction is taken, which, if it did not originate with Lord *Bacon*, was first clearly stated by him; it is the distinction between a *patent ambiguity* and a *latent ambiguity*. (*e*)

(*d*) *Hudson v. Clementson*, 18 C. B. 218, 36 Eng. L. & Eq. 332.

(*e*) The rule as to *latent* and *patent ambiguities* has been regarded as furnishing a decisive test by which to determine in all cases whether extrinsic evidence is admissible to aid in the interpretation and construction of a written instrument. It has been looked upon as covering the whole ground of the admission of extrinsic evidence, and the confusion which has existed upon this subject is attributable in a great degree to the loose and uncertain meanings attached to the terms *latent* and *patent ambiguities*. The term ambiguity itself, which properly means the having two meanings, is misapplied when used to comprehend all doubts and uncertainties in respect to the meaning of written instruments. As the term *patent* has been understood, it is not true, that a *patent ambiguity* is unexplainable by extrinsic evidence. Where words are, in the truest sense of the term, *ambiguous*, that is, have double meanings, not simply double applications, as mere names, the uncertainty is inherent in the word, and is of course necessarily *patent*. Thus, the word "freight," as it was remarked by Mr. Justice *Story*, in *Peisch v. Dickason*, 1 Mason, 10, is susceptible of two meanings, and it might be doubtful on the face of an instrument whether it referred to goods on board a ship, or to an interest in its earnings. There can be no doubt that in such a case extrinsic evidence of the circumstances under which the instrument was made would be admissible to remove the doubt or uncertainty. See also, as to the meaning of the word "port," *De Longuemere v. N. Y. Fire Ins. Co.* 10 Johns. 120. So although a devise or grant to "one of the sons of A," he having several sons, would be void for uncertainty (*Altham's case*, 8 Rep. 166, a), yet there is no reason why a devise "to one of the sons of A," he being dead, and having only one son, would not be good. *Wigram on Wills*, sec. 79. Here a *patent ambiguity* would be removed by evidence of extrinsic facts. In *Price v. Page*, 4 Ves. 679, there was a legacy to —— Price, the son of —— Price. The plaintiff was the only claimant. He was a son of a niece of the testator, the only relation of the name of Price, and lived upon terms of intimacy with the testator. He was *held* entitled. — The rule that no evidence is admissible to remove a *patent ambiguity* would be strictly correct, if by *patent ambiguity* we mean that state of uncertainty which exists where it is perfectly clear from the face of the instrument to be construed, either that no certain subject has been selected, upon which the instrument can operate or take effect, or that no certain person or persons have been selected to be benefited or affected by the instrument, or that no certain purpose has been indicated in respect to the subjects or objects. Thus, a devise to "twenty of the poorest of the testator's kindred," is void for uncertainty. *Webb's case*, 1 Rol. Abr. 609. So a bequest of "some of my best linen." *Peck v. Halsey*, 2 P. Wms. 387. So also, a devise to this effect: "I request a handsome gratuity to be given to each of my executors" *Jubber v. Jubber*, 9 Sim. 508. So a devise to the "best men of the White Towers." *Year-Book*, 49 Ed. III., cited in *Winter v. Perratt*, 9 Clark & F. 688. So a bequest of a legacy to be distributed "among the real distressed private poor of Talbot county," there being no discretion given to the executors. *Trippet v. Frazier*, 4 Harris & J. 446. The same would be true of a bequest, "to be applied towards feeding, clothing," &c., the poor children

* "There be two sorts of ambiguities of words; the one * 558
is *ambiguitas patens*, and the other *latens*. *Patens* is

of C. county, which attend the poor or charity school established at H., in said county. *Dashiell v. Attorney-General*, 6 *Harris & J. I.* See also *Dashiell v. Attorney-General*, 5 *Harris & J. 392*; *Beal v. Wyman, Styles*, 240; *Jackson v. Craig, Knight Bruce*, V. C., 3 Eng. L. & Eq. 178; *Baker v. Newton*, 2 *Beav.* 112; *Fowler v. Garlike*, 1 *Russ. & M.* 232; *Attorney-General v. Sibthorp*, 2 *Russ. & M.* 107; *Mason v. Robinson*, 2 *Simons & S.* 295; *Winter v. Ferratt*, 9 *Clark & F.* 606; *Doe v. Carew*, 3 Q. B. 317; *Weatherhead's lessee v. Baskerville*, 11 *How. 329*. In very few cases, however, will it be perfectly clear upon the face of the instrument, that the intent is so uncertain, that no evidence of extrinsic facts can make it certain.—The term "latent ambiguity" is used very loosely to mean any doubt or uncertainty raised by extrinsic evidence, and very frequently there is a failure to distinguish between cases where a description is equally applicable to either one of two or more persons, or of two or more things, and the other cases in which a doubt is raised by extrinsic facts, such as cases of defective and inaccurate description. This distinction is of great consequence, especially in reference to the kind of evidence admissible to remove the doubt or uncertainty, for it is only in the case of the double application of words of description that evidence of intention direct is admissible to remove the uncertainty. It may be shown which of two or more persons or things was intended by a description equally applicable to all. *Altham's case*, 8 Rep. 165 a; *Jones v. Newman*, 1 W. Bl. 60; *Doe v. Morgan*, 1 *Cromp. & M.* 235; *Doe v. Allen*, 12 A. & E. 451; *Osborn v. Wise*, 7 C. & P. 761; *Blundell v. Gladstone*, 3 *McN. & G.* 692, 12 Eng. L. & Eq. 52; *Careless v. Careless*, 19 Ves. 601; *Caruthers v. Sheddon*, 6 *Taunt.* 14; *Waterman v. Johnson*, 18 *Pick.* 261. But see as to latent ambiguity, in case of sheriffs' sales, *Mason v. White*, 11 Barb. 174. In *Doe d. Gord v. Needs*, 2 M. & W. 129, the law with respect to the admission of extrinsic evidence, in the case of latent ambiguities, is laid down with great clearness by *Parke, B.* The testator in that case devised a house to George Gord, the son of George Gord; another to George Gord, the son of Gord. He also bequeathed a legacy to George Gord, the son of John Gord. The question, was, whether evidence was admissible to show that the testator intended that the house

devised to "George Gord, the son of Gord," should go to George, the son of George Gord. *Parke, B.*, said, "If, upon the face of the devise, it had been uncertain whether the devisor had selected a particular object of his bounty, no evidence would have been admissible to prove that he intended a gift to a certain individual; such would have been a case of *ambiguitas patens*, within the meaning of Lord Bacon's rule, which ambiguity could not be holpen by averment; for to allow such evidence would be, with respect to that subject, to cause a parol will to operate as a written one, or, adopting the language of Lord Bacon, 'to make that pass without writing which the law appointeth shall not pass but by writing.' But here on the face of the devise no such doubt arises. There is no blank before the name of Gord the father, which might have occasioned a doubt whether the devisor had finally fixed on any certain person in his mind. The devisor has clearly selected a particular individual as the devisee. Let us then consider what would have been the case if there had been no mention in the will of any other George Gord, the son of a Gord; on that supposition there is no doubt, upon the authorities, but that evidence of the testator's intention, as proved by his declarations, would have been admissible. Upon the proof of extrinsic facts, which is always allowed, in order to enable the court to place itself in the situation of the devisor, and to construe his will, it would have appeared that there were at the date of the will two persons, to each of whom the description would be equally applicable. This clearly resembles the case put by Lord Bacon of a latent ambiguity, as where one grants his manor of S. to J. F. and his heirs, and the truth is that he has the manors both of North S. and South S.; in which case Lord Bacon says, 'it shall be holpen by averment whether of them was that which the party intended to pass.' The case is also exactly like that mentioned by Lord Coke in *Altham's case*, 8 Rep. 165 a; 'if A levies a fine to William, his son, and A has two sons named William, the averment that it was his intent to levy the fine to the younger is good, and stands well with the words of the fine.' Another case is put in *Counden v. Clerke*, Hob. 32, which is in point; 'if one devise to his son John, where he has two sons of that name,' and the same rule was acted upon in the recent case of *Doe v. Mor-*

* 559 that which * appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain, and without ambiguity, for anything that appeareth upon the deed or instrument; but there is * some collateral matter out of the deed that breedeth the ambiguity. *Ambiguitas patens* is never holpen by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account with matter of averment, which is of inferior account in law; for that were to make all deeds hollow, and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed. Therefore, if a man give land to J. D. et J. S. et *hæredibus*, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was the inheritance should be limited. But if it be *ambiguitas latens*, then otherwise it is: as if I grant my manor of S. to J. F. and his heirs, here appeareth no ambiguity at all; but if the truth be, that I have

gan, 1 Cromp. & M. 236. The characteristic of all these cases is, that the words of the will do describe the object or subject intended; and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever; it only enables the court to reject one of the subjects or objects to which the description in the will applies; and to determine which of the two the testator understood to be signified by the description which he used in the will. . . . There would have been no doubt whatever of the admissibility of evidence of the devisor's intention, if the devise to 'George, the son of Gord,' had stood alone, and no mention had been made in the will of George, the son of John Gord, and George, the son of George Gord. But does the circumstance that there are two persons named in the will, each answering the description of 'George, the son of Gord,' prevent the application of this rule? We are of opinion that it does not. In truth, the mention of persons by those descriptions in other parts of the will has no more effect, for this purpose, than proof by extrinsic evidence of the existence of such persons, and that they were known to the devisor, would have had; it shows that there were two persons, to either of whom the description in question would be applicable, and that such two persons were both known; and the present case really amounts to no more than this, that the person to whom the imperfect de-

scription appears on the parol evidence to apply, is described in other parts of the same will by a more full and perfect description, which excludes any other object than himself." Evidence of intention may be admitted, where there are two persons of the same name, father and son, although the son has the addition of jun'r to his name. *Coit v. Starkweather*, 8 Conn. 289. See *Doe v. Westlake*, 4 B. & Ald. 57. If in cases of latent ambiguity the intent of the parties is not ascertained, the instrument is void for uncertainty. *Richardson v. Watson*, 4 B. & Ad. 787; *Cheyney's case*, 5 Rep. 68 b. Much will be gained in point of accuracy, it is conceived, by restricting the term *latent ambiguity* to the case where words of description have a double application. Indeed, it is so restricted by *Alderson*, B., in *Smith v. Jeffryes*, 16 M. & W. 562. If the term is so restricted, we then have the cases of *latent ambiguities* proper, in which alone evidence of *intention direct* is admissible. All other uncertainties, whether *patent* or *latent*, in the ordinary sense of those terms, must be removed by the same kind of evidence, namely, by placing the court which is to construe an instrument as nearly as possible in the situation of the author of, or parties to, such instrument. The rule of *patent* and *latent ambiguities*, then, falls to the ground, as furnishing a decisive test by which to determine in all cases whether evidence may be admitted to explain a written instrument.

the manors both of South S. and North S., this ambiguity is matter in fact; and therefore, it shall be holpen by averment, whether of them was that the party intended should pass." (f)

The rules of Lord *Bacon* rest entirely upon the principle that the law will not make, nor permit to be made, for parties, a contract other than that which they have made for themselves. They can have no other basis than this; and so far as they carry this principle into effect they are good rules, and no further. For it is this principle which underlies the whole law of construction, and originates and measures the value of all its rules. Thus, if a contract be intelligible, and evidence shows an uncertainty, not in the contract, but in its subject-matter or its application, other evidence which will remove this uncertainty is admissible. (g) But if a contract is not certainly intelligible * by itself, it may be said that evidence which makes it so must make a new contract; for one that is intelligible cannot be the same with one that is unintelligible: and therefore the evidence is not admissible. But this argument must not be carried too

(f) *Bac. Max. Reg. 28.*

(g) "For the purpose of applying the instrument to the facts, and determining what passes by it, and who take an interest under it, every material fact that will enable the court to identify the person or thing mentioned in the instrument, and to place the court, whose province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it, is admissible in evidence." Per *Parke*, B., in *Shore v. Wilson*, 9 Clark & F. 556. See *Guy v. Sharp*, 1 Mylne & K. 589, 602, per Lord *Brougham*; *Doe v. Martin*, 1 Nev. & Man. 524, per *Parke*, J.; *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 387, per Lord *Abinger*; *Hildebrand v. Fogle*, 20 Ohio, 147; *Hasbrook v. Paddock*, 1 Barb. 635; *Simpson v. Henderson*, Moody & M. 300; *Wood v. Lee*, 5 T. B. Mon. 50, 59; *Hitchin v. Groom*, 5 C. B. 615. "Where there is a gift of the testator's stock, that is ambiguous, it has different meanings when used by a farmer and a merchant. So with a bequest of jewels; if by a nobleman, it would pass all; but if by a jeweller, it would not pass those that he had in his shop. Thus the same expression may vary in meaning according to the circumstances of the testator." Per *Plumer*, M. R., in *Colpoys v. Colpoys*, Jacob, 464. See also *Kelley v. Powlet*, Ambl. 606, 610. The remarks of Sir James *Wigram* upon this point, although

made with reference to wills, apply equally to all instruments to be construed. "It must always be remembered," says he, "that the words of a testator, like those of every other person, tacitly refer to the circumstances by which at the time of expressing himself he is surrounded. If, therefore, when the circumstances under which the testator made his will are known, the words of the will do not sufficiently express the intention ascribed to him, the strict limits of exposition cannot be transgressed, because the court, in aid of the construction of the will, refers to those extrinsic collateral circumstances to which it is certain the language of the will refers. It may be true, that without such evidence, the precise meaning of the words could not be determined; but it is still the will which expresses and ascertains the intention ascribed to the testator. A page of history (to use a familiar illustration) may not be intelligible till some collateral extrinsic circumstances are known to the reader. No one, however, would imagine that he was acquiring a knowledge of the writer's meaning, *from any other source than the page he was reading*, because, in order to make that page intelligible, he required to be informed to what country the writer belonged, or to be furnished with a map of the country about which he was reading." *Wigram on Wills*, sec. 76.

far, for it is not always applicable without much qualification. What indeed is the meaning of uncertainty? If words of a foreign language are used, the contract is uncertain until they are interpreted; if words which are merely technical, then it is uncertain until experts have given their meaning; if words which are applicable to two or three different things or persons, then it is uncertain until the one thing or person is clearly pointed out. Now, where does the law stop in this endeavor to remove uncertainty? We answer, not until it is found that the contract must be set aside, and another one substituted, before certainty can be attained. In other words, if the contract which the parties have made is incurably uncertain, the law will not or rather cannot enforce it; and will not, on the pretence of enforcing it, set up a different but valid one in its stead. It will only declare such a supposed contract no contract at all; and will leave the parties to the mutual rights and obligations which may then exist between them. But, on the other hand, the law will not pronounce a contract incurably uncertain, and therefore null, until it has cast upon it all the light to be gathered, either from a collation

of all the words used, or from all contemporaneous facts * 562 which extrinsic testimony ^{*} establishes. (h) If these make

(h) Among the material facts necessary to be known by the court, in order that it may be placed as near as may be in the position of the parties to any instrument, is the *knowledge* or *ignorance* of those parties as to certain facts necessarily involved in the application of the instrument to the persons or things described in it. Thus, in *Doe v. Beynon*, 12 A. & E. 431, there was a devise to Mary B., with remainder to "her three daughters, *Mary*, *Elizabeth*, and *Ann*." At the date of the will, Mary B. had two legitimate daughters, Mary and Ann, living, and one illegitimate, named Elizabeth. It was held, that evidence was admissible to show that Mary B. formerly had a legitimate daughter named Elizabeth, who died some years before the date of the will, and that the testator did not know of her death, or of the birth of the illegitimate daughter. See also, *Powell v. Biddle*, 2 Dall. 70; *Goodinge v. Goodinge*, 1 Ves. Sen. 231; *Careless v. Careless*, 19 Ves. 601; *Scanian v. Wright*, 13 Pick. 523; *Brewster v. McCall*, 15 Conn. 274, 290.—So where the question is one purely of intention, the *belief* of the *author* of an instrument, as to facts necessarily involved in it, may have an

important bearing upon its construction. A testator devised his farm in A., in the possession of T. H., to T. R. He had two farms in A., both of which were in the possession of T. H., but at different rents. On a question being raised which of these two farms the testator intended to give to T. R., held, that the devise must be taken to have been made to T. R. for his personal advantage and not upon trust; and if therefore it could be ascertained that one of the farms was subject to a trust, or that the testator *supposed* it to be so, it must then be inferred that such farm was not the one intended to be devised, but that the other was the one referred to by the testator. Lord St. Leonards said: "The only question which is absolutely necessary to be decided is this, not whether the testator really held those estates, or one of them, on any valid trusts, but rather what he considered and understood to be his interest, that is, whether he supposed that he held them, or one of them, on any trust, or treated, or intended to treat, or to have them or one of them treated as if so held in trust. If he supposed that he held one of them in trust, or treated it as if so held and intended that it should be con-

the intention and meaning of the parties certain, it may still be an intention which the words cannot be made to express by any fair rendering. In this case also the contract is null, for it is the words and not the intention without the words that must prevail. But if, when the intention is thus ascertained, it is found that the words will fairly bear a construction which makes them express this intention, then the words will be so construed, and the contract, in this sense or with this interpretation, will be enforced, as the contract which the parties have made.

The distinction and the rules of Lord *Bacon* are therefore less regarded of late, than they were formerly. (*i*) They are intended to enable the court to distinguish between cases of curable and those of incurable uncertainty; to carry the aid of *evidence as far as it can go without making for the parties what they did not make for themselves, and to stop there. And it is found that it is sometimes of doubtful utility to refer to these rules in the endeavor to ascertain the meaning of a contract, rather than to the simpler rule, that evidence may explain but cannot contradict written language. This last rule limits all explanation to cases of uncertainty, because where the meaning is plain and unquestionable, another meaning is not that which the parties have agreed to express. Thus, if a blank be left in an instrument, or a word or phrase of importance omitted by mistake, the omission may be supplied, if the instrument contains the means of supplying it with certainty, otherwise not, because the parties in such a case have not made the instrument; and the law would make it, and not the parties, if it undertook to supply by presumption an omitted word necessary to its legal existence. And if it permitted this to be supplied by parol testimony, it would be this testimony, and not a written instrument, which proved the property or determined the rights and obligation of the parties. (*j*) But this rule permits all fair and reasonable explanation of actual uncertainty. Thus, if a guaranty be

sidered and treated as so held, and if it does not appear that he held, or supposed that he held, the other of them on any trust, it seems to me that the one which he supposed to be held on any trust, or treated as if so held, cannot be regarded as intended to be the subject of the devise to Mr. Robinson, and consequently the other estate may be deemed to be the one referred to in that devise." Blundell v. Gladstone, 3 McN. & G. 692, 12 Eng.

L. & Eq. 52. See also *Quincey v. Quincey*, 11 Jurist, 111; *Connolly v. Pardon*, 1 Paige, 291; *Baker v. Baker*, 2 Ves. 167.

(*i*) See *ante*, p. *557, note (*e*).
 (*j*) *Miller v. Travers*, 8 Bing. 244; *Saunderson v. Piper*, 5 Bing. N. C. 426; *Baylis v. Attorney-General*, 2 Atk. 239; *Castledon v. Turner*, 3 Atk. 257; *Hunt v. Hort*, 3 Bro. C. C. 311.

given, beginning, "In consideration of your having this day advanced" money, &c., which guaranty is invalid if in fact for a past or executed consideration, evidence should be received to show that in point of fact the advancing of the money and the giving of the guaranty were simultaneous acts. (*k*)

It is not easy to lay down rules which will assist in determining these difficult questions, and not be themselves open to * 564 * much question. But we should express our own views on this subject by the following propositions.

If an instrument is intelligible and certain when its words are taken in their common or natural sense, all its words shall be so taken, unless something in the instrument itself gives to them, distinctly, a peculiar meaning, and with this meaning the instrument is intelligible and certain; and in that case this peculiar meaning shall be taken as the meaning of the parties.

If the meaning of the instrument, by itself, is intelligible and certain, extrinsic evidence is admissible to identify its subjects or its objects, or to explain its recitals or its promises, so far, and only so far, as this can be done without any contradiction of, or any departure from, the meaning which is given by a fair and rational interpretation of the words actually used.

If the meaning of the instrument, by itself, is affected with uncertainty, the intention of the parties may be ascertained by extrinsic testimony, (*l*) and this intention will be taken as

(*k*) *Goldshede v. Swan*, 1 Exch. 154. In this case, *Pigott*, of counsel for the defendant, insisted upon the rule that parol evidence is not admissible to vary the terms of a written instrument. But *Parke*, B., interrupting him, said: "You cannot vary the terms of a written instrument by parol evidence; that is a regular rule; but if you can construe an instrument by parol evidence, where that instrument is ambiguous, in such a manner as not to contradict it, you are at liberty to do so." And the other judges use similar language. See also *Butcher v. Steuart*, 11 M. & W. 857, where, "in consideration of your having released," was held to have a prospective and conditional meaning, by the help of extrinsic evidence. And see *Colbourn v. Dawson*, 10 C. B. 765, 4 Eng. L. & Eq. 378; *Haigh v. Brooks*, 10 A. & E. 309. In *Noonan v. Lee*, 2 Black, 499, the rule is stated, that parol evidence not inconsistent with a written instrument, is admissible to apply such instrument to its subject.

(*l*) See *ante*, p. * 557, n. (*e*). This intention, of course, is to be ascertained, in all cases, except that of *latent ambiguity* proper, by a development of the *circumstances* under which the instrument was made. It cannot be ascertained by bringing forward proof of declarations or conversations which took place at the time the instrument was made, or before, or afterwards. After considerable confusion, caused by some anomalous early cases, the law upon this point, especially in reference to wills, is clearly settled in England. In *Beaumont v. Fell*, 2 P. Wms. 140, it was permitted to be shown that Gertrude Yardley was the person intended to be designated by a testator by the name of Catharine Earnley [see the case stated *ante*, p. * 550, n. (*d*).] In *Thomas v. Thomas*, 6 T. R. 671, there was a devise as follows: "Item. I devise to my granddaughter, Mary Thomas, of Llechloyd in Merthyr parish," &c. The testator had a granddaughter of the name of Elinor Evans, living at the place

the * meaning of the parties expressed in the instrument, * 565 if it be a meaning which *may* be distinctly derived from a

mentioned in the will, and a great-granddaughter, Mary Thomas, who lived at a place some miles distant from Merthyr parish. It was held by Lord Kenyon, that evidence of declarations made by the testator at the time the will was made, would have been admissible to show whom the testator meant by the inaccurate description. See also Hampshire v. Peirce, 2 Ves. 216; Strode v. Russell, 2 Vern. 623; Price v. Page, 4 Ves. 680; Still v. Hoste, 6 Madd. & G. 192; Hodgson v. Hodgson, 2 Vern. 593. So far as these cases sanction the doctrine that evidence of intention is admissible in cases not falling under the rule as to *latent ambiguity*, as defined ante, p. * 567, n. (e), they are overruled by the cases of Miller v. Travers, 8 Bing. 244, and Doe d. Hiscocks v. Hiscocks, 5 M. & W. 383. In Miller v. Travers, there was a devise of all the testator's estates in the county of Limerick and city of Limerick. At the time of making the will, the testator had no estate in the county of Limerick. He had a small estate in the city of Limerick, inadequate to meet the charges in the will, and considerable estates situate in the county of Clare. It was held, that it could not be shown by parol evidence that the words "county of Limerick" were inserted by mistake, instead of the words "county of Clare;" and that the testator intended to devise his estate in the county of Clare. See the very able review of the cases by Tindal, C. J. In Doe d. Hiscocks v. Hiscocks, a testator devised lands to his son John Hiscocks for life; and from his decease, to his grandson John Hiscocks, *eldest son* of the said John Hiscocks. At the time of making the will, the testator's son John Hiscocks had been twice married; by his first wife he had one son Simon; by his second wife an eldest son John, and other younger children, sons and daughters. Held, that evidence of the instructions given by the testator for his will, and of his declarations, was not admissible to show which of these two grandsons was intended by the description in the will. Lord Abinger, after stating the facts, and noticing the question raised, said: "It must be admitted that it is not possible altogether to reconcile the different cases that have been decided on this subject; which makes it the more expedient to investigate the principles upon which any evidence to explain the will of a testator ought to be received. The object in all cases is to discover the intention of the

testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property, to which the will relates, are undoubtedly legitimate, and often necessary evidence, to enable us to understand the meaning and application of his words. Again,—the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cipher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will. But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors

- fair and rational interpretation of the words actually used.
* 566 But if it be *incompatible with such interpretation, the instrument will then be void for uncertainty, or incurable inaccuracy.

A contract may be enforced in its plain and natural, or in its legal meaning, although evidence be offered tending to show that the intention of the parties differed absolutely from their language, unless the transaction be void from fraud, illegality, incapacity, or in some similar way.

Lastly, no contract will be enforced, as a contract, if it have no plain and natural or legal meaning, by itself; and if admissible, extrinsic evidence can only show that the intention of the parties was one which their words do not express. But the supposed contract being set aside for such reasons as these, the parties will be remitted to their original rights and obligations.

of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls 'an equivocation,' i. e., the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction. It appears to us, that in all other cases, parol evidence of what was the testator's intention ought

to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will." See also Shore v. Wilson, 9 Clark & F. 355; s. c. non. Attorney-General v. Shore, 11 Sim. 592; and the late case of Attorney-General v. Clapham, 4 De G. M. & G. 591, 31 Eng. L. & Eq. 142, where this whole matter is very fully discussed. For the present state of the law upon the various points discussed in this last section, the profession are very greatly indebted to the admirable little treatise by Sir James Wigram on the Interpretation of Wills.

*CHAPTER II.

* 567

THE LAW OF PLACE.

SECT. I.—*Preliminary Remarks.*

If one or both parties to a contract entered into it away from their home, or if a contract, or questions dependent upon it, come into litigation before a foreign tribunal, the construction of the contract, the rights that it gives, the obligations that it imposes, and the remedies which either party may have, may depend upon the law of the place where the contract was made, or the law of the domicil of the parties, or the law of the place where the thing to which the contract refers is situated, or the law of the tribunal before which the questions are litigated ; or, to use the Latin phrases generally employed, the *lex loci contractus*, the *lex domicili*, the *lex loci rei sitae*, and the *lex fori*.

The common law has left many of these questions unsettled ; but the immense immigration into this country, the great and growing intercourse between it and foreign nations, and the extreme facility and frequency of foreign travel, and, more than this, the fact that our own nation is composed of thirty-six independent sovereignties, all combine to give to questions of this kind peculiar importance, and, on some points, peculiar difficulty. It will not be possible to exhaust the consideration of these topics within the space which can, in this work, be given to them. But an attempt will be made to present the leading principles which must determine all these questions. To few of them is there a precise and certain answer given by the common law ; and some of them have not yet passed into adjudication. By writers on the civil and continental law of Europe, they have been, perhaps all of them, very fully considered ; but with such a diversity, and irreconcilable contrariety * of conclusion, that we shall * 568 confine ourselves, as far as possible, to the common-law authorities. (a)

(a) Mr. Justice Story's large work on the Conflict of Laws is in a great measure composed of those conflicting statements ; and in his closing paragraph he

SECTION II.

GENERAL PRINCIPLES.

The first principle we state is this. Laws have no force, by their own proper vigor, beyond the territory of the State by which they are made; excepting, for some purposes, the high seas, or lands over which no State claims jurisdiction. Without this limit, they have no sanction; obedience cannot be compelled, nor disobedience punished; and no contiguity of border, and no difference of magnitude or power between two independent States, can affect this rule. For if the State, a law of which is broken, send its officers into another, and there by force or intimidation acts in reference to this breach as it might act at home, such act is wholly illegal; and if it thus acts with the consent of the foreign State, within whose dominion it goes by its officers, it is this consent only which legalizes its acts. (b)¹

In the next place, all laws duly made and published by any State bind all persons and things within that State. (c) This

says: "It will occur to the learned reader, upon a general survey of the subject, that many questions are still left in a distressing state of uncertainty as to the true principles which ought to regulate and decide them. Different nations entertain different doctrines and different usages in regard to them. The jurists of different countries hold opinions opposite to each other, as to some of the fundamental principles which ought to have a universal operation, and the jurists of the same nation are sometimes as ill agreed among themselves." And in *Saul v. His Creditors*, 17 Mart. (La.) 570, *Porter*, J., says: "The only question presented for our decision is one of law; but it is one which grows out of the conflict of laws of different States. Our former experience had taught us that questions of this kind are the most embarrassing and difficult of decision that can occupy the attention of those who preside in courts of justice. The argument of this case has shown us that the

vast mass of learning which the research of counsel has furnished, leaves the subject as much enveloped in obscurity and doubt as it would have appeared to our own understandings, had we been called on to decide, without the knowledge of what others had thought or written upon it."

(b) *Le Louis*, 2 Dods. 210; *Blanchard v. Russell*, 13 Mass. 4; *Bank of Augusta v. Earle*, 18 Pet. 584; *Smith v. Godfrey*, 8 Foster, 879.

(c) "The law and legislative government of every dominion equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the laws of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the Plantations, has no privilege distinct from the natives." Per Lord *Mansfield*, in *Hall v. Campbell*, Cowp. 208. See *Ruding v. Smith*, 3 Hagg. Consist. 388.

¹ *Faulkner v. Hart*, 82 N. Y. 413, was to the effect that the decisions of one State upon a commercial question are not obligatory upon the courts of another State, and when in conflict with common-law principles will be upheld not even as to contracts made in the latter to be performed in the former.

* is a general, and perhaps a universal rule; for the few * 569 seeming exceptions to it are not such in fact. A stranger is bound to the State wherein he resides only by a local and limited allegiance; but it is one which is sufficient to subject him to all the laws of that State, excepting so far as they relate to duties which only citizens can perform. For, as every State has the right, in law, of excluding whom it will, so it may put what terms and conditions it will upon the admission of foreigners. All contracts, therefore, which are construed within the State in which they are made, must be construed according to the law of that State. The same thing is true, in general, when contracts are construed in a place other than that in which they are made; but this rule, and the exceptions to it, will be considered presently.

In the next place, every State may, by its own laws, bind all its own subjects or citizens, wherever they may be, with all the obligations which the home tribunals can enforce. If laws are made which go further than this, they must needs be inoperative, as they cannot be enforced beyond the jurisdiction of the home tribunals, except with the consent and by the action of the foreign State.

Lastly, it may now be said, on good authority, that foreign laws may have a qualified force, or some effect, within a State, either by the comity of nations, which is one of the fruits of modern civilization, or by special agreement, as by treaty, or by constitutional requirements as in the case of our own country, of which the Constitution requires that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." (cc) But in none of these cases do laws acquire, strictly speaking, the force of laws, within a sovereignty which is foreign to that in which they were enacted; nor could this be the case without a confusion of sovereignties. But the effect of such comity, aided in some * instances by special * 570 agreements, or constitutional requirements, may be stated to be, that the laws of civilized nations are permitted to have some operation in foreign States, so far as they in no degree conflict with the powers or the rights of such foreign States, or with the operation of their laws, (d) their general policy, or morality. (dd)

(cc) See *Green v. Van Buskirk*, 5 *ubique suam vim, quatenus nihil potestati aut Wallace*, 307.

(d) Story quotes from Huberus a very precise statement of this rule. "Rectores imperiorum id comiter agunt, ut iura cujusque populi intra terminos ejus exercita teneantur." *Confl. of Laws*, § 29, n. 3. And see *Zipcey v. Thompson*, 1 Gray, 243.

(dd) *Eubanks v. Banks*, 34 Ga. 416.

The first and most general principle as to the *validity* of a contract, rests upon obvious reasons, and certain expediency, if indeed we may not say that it is founded in the necessities of national intercourse; it is, that a contract which is valid where it is made is to be held valid everywhere. And, on the other hand, if void or illegal by the law of the place where made, it is void everywhere. (e)¹ There may be an exception to this,

* 571 * where a contract which violates the revenue laws of the country where it was made, comes before the court of another country. (f)

The general rule as to the construction of contracts is, that if they relate to movables, which have no place, no *sequelam*, in the language of the civil law, for "*mobilia inherent ossibus domini*,"

(e) *Trimbey v. Vignier*, 1 Bing. N. C. 151; *De Sobry v. De Laistre*, 2 Harris & J. 191; *Willinge v. Consequa*, Pet. C. C. 317; *Pearall v. Dwight*, 2 Mass. 88; *Smith v. Mead*, 8 Conn. 253; *Medbury v. Hopkins*, id. 472; *Houghton v. Page*, 2 N. H. 42; *Dyer v. Hunt*, 5 id. 401; *Gassett v. Godfrey*, 6 Foster, 415; *Smith v. Godfrey*, 8 id. 379; *Whiston v. Stodder*, 8 Mart. (La.) 95; *Andrews v. His Creditors*, 11 La. 464; *Young v. Harris*, 14 B. Mon. 559; *Bank of United States v. Donnally*, 8 Pet. 361; *Andrews v. Pond*, 13 id. 65; *Wilcox v. Hunt*, id. 378; *Van Reimsdyk v. Kane*, 1 Galia. 871; *Touro v. Cassin*, 1 Nott & McC. 178; *Houghtaling v. Ball*, 20 Mo. 563; *M'Intyre v. Parks*, 3 Met. 207; *Robinson v. Bland*, 2 Burr. 1077; *Burrows v. Jemino*, 2 Stra. 783; *La Jeune Eugenie*, 2 Mason, 459; *Alves v. Hodgson*, 7 T. R. 241; *Clegg v. Levy*, 3 Camp. 166. These two rules, or rather this one rule, is generally asserted as broadly as we have stated it in the text; and yet there are cases and *dicta* of weight that conflict with it. In *James v. Catherwood*, 3 Dowl. & R. 190, where, on assumption for money lent in France, receipts were offered in evidence not stamped as the laws of France required to make them available there, they were received in England. It is true, that on the motion for a new trial, it is put on the ground that it is perfectly well settled that an English court will not take notice of foreign *revenue laws*. This is undoubtedly established. See *Boucher v.*

Lawson, Cas. Temp. Hardw. 85, 194; *Holman v. Johnson*, Cowp. 341; *Biggs v. Lawrence*, 3 T. R. 454; *Clugas v. Penaluna*, 4 id. 406; *Planché v. Fletcher*, 1 Doug. 251; *Ludlow v. Van Renesselaer*, 1 Johns. 94. In *Wynne v. Jackson*, 2 Russ. 351, it was held, that a holder might recover in an English court on a bill drawn in France on a French stamp, though in consequence of its not being in the form required by the French code, he had failed in an action which he brought on it in France. Even if the contracts in these cases were to be considered as violating only revenue laws, still, could a contract made in France, between Frenchmen there, to smuggle goods against the law of France, be held good in England or America? Not on any general principles that we are aware of; and certainly not because a contract made in England to smuggle into France would be held good in England; for the cases are entirely distinct.—So, if contracts are made only orally, where by law they should be in writing, they cannot be enforced elsewhere where writing is not required. And if made orally where writing is not required, they can be enforced in other countries where such contracts should be in writing. *Vidal v. Thompson*, 11 Mart. (La.) 23; *Alves v. Hodgson*, 7 T. R. 241; *Clegg v. Levy*, 3 Camp. 166.

(f) *Sharp v. Taylor*, 2 Phillips, 811. And see preceding note.

¹ See *Milliken v. Pratt*, 125 Mass. 374; *Bell v. Packard*, 69 Me. 105. A sale of goods was made in Rhode Island, where it was valid, delivery of which was to be made in New York, where it was invalid by reason of the statute of frauds; and it was held, that recovery could be had in Rhode Island. *Hunt v. Jones*, 12 R. I. 265.

they are to be construed according to the law of the place where they are made, or the *lex loci contractus*; (g) and if they relate to immovables, or what the common law calls real property, they are to be construed according to the law of the place where the property is situated, or the *lex loci rei sitae*. (h)¹ * This

(g) *Thorne v. Watkins*, 2 Ves. 35; *Holmes v. Remsen*, 4 Johns. Ch. 487; *Harvey v. Richards*, 1 Mason, 412; *Bruce v. Bruce*, 2 B. & P. 229, n. (a); *Somerville v. Somerville*, 5 Ves. 750. In the case *In re Ewin*, 1 Cromp. & J. 156, *Bayley*, B., says: "It is clear, from the authority of *Bruce v. Bruce*, 2 B. & P. 229, and the case of *Somerville v. Somerville*, 5 Ves. 750, that the rule is that personal property follows the person, and it is not in any respect to be regulated by the *situs*; and if, in any instances, the *situs* has been adopted as the rule by which the property is to be governed, and the *lex loci rei sitae* resorted to, it has been improperly done. Wherever the domicil of the proprietor is, there the property is to be considered as situate; and in the case of *Somerville v. Somerville*, which was a case in which there was stock in the funds of this country, which were at least as far local as any of the stocks mentioned in this case are local, there was a question whether the succession to that property should be regulated by the English or by the Scotch rules of succession. The Master of the Rolls was of opinion that the proper domicil of the party was in Scotland. And having ascertained that, the conclusion which he drew was, that the property in the English funds was to be regulated by the Scotch mode of succession; and if the executor had, as he no doubt would have, the power of reducing the property into his own possession, and putting the amount into his own pocket, it would be distributed by the law of the country in which the party was domiciled. Personal property is always liable to be transferred, wherever it may happen to be, by the act of the party to whom that property belongs; and there are authorities that ascertain this point, which bears by analogy on this case, namely, that if a trader in England becomes bankrupt, having that which is personal property, debts, or other personal property, due to him abroad, the assignment under the commission of bankrupt operates upon the property,

and effectually transfers it, at least as against all those persons who owe obedience to these bankrupt laws, the subjects of this country." In *Milne v. Moreton*, 6 Binn. 363, *Tilghman*, C. J., states the rule with some qualification. He says: "This proposition is true in general, but not to its utmost extent, nor without several exceptions. In one sense personal property has locality, that is to say, if tangible, it has a place in which it is situated, and if invisible (consisting of debts), it may be said to be in the place where the debtor resides; and of these circumstances the most liberal nations have taken advantage, by making such property subject to regulations which suit their own convenience."

(h) Upon this general rule the common law and civil law agree; and the American authorities are explicit. See *Warrender v. Warrender*, 9 Bligh, 127; *Dundas v. Dundas*, 2 Dow & C. 349; *Coppin v. Coppin*, 2 P. Wms. 291; *United States v. Crosby*, 7 Cranch, 116; *Cutter v. Davenport*, 1 Pick. 81; *Hosford v. Nichols*, 1 Paige, 220; *Willis v. Cowper*, 2 Hamm. 312; *Kerr v. Moon*, 9 Wheat. 565; *McCormick v. Sullivan*, 10 id. 192; *Darby v. Mayer*, id. 465. It is a conclusion from this rule, as will be seen from the preceding authorities, that the title to land can be given or taken, acquired or lost, only in conformity with all the requirements of the law of the place where the real estate is situated. Some question may exist as to what comes under this rule as to immovables. In *Robinson v. Bland*, 2 Burr. 1079, Lord *Mansfield* applies it to public stock. And Mr. Justice *Story*, Conf. of Laws, § 383, says: "The same rule may properly apply to all other local stock or funds, although of a personal nature, or so made by the local law, such as bank-stock, insurance stock, turnpike, canal, and bridge shares, and other incorporeal property, owing its existence to, or regulated by, peculiar local laws. No positive transfer can be made of such property, except in the manner prescribed by the local regulations."

¹ Thus the right of an adopted child to inherit real estate must be determined by the law of the State where the property is situated, and not by the law of the State where the adoption occurred. *Keegan v. Geraghty*, 101 Ill. 26. See also *Ross v. Ross*, 129 Mass. 243.

we have said to be the general rule; and if we do not call it a universal rule, it is because we are not quite prepared to say that none of the apparent exceptions to the rule are real. Thus, in a suit to foreclose a mortgage, if the defence is an avoidance of the contract by usury, the suit being brought where the land is, and the parties living and contracting in another State, the law of the latter State determines whether the contract is void. (*hh*) But the validity of a mortgage of land is determined by the law of the State where it lies, although the parties lived and made their contract in another. (*hi*)¹

There is a question involved in the construction of every contract, or rather, a question prior to its construction; namely, whether the parties to the contract had the power to make it. This is the question of the capacity of persons, and it is decided by what civilians term personal laws. And the general rule is said to be, that a personal capacity or incapacity, created by a law of the State wherein a party has his domicil, follows him wherever he may go. (*i*) But if this be the rule of law, it is not one of universal application, and in some cases needs important qualification. For this rule as to capacity may come into direct conflict with the general rule, that all personal contracts are to be construed and applied according to the law of the place where they were made; and when this conflict exists, the important question arises, which rule shall prevail. This we consider in the next section.

(*hh*) *Dolman v. Cook*, 1 McCarter, 56; *Campion v. Kille*, id. 220; *Andrews v. Torrey*, id. 355.

(*hi*) *Goddard v. Sawyer*, 9 Allen, 78.

(*i*) This rule is laid down by most of the great multitude of writers, who may be cited as authorities of greater or less weight, on the law of Continental Europe; but it does not seem to have been asserted, in so many words, by the courts of common law. In *Ruding v. Smith*, 2 Hagg. Consist. 381, Lord Stowell discusses it somewhat. And it seems to be implied in many of the cases to which we shall refer, in the further consideration of the question of capacity.

¹ A mortgage made in Massachusetts, the mortgagor's domicil, according to the requirements of that State, of chattels situated in New Hampshire, is invalid as against New Hampshire creditors, the requirements of the New Hampshire law not having been complied with. *Clark v. Tarbell*, 58 N. H. 88.

SECTION III.

CAPACITY OF PARTIES.

It must be remembered that the *rule* is, that persons have capacity to contract; and the *exception* is, their want of capacity. * This exception, therefore, must be made out. And * 573 capacity or competency will be held not only when there is no evidence and no rule against it, but when the evidence, or the rules, or the argument, leave it in doubt. (j)

Incapacities are of two kinds; those which may be called natural incapacities, as absolute duress, insanity, or imbecility; and those which may be called artificial, because arising by force of local laws, from marriage, or slavery, or such other causes as are made grounds of incapacity only by positive laws, which vary in different States. And then there is a third kind between these two, or composed of these two, when a natural incapacity, as that of an *actual* infant, passes by imperceptible degrees into the artificial incapacity of a *legal* infant of twenty years of age. In regard to the first class, it is true that wherever the incapacitated person goes he carries his incapacity with him; but this is perhaps not because his incapacity was created by a law of the home from which he came, for it was only recognized by that law; but because it must be recognized by every other law, and he finds himself under the same incapacity in every State, because he finds a similar law everywhere in force. For this law is one which may well be called a law of nature; that is, a law enacted by the supreme Creator of, and Law-giver for, human nature, and as wide in its scope and operation as that nature.

When we come to the incapacities of the second kind, that is, to artificial incapacities, the law is not so certain. Upon the law of the capacity of the person, and the law of the place of the contract, on either or on both, the law of construction of contracts as to place, would seem to be founded. Nor is there any difficulty in applying either alone, or both if they are coincident; but if they are both applicable, but would lead to directly opposite results, this collision gives rise to questions which it would be im-

(j) See ante, vol. I. p. *298.

possible to settle absolutely, even on the authority of civilians; because there is an irreconcilable difference among them. But,

judging as well as we may, from the general principles * 574 which belong to this subject, we should prefer * the opinion of those who hold, that when the two rules above mentioned come into conflict, that which gives controlling power to the law of the place of the contract should prevail. We might admit a distinction sometimes intimated, and say, that a question which related only to the state and condition of a person, without reference to other parties, would generally be construed by the law of his domicil, wherever he might be. But if one away from his domicil disposes of his movable property, or enters into personal contracts, we cannot but think that the law of the place in which he does these acts would be applied to them. (k)

(k) On this point, as on most of the questions of the *lex loci*, the opinions of civilians stand opposed to each other irreconcilably; the great majority, both in number and weight, assert that the law of the domicil determines everywhere the capacity of the party; but they differ very much in the application of the rule; and some of high authority hold a different doctrine. But on this subject we must refer to such works as Livermore's Dissertations, Story's Conflict of Laws, Burge's Commentaries on Colonial and Foreign Laws, and Henry on Foreign Law, in which these authorities are cited and compared; and the student who would push his inquiries further in this direction, will be guided to the original authors, and referred to the places in which these questions are considered. The whole discussion of this question, among civilians, turns upon the exact distinction between real and personal statutes; a distinction wholly unknown to the common law. And indeed they understand by "statute" not what we do, but anything which has the force of law, whatever be its origin and authorization. Kent says, that while the continental jurists generally adopt the law of the domicil (supposing it to come in conflict with the law of the place of the contract), the English common law adopts the *lex loci contractus*. See 2 Kent's Com. 459, n. (b). We have not, however, been able to find direct and conclusive authority for this. In *Male v. Roberts*, 3 Esp. 188, in which the plaintiff sought to recover money paid for the defendant in Scotland, and the defence was infancy, Lord Eldon said: "It appears from the

evidence in this case that the cause of action arose in Scotland; the contract must be therefore governed by the laws of that country where the contract arises. Would infancy be a good defence by the law of Scotland, had the action been commenced there? What the law of Scotland is with respect to the right of recovering against an infant for necessities I cannot say; but if the law of Scotland is, that such a contract as the present could not be enforced against an infant, that should have been given in evidence, and I hold myself not warranted in saying that such a contract is void by the law of Scotland, because it is void by the law of England. The law of the country where the contract arose must govern the contract; and what that law is should be given in evidence to me as a fact. No such evidence has been given; and I cannot take the fact of what that law is without evidence." It would seem in this case, though not distinctly stated, that both parties were domiciled in England. In *Saul v. His Creditors*, 17 Mart. (La.) 589, 590, which it might be supposed would be governed rather by the rules of the civil law, the court say: "A personal statute is that which follows and governs the party subject to it wherever he goes. The real statute controls things, and does not extend beyond the limits of the country from which it derives its authority. The personal statute of one country controls the personal statute of another country, into which a party once governed by the former, or who may contract under it, should remove. But it is subject to a real statute of the place where the person subject to the personal

* Thus, if a woman at the age of nineteen, whose domicil was in Massachusetts, having gone into Vermont (where women are so far of age at eighteen that they may bind themselves at that age for things not necessary), there bought non-necessaries, and gave her note for the price, and while she was there the note was put in suit against her, we do not think that she could interpose the law of Massachusetts in her defence. And if a woman of that age, whose domicil was in Vermont, came into Massachusetts, and there bought non-necessaries, and was sued for the price, we think she could interpose the defence of infancy. If, in the first case, the woman returned to Massachusetts, and the note was sent after her and put in suit there, it might admit of more question whether the law of the forum would not prevail over the law of the place of the contract, and constitute a good defence ; or, if in the second case, the woman returned to Vermont, and suit was brought against her there, it might admit of more question whether the law of the forum would now prevail over the law of the place of the contract, and enforce the contract, negativing this defence. But this doubt would be in fact a doubt whether, when the law of the domicil and the law of the place of the contract conflict, the law of the forum may not come in, and decide in favor of the law of the domicil, if that be also the place of the forum, or in favor of the law of the place of the contract, if that be the place of the forum. But we are not satisfied that such would be the rule.

should fix himself, or where the property on which the contest arises may be situated." Afterwards, p. 597, in the illustration of these rules, the court say, what we should suppose to mean simply, that the law of the place of the contract overcomes the law of the domicil as to capacity. "Now, supposing the case of our law fixing the age of majority at twenty-five, and the country in which a man was born and lived, previous to his coming here, placing it at twenty-one, no objection could be perhaps made to the rule just stated, and it may be, and we believe would be true, that a contract made here at any time between the two periods already mentioned would bind him. But reverse the facts of this case, and suppose, as is the truth, that our law placed the age of majority at twenty-one; that twenty-five was the period at which a man ceased to be a minor in the country where he resided; and that at the age

of twenty-four he came into this State, and entered into contracts;—would it be permitted that he should, in our courts, and to the demand of one of our citizens, plead, as a protection against his engagements, the laws of a foreign country, of which the people of Louisiana had no knowledge; and would we tell them that ignorance of foreign laws, in relation to a contract made here, was to prevent them enforcing it, though the agreement was binding by those of their own State? Most assuredly we would not. 16 Martin, 198. Take another case. By the laws of this country slavery is permitted, and the rights of the master can be enforced. Suppose the individual subject to it is carried to England or Massachusetts;—would their courts sustain the argument that his state or condition was fixed by the laws of his domicil of origin? We know they would not."

* 576 * There is another principle which may have a bearing upon this question ; for it seems reasonable at least to say that a contract, void or voidable at its inception, cannot be made valid against the will of the party having the right of avoidance, by a mere change of his place, nor can a contract valid and enforceable when and where entered into be made invalid in this way. Any woman over eighteen, buying on credit non-necessaries in Vermont, makes a contract which is valid then and there, and any woman of that age making such a contract in Massachusetts, makes one which is not valid then and there ; and these contracts must remain, the first valid and the second invalid, wherever it may be sought to enforce them, unless, in the first case, a foreign law is admitted to destroy the validity of the contract, and in the second case, comes in to give the contract validity and force ; and we think a foreign law can do neither of these things.

By the second of the general principles which we presented early in this chapter, the laws of every State have a binding force over all persons and things within its dominion, and contracts are among the things which it thus controls. It must be true, therefore, that these laws govern and determine all contracts made within their territorial scope, or, in other words, that every contract must be construed according to the law of the place of the contract, unless we are at liberty to say one of two things ; either that the foreign law affected the contract, and controlled the home law at the time the contract was made or else that it had this effect subsequently. Now to say that the foreign law thus operated upon the contract at its inception, would be to say that a foreign law entered into a foreign and independent State with a power of its own, and there by this power resisted and controlled the home law, and importantly affected the rights of parties who made the contract under the home laws. And this would be giving to this foreign law a power far beyond what it could derive from any principle which can be admitted

* 577 to belong to the comity of nations. (l) On * the other

(l) In *Saul v. His Creditors*, 17 Mart. (La.) 595, the court say, after quoting from Chancellor *D'Aguesseau*: "If the subject had been susceptible of clear and positive rules, we may safely believe this illustrious man would not have left it in doubt, for if anything be more remarkable in him than his genius and his knowledge, it is the extraordinary fulness

and clearness with which he expresses himself on all questions of jurisprudence. When he, therefore, and so many other men of great talents and learning, are thus found to fail in fixing certain principles, we are forced to conclude that they have failed not from want of ability, but because the matter was not susceptible of being settled on certain principles. They

hand, if we admit that the contract when made was valid only according to the laws of the country, where it was made, but say that afterwards another law, the law of the domicil of a party, or of the forum before which the question comes, varies the contract in important respects, we say no less than that a law, which the parties in making their contract could not be supposed to contemplate, and were not affected by, afterwards made a new contract for them, or established or discharged relations or obligations between them, against or without their will and consent.

Upon the whole, we are of opinion that the rule which requires that every contract should be construed according to the law of the place where it was made, is very nearly universal. The exceptions we should admit are, principally, those founded upon the possible fact that the law of a State might oppose or vary the law of *natural* capacity or incapacity, or might permit a contract which could be performed only by acts in another country, which acts would be distinctly and positively prohibited by the law of that country. And even in such cases it might more properly be said, that the contract should be construed according to the law of the place where it was made, but that whenever such construction could make it illegal, it would be for that reason void. But the illegality here meant is not that of an infant's contract for non-necessaries, or the contract of a married woman. When it is said that he or she cannot do this, it is meant only that the law permits a party making such a *contract to treat it * 578 as void; not that the law prohibits such parties from making these contracts.

All of these questions are sometimes much complicated with other questions, as where the domicil of the party is, or where was the place in which the contract was made; and they become in this way much more difficult.

have attempted to go too far. To define and fix that which cannot in the nature of things be defined and fixed. They seem to have forgotten that they wrote on a question which touched the comity of nations, and that that comity is, and ever must be, uncertain. That it must necessarily depend on a variety of circumstances which cannot be reduced within any certain rule. That no nation will suffer the laws of another to interfere with her own, to the injury of her

citizens; that whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced — the particular nature of her legislation — her policy, and the character of her institutions. That in the conflict of laws, it must be often a matter of doubt which should prevail, and that whenever that doubt does exist, the court which decides will prefer the law of its own country to that of the stranger."

SECTION IV.

DOMICIL.

Every person has, in law, a home, or domicil ; (*m*) and every domicil which one has, whether the original domicil or a subsequent one, continues until a new one is acquired, (*n*) and when a new one is acquired, the former domicil ceases, (*o*) because no person can have more than one domicil at the same time. (*p*) One's domicil, or home, is in the country in which he permanently resides. To the idea of domicil, or home, two elements belong ; one, that of act, the other, that of intent. The very beautiful definition of the Roman law cannot be literally and adequately translated into English. "It is not doubted that individuals have a home in that place where each one has established his hearth and the sum of his possessions and his fortunes (*larem rerumque ac fortunarum suarum summam constituit*) ; whence he will not depart if nothing calls him away ; whence if he has departed he seems to be a wanderer, and if he returns he ceases to wander." (*q*)

The questions of domicil sometimes present much difficulty in determining what is the measure, or what is the evidence of the residence which constitutes domicil in fact, or in intent. Residence

* 579 and domicil are not convertible terms, because they are not the same things. A man may have more than one * residence. He may reside a part of the time in the city, and a part in the country ; or a part in one country and a part in another. But he can have but one domicil ; (*r*)¹ and where that is, must be determined, by a consideration on the one hand of the facts attending his residence, and, on the other, of the intention with which he resides in one place or another. For both fact and

(*m*) *Crawford v. Wilson*, 4 Barb. 504.

(*q*) *Code*, lib. 10, tit. 39, 7.

(*n*) *Id. ; Brewer v. Linnaeus*, 36 Me. 428.

(*r*) *Bartlett v. The Mayor*, 5 Sandf.

(*o*) *Crawford v. Wilson*, 4 Barb. 504.

44. On this point see also *Hood's Estate*,

(*p*) *Id. ; Abington v. North Bridge-water*, 23 Pick. 170; *Thorndike v. The City of Boston*, 1 Met. 242.

21 Penn. St. 106, and *Douglas v. Mayor of New York*, 2 Duer, 110.

¹ Where one's wife and children live permanently, and his establishment is kept up, are material in considering a man's domicil. *Platt v. New South Wales*, 3 App. Cas. 336; *Hindman's Appeal*, 35 Penn. St. 466; *Long v. Ryan*, 30 Gratt. 718.

intent are necessary to constitute a domicil. Both are implied in favor of the home which one has by birth and parentage, and subsequent inhabitancy. The dwelling in a place, or even being there, may constitute *prima facie* evidence of domicil; but it is evidence which may be rebutted. (s) And it is quite certain that no definite period of time, no exact manner of residence, no precise declarations or specific acts, are necessary to ascertain domicil, or perhaps suffice to determine domicil; although the Supreme Court of the United States have intimated that an exercise of the right of suffrage would be the highest evidence; and perhaps it would be conclusive *against* the party. (t)¹

When a domicil is in any way acquired, it may be changed, by a change both in fact and in intent, but not by either change alone;² the change in fact not being enough without intent, (u) nor the change in intent without the change in fact. (v) One who goes abroad *animo revertendi*, does not change his domicil, because only the fact of residence is changed, and not the intent. But if he remains very long abroad, and in one place, the intent may be inferred from the fact. And this inference may be made against the express declarations and assertions of the person. (w) For the fact and the intent together determine * the dom- * 580 icil, and not the language; nor is this important except as evidence of intent. If, therefore, one insists upon his purpose of return, and the preservation of his domicil, but the facts are such as to lead to and justify the belief that this expressed intention of return is but a false pretence, made for the sake of preserving as long as he can the rights of domicil, while in fact he

(s) *Crawford v. Wilson*, 4 Barb. 504, 519; *Bruce v. Bruce*, 2 B. & P. 229, n. (a); *Sears v. The City of Boston*, 1 Met. 250.

(t) *Shelton v. Tiffin*, 6 How. 185. In this case the court say: "On a change of domicil from one State to another, citizenship may depend upon the intention of the individual. But this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage is conclusive on the subject; but acquiring a right of suffrage, accompanied by acts which show a permanent location, unexplained, may

be sufficient." See also *Cole v. Cheshire*, 1 Gray, 441.

(u) *Bradley v. Lowry*, 1 Speers, Eq. 1; *Granby v. Amherst*, 7 Mass. 1; *Lincoln v. Hapgood*, 11 id. 850; *Harvard College v. Gore*, 5 Pick. 370; *Cadwalader v. Howell*, 3 Harrison, 188; *Wilton v. Falmouth*, 15 Me. 479.

(v) *The Attorney-General v. Dunn*, 6 M. & W. 511; *Hallowell v. Saco*, 5 Greenl. 148; *The State v. Hallett*, 8 Ala. 159; *Williams v. Whiting*, 11 Mass. 424; *Hairston v. Hairston*, 27 Miss. 704.

(w) See *supra*, n. (t).

¹ A person may even change his domicil while in the military service. *Moor v. Harvey*, 128 Mass. 219.

² A man having acquired a domicil of choice, may abandon it without being obliged to acquire a new domicil. Per *Jessel, M. R.*, *King v. Foxwell*, 3 Ch. D. 518. See *Kellogg v. Winnebago*, 42 Wis. 97.

means to abide where he now is, the intent will govern, and the change of domicil will be complete. It seems to be agreed that "residence" and "inhabitancy" mean the same thing; (x) and there are cases in which these words and "domicil" are used as if they were synonymous, (y) which we think they are not, as we have just now stated. This may, however, be regarded as rather a question about the meaning and use of words, than a question of principle; for all admit that one may dwell for a considerable time, and even regularly during a large part of the year, in one place, or even in one State, and yet have his domicil in another. (z) If one resides in Boston five months in the twelve, including the day on which residency determines taxation, and the other seven months at his house in the country, he will be taxed in Boston, and may vote there, and his domicil is there. (a)

(x) *Roosevelt v. Kellogg*, 20 Johns. 208; In the Matter of Wrigley, 4 Wend. 602, 8 id. 134.

(y) See *Jefferson v. Washington*, 19 Maine, 293; In the Matter of Thompson, 1 Wend. 45; *Frost v. Brisbin*, 19 id. 11; *Thorndike v. The City of Boston*, 1 Met. 246; *McDaniel v. King*, 5 Cushing, 473; *Cadwalader v. Howell*, 3 Harrison, 144; *Crawford v. Wilson*, 4 Barb. 522. See also cases cited in preceding note. In *Crawford v. Wilson*, 4 Barb. 522, the court put soldiers and seamen on the same footing with foreign ministers in respect to domicil. "The actual residence is not always the legal residence or inhabitancy of a man. A foreign minister actually resides and is personally present at the court to which he is accredited, but his legal residence or inhabitancy, and domicil, are in his own country. His residence at the foreign court is only a temporary residence. He is there for a particular purpose. So soldiers and seamen may be legal residents and inhabitants of a place, although they may have been absent therefrom for years. They do not lose their residence or domicil by following their profession." In regard to seamen, in *Thorndike v. The City of Boston*, 1 Met. 242, the court say: "If a seaman without family or property sails from the place of his nativity, which may be considered his domicil of origin, although he may return only at long intervals, or even be absent many years, yet if he does not by some actual residence or other means acquire a domicil elsewhere, he retains his domicil of origin." See also *Sears v. The City of Boston*, 1 Met. 250.

(z) *Frost v. Brisbin*, 19 Wend. 11.

(a) This is the established rule and common practice in Massachusetts, as to the right of taxing one not actually a resident. It is provided by statute, that personal estate shall be assessed to the owner in the town where he shall be an inhabitant on the first day of May. Rev. Stat. ch. 7, § 9. It is held, that inhabitancy under this statute means substantially the same thing as *domicil*. *Thorndike v. The City of Boston*, 1 Met. 242. In this case a citizen of Boston, who had been at school in the city of Edinburgh when a boy, and formed a predilection for that place as a residence, and had expressed a determination to reside there, if he ever should have the means of so doing, removed with his family to that city, in 1836, declaring, at the time of his departure, that he intended to reside abroad, and that if he should return to the United States he should not live in Boston. He resided in Edinburgh and the vicinity, as a housekeeper, taking a lease of an estate for a term of years, and endeavored to engage an American to enter his family for two years, as instructor of his children. Before he left Boston he made a contract for the sale of his mansion-house and furniture there, but shortly afterwards procured said contract to be annulled (assigning as his reason therefor, that, in case of his death in Europe, his wife might wish to return to Boston), and let his house and furniture to a tenant. Held, that he had changed his *domicil*, and was not liable to taxation as an inhabitant of Boston in 1837. *Shaw, C. J.*, said: "The questions of residence, inhabitancy, or *domicil*, — for although not in all respects precisely the same, they are nearly so, and depend

* A woman marrying takes her husband's domicil, and * 581

upon much the same evidence, — are attended with more difficulty than almost any other which are presented for adjudication. No exact definition can be given of domicil; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case. It is a maxim, that every man must have a domicil somewhere; and also that he can have but one. Of course it follows that his existing domicil continues until he acquires another; and *vice versa*, by acquiring a new domicil he relinquishes his former one. From this view it is manifest that very slight circumstances must often decide the question. It depends upon the preponderance of the evidence in favor of two or more places; and it may often occur that the evidence of facts, tending to establish the domicil in one place, would be entirely conclusive, were it not for the existence of facts and circumstances of a still more conclusive and decisive character, which fix it, beyond question, in another. So, on the contrary, very slight circumstances may fix one's domicil, if not controlled by more conclusive facts fixing it in another place. If a seaman, without family or property, sails from the place of his nativity, which may be considered his domicil of origin, although he may return only at long intervals, or even be absent many years, yet if he does not by some actual residence or other means acquire a domicil elsewhere, he retains his domicil of origin. . . . The actual change of one's residence, with his family, and the taking up of a residence elsewhere, without any intention of returning, is one of the strong indications of change of domicil, and, unless controlled by other circumstances, is decisive. It was for the jury to determine whether there were any circumstances sufficient to control such conclusion. If the plaintiff had left Boston, and actually taken up a residence, with his family, in Scotland, without any intention of returning, thereby assuming that country as his definite abode and place of residence until some new intention had been formed or resolution taken, he had ceased to be an inhabitant of Boston, liable to taxation for his personal property." In *Sears v. The City of Boston*, 1 Met. 250, a native inhabitant of Boston, intending to reside in France, with his family, departed for that country in June, 1836, and was followed by his family about three months afterwards. His dwelling-house and furni-

ture were leased for a year, and he hired a house for a year in Paris. At the time of his departure he intended to return and resume his residence in Boston, but had not fixed on any time for his return. He returned in about sixteen months, and his family in about nine months afterwards. *Held*, that he continued to be an inhabitant of Boston, and that he was rightly taxed there, during his absence, for his person and personal property. *Shaw*, C. J., said: "Actual residence, that is, personal presence in a place, is one circumstance to determine the domicil, or the fact of being an inhabitant; but it is far from being conclusive. A seaman on a long voyage, and a soldier in actual service, may be respectively inhabitants of a place though not personally present there for years. It depends, therefore, upon many other considerations, besides actual presence. Where an old resident and inhabitant, having a domicil from his birth in a particular place, goes to another place or country, the great question whether he has changed his domicil, or whether he has ceased to be an inhabitant of one place and become an inhabitant of another, will depend mainly upon the question, to be determined from all the circumstances, whether the new residence is temporary or permanent; whether it is occasional, for the purpose of a visit, or of accomplishing a temporary object; or whether it is for the purpose of continued residence and abode until some new resolution be taken to remove. If the departure from one's fixed and settled abode is for a purpose in its nature temporary, whether it be business or pleasure, accompanied with an intent of returning and resuming the former place of abode as soon as such purpose is accomplished; in general, such a person continues to be an inhabitant at such place of abode, for all purposes of enjoying civil and political privileges, and of being subject to civil duties." The learned Chief Justice then remarks, that the facts in the present case are considered by the court as indicating only a casual and temporary departure of the plaintiff from his place of permanent residence; that Paris was his place of temporary and not of permanent abode; and that he did not relinquish his domicil, or cease to be an inhabitant of Boston. The case is distinguished from the case of *Thorndike v. The City of Boston*, by the different intent of the parties upon their departure.

changes it with him. (b)¹ A minor child has the domicil * 582 of his * father, (c) or of his mother if she survive his father; and the surviving parent with whom a child lives, by changing his or her own domicil in good faith, changes that of the child. (d) And even a guardian has the same power. (e)

SECTION V.

THE PLACE OF THE CONTRACT.

The rules of law in respect to domicil are quite well settled, and when difficult questions occur, they are usually questions of fact. But the law as to what shall be deemed the place of the contract, seems not to be quite well settled.² A contract is made when both parties agree to it, and not before; if it be an oral contract, it is made when the offer of one party is distinctly accepted by the other; and if it be made by letter, then it is made when the party receiving the proposition puts into the mail his answer accepting it, or does an equivalent act. If the contract is in writing, it is made when all the parties have executed it; and

(b) *Warrender v. Warrender*, 9 Bligh, 1473; *Pottinger v. Wightman*, 3 Meriv. 89, 108, 104.

(c) *Guier v. O'Daniel*, 1 Binn. 349, See Story's Conf. of Laws, § 46, n. (2).

n. a. (e) *Pottinger v. Wightman*, 3 Meriv.

(d) *Cumner v. Milton*, 2 Salk. 528; 67; *Holyoke v. Haskins*, 5 Pick. 20. *Woodend v. Paulisbury*, 2 Ld. Raym. See Story's Conf. of Laws, § 46, n. (2).

¹ But a change of the wife's abode alone changes neither the husband's nor the matrimonial domicil. *Porterfield v. Augusta*, 67 Me. 556; *Scholes v. Murray, &c. Co.* 44 Ia. 190; *Johnson v. Johnson*, 12 Bush, 485.

² In *Scudder v. Union Bank*, 91 U. S. 406, *Hunt*, J., said: "Matters bearing on the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance." See also *Bond v. Cummings*, 70 Me. 125. Whether a sealed instrument, given in New York by the defendant to indemnify the plaintiff against liability as surety on an appeal bond given in Louisiana, imports a consideration absolutely or only *prima facie* must be determined by the law of Louisiana. *Pritchard v. Norton*, 106 U. S. 124. A., in Boston, wishing to pay his vendor, B., in Naples, procured of C. in London, through the latter's agent in Boston, letters of credit, and sent them to B., who on the strength of them drew on C., attaching to the drafts bills of lading. C., on accepting the drafts, sent the bills to A., who transmitted money through C.'s agent to meet the acceptances. C. became bankrupt, and paid dividends on the drafts, the balance being paid by B., and the latter being reimbursed by A. *Held*, in an action by A. to recover the money paid to C.'s agent, A. having attached property of C. in Rhode Island, that the place of performance of C.'s implied contract to repay the money transmitted to meet the acceptances was in Boston, and therefore C.'s discharge in bankruptcy at London was no defence. *Goodsell v. Benson*, 13 R. I. 225.

therefore is not made until the latest party has * put to it * 583 his name or seal, or both, as may be requisite. (f) Suppose, however, that the contract is made in one place, but is to be performed in another; then in general, although perhaps not always, and for all purposes, the place of payment or performance is the place of the contract. (g) The most familiar instance is a promissory note, made, that is, signed, we will say in Boston, and payable in New York. Is this note to be construed by the law of Massachusetts or the law of New York? It would seem, from the authorities, that a contract may have two different places, the law of which enters into its construction. If it be expressly payable, or to be otherwise performed, there where it is signed, then that is its only place. If it be but a naked promise, without any special condition as to the place of payment, then it must be demanded of the maker where he is, or at his domicil, but it would be regarded as made where it was signed. If expressly payable in a place other than that where it is made, it would seem, according to some authorities, that the law of either place may be applied; thus if the legal interest in New York were seven per cent., and the legal interest in Boston were six per cent., a note on interest payable at Boston, and made in New York, would be held not to be usurious in Boston if it expressed seven per cent., as its rate of interest; while according to other authorities, if payable at Boston, it must, wherever signed, conform to the law of Massachusetts in respect to interest, and would therefore be usurious there if it bore on its face more than six per cent., although not usurious at New York, where it was made. Our own opinion is decidedly in favor of the former view. That is, if a note be made, *bona fide*, in one place, expressly bearing an interest legal there, and payable in another place in which so high a rate of interest * is not allowed, it may be sued in the * 584 place where payable, and the interest expressed recovered.

(f) See *ante*, volume i., book ii., chap. 2. Also, *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Orcutt v. Nelson*, id. 538; *Whiston v. Stodder*, 8 *Mart. (La.)* 95; *Western v. The Gene*-
see *Mut. Ins. Co.* 2 Kern. 258.

(g) *Robinson v. Bland*, 2 Burr. 1077; per *Baldwin*, J., in *Strother v. Lucas*, 12 Pet. 410, 436; *Bell v. Bruen*, 1 How. 169, 182; *Le Breton v. Miles*, 8 *Paige*, 261; *Prentiss v. Savage*, 18 Mass. 23;

Percy v. Percy, 9 La. An. 185; *Thompson v. Ketcham*, 8 Johns. 189; *Cox v. The United States*, 6 Pet. 172; *Fanning v. Consequa*, 17 Johns. 511; *Andrews v. Pond*, 13 Pet. 65; *Duncan v. Cannan*, 7 De G. M. & G. 78, 31 Eng. L. & Eq. 443; *Dacosta v. Davis*, 4 N. J. 819; *Lennig v. Ralston*, 28 Penn. St. 137; *Davis v. Clemson*, 6 McLean. 622; *Emerson v. Partridge*, 1 Williams, 8; *Penobscot R. R. Co. v. Bartlett*, 12 Gray, 244.

Because the parties had their election to make the interest payable according to the law of either place ; or, to express the same thing differently, they may lawfully agree upon the largest interest allowed by the law of either place, or any less interest. (h)¹

(h) This is the result arrived at after much consideration, by the Supreme Court of Louisiana, in *Depau v. Humphreys*, 20 Mart. (La.) 1. Mr. Justice Story, in his Conflict of Laws, discusses the question at great length, and with a citation of very numerous authorities, most of which are from the civil law, and comes to an opposite conclusion, if we understand him aright, although some statements might leave the matter in doubt. In reference to the case of *Depau v. Humphreys*, he says: "Another case has arisen of a very different character. The circumstances of the case were somewhat complicated, but the only point for consideration there arose upon a note, of which the defendants were the indorsers, and with the amount thereof they had debited themselves in an account with the plaintiff; and which they sought now to avoid upon the ground of usury. The note was given in New Orleans, payable in New York, for a large sum of money bearing an interest of ten per cent., being the legal interest of Louisiana, the New York legal interest being seven per cent. only. The question was whether the note was tainted with usury, and therefore void, as it would be, if made in New York. The Supreme Court of Louisiana decided that it was not usurious; and that although the note was made payable at New York, yet the interest might be stipulated for either according to the law of Louisiana or according to that of New York. The court seem to have founded their judgment upon the ground, that in the sense of the general rule already stated, there are or there may be two places of contract; that in which the contract is actually made, and that in which it is to be paid or performed; *Locus, ubi contractus celebratus est; locus, ubi destinata solutio est;* and therefore, that if the law of both places is not violated, in respect to the rate of interest, the contract for interest will be valid. In support of their decision the court mainly relied upon the doctrines supposed to be maintained by certain learned jurists of continental

Europe, whose language, however, does not appear to me to justify any such interpretation when properly considered, and is perfectly compatible with the ordinary rule, that the interest must be or ought to be according to the law of the place where the contract is to be performed, and the money is to be paid. It may not be without use to review some of the more important authorities thus cited, although it must necessarily involve the repetition of some which have been already cited." *Confl. of Laws*, § 298. Then after twenty pages of the examination of authorities, he comes to the conclusion that the decision of the court of Louisiana is not supported by the reasoning or principles of foreign jurists, and is directly opposed by the English case of *Robinson v. Bland*, 2 Burr. 1077, and the American case of *Andrews v. Pond*, 18 Pet. 65. Such is not our view of those cases. The first is wholly different in its facts. A bill of exchange was sued, drawn in France upon the drawer in England; and all that the case finds, so far as the present question is concerned, is, that Lord Mansfield says: "The law of the place" (meaning France) "can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed." The case of *Andrews v. Pond* only decides, that if the interest allowable at the place of payment be larger than that where the note is made or the bill drawn, the parties may stipulate for the higher interest. No doubt of this; but the case does not say that if the interest where the note is made be the highest, the parties may not stipulate for that; and this alone is the question. We consider *Depau v. Humphreys* as fully sustained by *Peck v. Mayo*, 14 Vt. 33, and *Chapman v. Robertson*, 6 Paige, 627. The former was an action of assumpsit on two promissory notes given by Horatio Gates & Co. of Montreal, to the defendants, payable in Albany, N. Y., and by the defendants indorsed to the plaintiffs. It appeared

¹ *Stickney v. Jordan*, 58 Me. 106; *Freese v. Brownell*, 6 Vroom, 285; *Kilgore v. Dempsey*, 25 Ohio St. 413. A note made in Michigan as collateral security for a debt then past due in that State, and expressed to be at a rate of interest valid in Michigan, but usurious in New York, will be upheld in the latter State, and the place of payment of such a note is immaterial. *West T. & Coal Co. v. Kilderhouse*, 87 N. Y. 430.

But if no interest be *expressed, then the interest will * 585

that the notes were made at Montreal, where the makers resided, and that the indorsers and the plaintiffs resided in Vermont. The lawful rate of interest in Montreal was six per cent., and in New York seven per cent., per annum. *Redfield, J.*, in delivering the opinion of the court, after an examination of all the authorities, says: "From all which I consider the following rules in regard to interest on contracts made in one country, to be executed in another, to be well settled: 1. If a contract be entered into in one place to be performed in another, and the rate of interest differ in the two countries, the parties may stipulate for the rate of interest of either country, and thus by their own express contract determine with reference to the law of which country that incident of the contract shall be decided. 2. If the contract so entered into stipulate for interest generally, it shall be the rate of interest of the place of payment, unless it appear the parties intended to contract with reference to the law of the other place. 3. If the contract be so entered into for money, payable at a place on a day certain, and no interest be stipulated, and payment be delayed, interest, by way of damages, shall be allowed, according to the law of the place of payment, where the money may be supposed to have been required by the creditor for use, and where he might be supposed to have borrowed money to supply the deficiency thus occurring, and to have paid the rate of interest of that country." *Chapman v. Robertson*, 8 Paige, 627, was a bill in equity to foreclose a mortgage, given by the defendant, a resident of New York, on lands in that State, to the complainant, who resided in England, to secure the payment of £800 sterling. The money was borrowed by Robertson when in England, upon an agreement for interest at the rate of seven per cent. per annum, payable annually. According to the agreement, Robertson, upon his return to this country, executed the bond and mortgage, and transmitted them to the complainant, who then deposited the £800 with Robertson's bankers in London. The defendant contended, that as the original agreement for the loan was made in England, and the money was received there, the contract for the payment of more than five per cent. per annum rendered the bond and mortgage usurious and void. *Walworth, C.*, after disposing of a preliminary point which arose in the

case, said: "The other point in this case presents a very nice question arising out of the conflict of laws in this State and England relative to the legal rate of interest. It is an established principle, that the construction and validity of contracts which are purely personal depend upon the laws of the place where the contract is made, unless it was made in reference to the laws of some other place or country, where such contract, in the contemplation of the parties thereto, was to be carried into effect or performed. 2 Kent's Com. 457; Story, *Conf. Laws*, § 272. On the other hand, it appears to be equally well settled, by the laws of every State or country, that the transfer of lands or other hereditable property, or the creation of any interest in, or lien or incumbrance thereon, must be made according to the *lex situs*, or the local law of the place where the property is situated. And it has been decided, that the *lex loci rei sitae* must also be resorted to for the purpose of determining what is, or is not, to be considered as real or heritable property, so as to have locality within the intent and meaning of this latter principle. . . . Upon a full examination of all the cases to be found upon the subject, either in this country or in England, none of which, however, appear to have decided the precise question which arises in this cause, I have arrived at the conclusion, that this mortgage executed here, and upon property in this State, being valid by the *lex situs*, which is also the law of the domicil of the mortgagor, it is the duty of this court to give full effect to the security, without reference to the usury laws of England, which neither party intended to evade or violate by the execution of a mortgage upon the lands here. If no rate of interest was specified in the contract, it might perhaps be necessary to inquire where the money was legally payable when it became due, for the purpose of ascertaining what interest the mortgagor was entitled to receive. *Quince v. Callender*, 1 Des. 160; *Scofield v. Day*, 20 Johns. 102. But if a contract for the loan of money is made here, and upon a mortgage of lands in this State, which would be valid if the money was payable to the creditor here, it cannot be a violation of the English usury laws, although the money is made payable to the creditor in that country, and at a rate of interest which is greater than is allowed by the laws of England. This question was very fully and ably

be measured by the law of the place where the note is payable. (hh)¹

A note dated in one State, and made in another, is presumed to be payable where dated, and is governed by the laws of that State. (hi)² And if a loan is made where the parties reside, and is payable there, and is secured by mortgage of land in another State, the loan as to all questions of usury is governed by the laws of the State where it is made. (hj) If the contract be made in a foreign country, and is sued here, the judgment must be for that amount in the legal tender of this country which would equal the value in the metal which is the legal currency where the contract was made. (hk)

examined by Judge Martin, in the case of *Depau v. Humphreys*, in the Supreme Court of Louisiana (20 Martin, 1), and that court came to the conclusion, in which decision I fully concur, that in a note given at New Orleans, upon a loan of money made there, the creditor might stipulate for the highest legal rate of conventional interest allowed by the laws of Louisiana, although the rate of interest thus agreed to be paid was higher than that which could be taken, upon a loan, by the laws of the State where such note was made payable." In *Hosford v. Nichols*, 1 Paige, 220, where a contract for the sale of land situated in New York was made between two citizens of New York, one of whom removed to Pennsylvania, where the contract was afterwards executed, by giving a deed, and taking a mortgage of the premises to secure the payment of the purchase-money, in which mortgage the New York rate of interest was reserved, which was greater than that of Pennsylvania, it was held, that the giving the deed and taking the mortgage was only a consummation of the original contract made in New York, and that the mortgage was not void for usury. It is true that in this case the court also say: "Again, there is no evidence in this case to show that the bond and mortgage were not both valid by the law of the State where they were originally executed. E. Kane testifies, that at the time of their date, and for some

years previous, six per cent. was the legal rate of interest in Pennsylvania. But it does not appear that any law existed in that State which prohibited the parties from agreeing upon a higher rate of interest, or declaring securities void in which a higher rate of interest was reserved. And courts of this State cannot take notice of the laws of other States, unless they are proved in the same manner as other facts." But there is little doubt that the decision would have been the same, independently of this last ground. See further upon this question, *Champant v. Ranelagh*, Prec. in Ch. 128; *Connor v. Bellamont*, 2 Atk. 382; *Stapleton v. Conway*, 1 Ves. 427, 3 Atk. 727; *Phipps v. Anglesea*, 5 Vin. Abr. 209, pl. 8; 1 Eq. Cas. Abr. ch. 38, tit. Interest, Money (E); *Ekins v. East India Co.* 1 P. Wms. 396; *Anonymous*, 3 Bing. 198; *Fergusson v. Fyffe*, 8 Clark & F. 121; *Harvey v. Archbold*, Ryan & M. 184; *Boyce v. Edwards*, 2 Pet. 111; *Fanning v. Consequa*, 17 Johns. 511; *Winthrop v. Carleton*, 12 Mass. 4; *Foden v. Sharp*, 4 Johns. 183; *Dewar v. Span*, 3 T. R. 425; *Bank of Georgia v. Lewin*, 45 Barb. 340.

(hh) *Hunt v. Hall*, 37 Ala. 702.

(hi) *Tillotson v. Tillotson*, 34 Conn. 385.

(hj) *Cope v. Alden*, 53 Barb. 350; *Chase v. Dow*, 47 N. H. 406.

(hk) *Benners v. Clemens*, 58 Penn. St. 24.

¹ Where interest is recoverable as damages, none being stipulated for, it is to be computed at the rate established by the law of the place of performance. *Kavanaugh v. Day*, 10 R. I. 393.

² A note made in Illinois, sent to the payee in Louisiana, there indorsed and returned by mail to the makers to be negotiated for their accommodation, and negotiated and delivered in Illinois, is an Illinois note. *Gay v. Rainey*, 89 Ill. 221.

* If a merchant in New York comes to Boston to buy * 586 goods, and there receives them, and gives his note for them, which specifies either Boston or no place for payment, it is a Boston transaction. When the note is due, it may be demanded of the maker wherever he is, but wherever demanded would be construed by the law of Massachusetts. If the note were made payable in New York, it could be demanded nowhere else, and would be construed by the law of New York. If he did not come to Boston, but sent his orders from New York, and the goods were sent to him from Boston, either by a carrier whom he pointed out, or in the usual course of trade, this would be a completion, a making of the contract, and it would be a Boston contract, whether he gave no note, or a note payable in Boston, or one without express place of payment. (i) But if, as before, he gave his note payable in New York, it would * be a New York note. * 587 And if, by the terms of the orders or the bargain, the property in the goods were not to pass to the purchaser until their arrival in New York, they being previously at the risk of the seller, and then a note was given by the buyer in New York, this would be a New York transaction and a New York note, unless the note was made expressly payable in Boston. Such would be the inferences which we should draw from the reasons of the cases, and from what seem to be the stronger authorities; but many of these questions are not yet distinctly determined by adjudication. It is quite certain that the Roman civil law considered the place of payment or performance as the place of the contract. And this law has much title to respect on a question of this kind, both as the basis of a widely extended system of law now in force, and as the embodiment, in its commercial law, of sound sense and accurate justice.

It is to be noticed, that the payment is to be measured or regulated by the law of the place where the note is by the terms of the contract to be performed, and not by that where it happens to be performed. A note made in Boston may be demanded and sued in England, or *vice versa*; because a note without a specified place of payment has no controlling place, but may be demanded of the maker wherever he is. But such a note would still be a Boston note or an English note, according to the place of its signature. In fact, all debts are payable everywhere, unless there be some

(i) *Whiston v. Stodder*, 8 Mart. (L.) 95.

special limitation or provision in respect to the payment ; the rule being that debts, as such, have no *locus* or *situs*, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere. (j)

A discharge of a contract under the law of a country which is not that where the contract was made or to be performed, will not discharge the contract in the country where it was made or to be performed. (k)

We have spoken here only of contracts ; but the place of a tort may have a bearing on the remedy. In a recent English case it was held, that a British subject may maintain, in the courts of that country, an action against another British subject for an assault committed in another country, although proceedings are pending in that other country relating to the same assault ; and even if, by the law of that country, no damages were recoverable for that assault. (kk)

OF THE LAW OF THE FORUM IN RESPECT TO PROCESS AND
REMEDY.

Every State holds jurisdiction over all persons and all things within its dominion, and no further. In England and America, foreigners may avail themselves of the courts for suits or defences against each other, in like manner as citizens may. And a person who has property within the jurisdiction of an English or American court, is liable in respect to that property to the action of such court, though he himself may be out of the jurisdiction, provided he receives such notice as the general law of the State or the rules of the court may require. (l)

But on the trial, and in respect to all questions as to the forms, or methods, or conduct of process, or remedy, the law of the place

(j) *Blanchard v. Russell*, 13 Mass. 1; *Blake v. Williams*, 6 Pick. 286; *Braynard v. Marshall*, 8 id. 194. See also *ante*, p. * 571, n. (g).

(k) *Very v. McHenry*, 29 Me. 206.

(kk) *Scott v. Seymour*, 1 Hurl. & Colt. 219.

(l) In this country we have, very generally, statutory provisions for giving

absent defendants due notice ; and there are generally, perhaps universally, rules of court and of practice, for the same purpose. And the principle that they are entitled to this protection is universally recognized. *Fisher v. Lane*, 3 Wilson, 802, 908; *The Mary*, 9 Cranch, 126, 144; *Bradstreet v. Neptune Ins. Co.* 8 Sumner, 600.

of the forum is applied. (*m*) A familiar instance of this is an action on an instrument, which, having a scrawl with a mere *locus sigilli* (or L. S.) upon it, was made in a State where this is all that is necessary to constitute it a sealed instrument, but is sued in a State where a seal of some kind must be put to it. This instrument must not only be declared on as a simple contract, but if sued there it is only as a simple contract * that it will be * 589 there construed, in respect to all the rights and obligations of the parties. (*n*) So, too, if a negotiable note be given for a debt, the law of the State in which it is given, determines whether it operates as a payment of the debt. (*nn*) If goods be consigned in one State to a commission merchant in another, the interest he may charge is determined by the law of the State in which he lives. (*no*) The acceptance of a bill is a contract to be performed in and be governed by, the law of the State where it is to be paid. (*np*)

Some question has arisen in the case of an arrest in a suit on a contract made where the arrest would not have been permitted by law; and it has been held, that the right to arrest would be that only which was given by the law of the place where the contract was made. (*o*) It seems, however, to be * settled otherwise, * 590 arrest being of the *remedy* and not of the *right*. (*p*)

(*m*) This rule is constantly asserted, not only by all civilians, but in numerous cases in England and in this country. See *Robinson v. Bland*, 2 Burr. 1077; *De La Vega v. Vianna*, 1 B. & Ad. 284; *Trimbey v. Vignier*, 1 Bing. N. C. 151, 159; *British Linen Co. v. Drummond*, 10 B. & C. 98; *Don v. Lippman*, 5 Clark & F. 1; *Nash v. Tupper*, 1 Caines, 402; *Pearshall v. Dwight*, 2 Mass. 84; *Smith v. Spinolla*, 2 Johns. 198; *Van Reimadyk v. Kane*, 1 Gallis. 374; *Lodge v. Phelps*, 1 Johns. Cas. 139, 2 Caines's Cas. in Error, 821; *Peck v. Hozier*, 14 Johns. 346; *Jones v. Hook*, 2 Rand. 908; *Wilcox v. Hunt*, 13 Pet. 378; *Pickering v. Fisk*, 6 Vt. 102; *Wood v. Watkinson*, 17 Conn. 500. But in *Rice et al. v. Courtis*, 32 Vt. 400, *Redfield*, C. J., it was held, that the local rule of policy in that State requiring a complete change of possession, in case of the transfer of personal property, in order

to exempt it from attachment upon process against the transferrer, is universal in its application to all personal property actually within the State.

(*n*) *Andrews v. Herriot*, 4 Cowen, 508, overruling *Meredith v. Hinsdale*, 2 Caines, 362; *Bank of United States v. Donally*, 8 Pet. 361; *Douglas v. Oldham*, 6 N. H. 150; *Thrasher v. Everhart*, 3 Gill & J. 234; *Adams v. Kerr*, 1 B. & P. 380; *Le Roy v. Beard*, 8 How. 451.

(*nn*) *Pecker v. Kennison*, 46 N. H. 488.

(*no*) *Cartwright v. Green*, 47 Barb. 9.

(*np*) *Bright v. Judson*, 47 Barb. 29.

(*o*) Such at least has been understood to be the decision of the court in *Melan v. Fitzjames*, 1 B. & P. 138. We would submit, however, that the judgment of the court in that case proceeded on a different ground. It was an action on an instrument executed in France. The

(*p*) *De La Vega v. Vianna*, 1 B. & Ad. 284; *Imlay v. Ellefsen*, 2 East, 468; *Peck v. Hozier*, 14 Johns. 346; *Hinkley v. Marean*, 8 Mason, 88; *Titus v. Hobart*, 5 id. 378; *Smith v. Spinolla*, 2 Johns. 198;

Woodbridge v. Wright, 8 Conn. 528; *Atwater v. Townsend*, 4 id. 47; *Smith v. Healy*, id. 49; *Whittemore v. Adams*, 2 Cowen, 628.

So, too, limitation and prescription are applied only according to the law of the forum. At least, it seems quite well established,

defendant having been held to bail, a rule was obtained calling on the plaintiff to show cause why the bail-bond should not be given up to be cancelled, on the defendant's entering a common appearance. At the hearing an affidavit of a French counsellor was produced, stating, that by the law of France, "not only the person of the contractor or grantor was not engaged or liable, but it was not even permitted to the party contracting to stipulate that his body should be arrested or imprisoned by reason of a deed of that sort." After argument, the court made the rule absolute, *Heath*, J., dissenting. But it seems clear, from the opinions delivered, that *Eyre*, C. J., and *Rooke*, J., who constituted a majority of the court, went upon the ground that the instrument in question did not, according to the law of France, contain any *personal obligation*, and did not authorize any proceedings in *personam*, but only in *rem*. And it was upon this point that *Heath*, J., differed from them. *Eyre*, C. J., said: "If it appears that this contract creates no personal obligation, and that it could not be sued as such by the laws of France, on the principle of preventing arrests so vexatious as to be an abuse of the process of the court, there seems to be fair ground on which the court may interpose to prevent a proceeding so oppressive as a personal arrest in a foreign country, at the commencement of a suit in a case which, as far as we can judge at present, authorizes no proceeding against the person in the country in which the transaction passed. If there could be none in France, in my opinion there can be none here. I cannot conceive that what is no personal obligation in the country in which it arises, can ever be raised into a personal obligation by the laws of another. If it be a personal obligation there, it must be enforced here in the mode pointed out by the law of this country; but what the nature of the obligation is must be determined by the law of the country where it was entered into, and then this country will apply its own law to enforce it." *Heath*, J., said: "This, on consideration, does seem to me to be a personal contract, and if it be so, I have not the least doubt that the defendant should be held to bail. That being the case, we all agree, that in construing contracts, we must be governed by the laws of the country in which they are made; for all contracts have a reference to such laws. But when

we come to remedies it is another thing; they must be pursued by the means which the law points out where the party resides. The laws of the country where the contract was made can only have a reference to the nature of the contract, not to the mode of enforcing it. Whoever comes into a country voluntarily subjects himself to all the laws of that country, and therein to all the remedies directed by those laws, on his particular engagements." *Rooke*, J.: "I entirely agree with my Lord Chief Justice. Though the contract, on the face of it, may seem to bind the person of the Duke de Fitzjames, by the words 'binding himself,' &c., yet being made abroad, we must consider how it would be understood in the country where it was made. According to the affidavit which has been produced on one side, and not contradicted by the other, this contract is considered in France as not affecting the person. Then what does it amount to? It is a contract that the duke's estate shall be liable to answer the demand, but not his person. If the law of France has said that the person shall not be liable on such a contract, it is the same as if the law of France had been expressly asserted in the contract. If it had been specially agreed between the parties not to consider the duke's person liable, and under those circumstances he had come over here, there would have been no difference between us; for if it were agreed there that the person should not be liable, it would not be liable here. Now, as far as I can understand the contract, this is the true meaning of it. The defendant is not bound by the mere words of the contract, but has a right to explain by affidavit how it would be considered in France. With the explanation given I am satisfied, and being satisfied with it, I think the defendant should be permitted to enter a common appearance." Such was also understood to be the turning-point of the case by *Adair*, Serjeant, who showed cause against the rule. "This rule," said he, "was granted in order to ascertain whether the security in question was that kind of security which imported a remedy against the person of the defendant, or whether it was only in the nature of a mortgage on his estate. If this be a mere security, affecting the land and personal property only of the defendant, and if it so appears on the face of it, the court will attend to that circumstance.

that a foreigner, bringing an action on a debt which is barred by lapse of time in the State where it is sued, but would not be at home, is bound by the law of the forum, and cannot recover payment. (q) The general reason is, that all States make their laws of place to prevent oppressive and wasteful litigation within their jurisdiction, and have a right to determine, for all who resort to their tribunals, how soon after the debt is due the creditor must claim it or lose it. But the question which might arise, if the action would be barred if brought in the place of the contract, but is not barred by the law of the forum, whether the shorter limitation, being that by the law of the place of contract, shall now prevail, is not so well settled. We should say, however, in this as in the former case, the law of the forum must govern, on the general ground that the whole question of limitation or prescription is one of process and * remedy, and not of right and obligation. (r)¹ Thus, it seems to be decided, that the

But if I can show that it is a personal security affecting the person and following it everywhere, whatever may be the law of France as to the form of proceeding, yet when the party is found in this or any other country, he may be proceeded against according to the rules and practice of the country in which he is resident."

(q) British Linen Co. v. Drummond, 10 B. & C. 903; Van Reimsdyk v. Kane, 1 Gallis. 371; Le Roy v. Crowninshield, 2 Mason, 151; Nash v. Tupper, 1 Caines, 402; Bank of United States v. Donnally, 8 Pet. 361; Ruggles v. Keeler, 3 Johns. 263; Decouche v. Savetier, 3 Johns. Ch. 190; Lincoln v. Battelle, 6 Wend. 475; M'Elmoyle v. Cohen, 18 Pet. 312; Thibodeau v. Levasseur, 36 Me. 362.

(r) Williams v. Jones, 13 East, 439; Medbury v. Hopkins, 3 Conn. 472; Van Reimsdyk v. Kane, 1 Gallis. 371; Le Roy v. Crowninshield, 2 Mason, 151; Huber v. Steiner, 2 Bing. N. C. 202; Decouche v. Savetier, 3 Johns. Ch. 190; Ruggles v. Keeler, 3 Johns. 263; Pearsall v. Dwight, 2 Mass. 84. Mr. Justice Story, in his Conflict of Laws, § 582, takes this distinction. "Suppose the statutes of limitation or prescription of a particular country do not only extinguish the right of action, but the claim or title itself, ipso

facto, and declare it a nullity after the lapse of the prescribed period, and the parties are resident within the jurisdiction during the whole of that period, so that it has actually and fully operated upon the case, under such circumstances the question might properly arise, whether such statutes of limitation or prescription may not afterwards be set up in any other country to which the parties may remove, by way of extinguishment or transfer of the claim or title. This is a point which does not seem to have received as much consideration in the decisions of the common law as it would seem to require." In Don v. Lippman, 5 Clark & F. 16, Lord Brougham speaks of this as an excellent distinction. And it is approved of by Tindal, C. J., in Huber v. Steiner, 2 Bing. N. C. 202. But in Bulger v. Roche, 11 Pick. 38, where a debt was contracted in a foreign country, between subjects thereof, who remained there until the debt became barred by the law of limitations of such country, it was held, that such debt could be recovered in Massachusetts, the action having been brought within six years after the parties came into that commonwealth. And Shaw, C. J., said: "That the law of limitation of a foreign country cannot of itself be pleaded as a bar to an action in

¹ A creditor whose claim has been barred under a State statute declaring that all demands against estates of deceased persons not legally exhibited within two years after the granting of the first letters of administration "shall be forever barred," cannot take out letters of administration and satisfy his claim out of real estate of the deceased in another State. Wernae v. Hall, 101 Ill. 423.

*592 section of the statute of frauds, providing *that certain agreements shall not be enforced unless in writing, if made *not* to be performed within a year, does not make the contract void, but is a law of remedy only; and therefore such a contract made abroad, where it may be enforced because there is no such law, cannot be enforced here or in England where that law prevails. (s)

So the courts of one State, where a note is sued, will not enforce the laws of set-off of another State where it was made. (t)

this commonwealth seems conceded, and is indeed too well settled by authority to be drawn in question. *Bryne v. Crowninshield*, 17 Mass. 55. The authorities, both from the civil and the common law, concur in fixing the rule, that the nature, validity, and construction of contracts is to be determined by the law of the place where the contract is made, and that all remedies for enforcing such contracts are regulated by the law of the place where such remedies are pursued. Whether a law of prescription or statute of limitation, which takes away every legal mode of recovering a debt, shall be considered as affecting the contract like payment, release, or judgment, which in effect extinguish the contract, or whether they are to be considered as affecting the remedy only by determining the time within which a particular mode of enforcing it shall be pursued, were it an open question, might be one of some difficulty. It was ably discussed upon general principles in a late case (*Le Roy v. Crowninshield*, 2 Mason's Rep. 151), before the Circuit Court, in which, however, it was fully conceded, by the learned Judge, upon a full consideration and review of all the authorities, that it is now to be considered a settled question. A doubt was intimated in that case, whether, if the parties had remained subjects of the foreign country until the term of limitation had expired, so that the plaintiff's remedy would have been extinguished there, such a state of facts would not have presented a stronger case, and one of more serious difficulty. Such was the case in the present instance; but we think it sufficient to advert to a well-settled rule, in the construction of the statute of limitations, to show that this circumstance can make no difference. The rule is this, that where the statute has begun to run, it will continue to run, notwithstanding the intervention of any impediment, which, if it had existed, when the cause of action accrued, would have prevented the operation of the statute.

For instance, if this action accrued in Nova Scotia, in 1821, and the plaintiff or defendant had left that country in 1825, within six years, in 1828, after the lapse of six years, the action would be as effectually barred, and the remedy extinguished there, as if both had continued to reside in Halifax down to the same period. So that when the parties met here in 1829, so far as the laws of that country, by taking away all legal remedy, could affect it, the debt was extinguished, and that equally whether they had both remained under the jurisdiction of those laws till the time of limitation had elapsed, or whether either or both had previously left it. The authorities referred to, therefore, must be held applicable to a case where both parties were subject to the jurisdiction of a foreign State, when the bar arising from its statute of limitations attached. The same conclusion results from the reason upon which these cases proceed, which is, that statutes of limitation affect only the time within which a legal remedy must be pursued, and do not affect the nature, validity, or construction of the contract. This reason, whether well founded or not, applies equally to cases where the term of limitation has elapsed, when the parties leave the foreign State, as to those where it has only begun to run before they have left the State, and elapses afterwards." And see *Horton v. Horner*, 16 Ohio, 145; *Pratt v. Hubbard*, 1 Greene (Iowa), 19; *Hale v. Lawrence*, 1 N. J. 714; *Beardsley v. Southmayd*, 3 Green, 171; *Townsend v. Jennison*, 9 How. 407; *Nichols v. Rogers*, 2 Paine, C. C. 437; *Henry v. Sargeant*, 13 N. H. 521; *Martin v. Hill*, 12 Barb. 631. Also, Ohio Civil Code (1853), § 22; Indiana Civil Code (1852), § 216; Iowa Code (1851), § 1666.

(s) *Leroux v. Brown*, 12 C. B. 801, 14 Eng. L. & Eq. 247. See the case stated, *post*, vol. iii. p. *57, n. (w)

(t) *Bank of Galliopolis v. Trimble*, 6 B. Mon. 599.

In some of our States, as in Iowa, Indiana, and Ohio, there are statute provisions that actions shall not be maintained in their courts, if they would have been barred by the statutes of limitations where the cause of action arose.

If one holds personal property by adverse title, long enough to acquire a title to it in that way by the law of prescription of the place where he holds it, and afterwards removes with the property to a place where the prescription necessary to give title is longer, the original owner cannot, as it seems, maintain his title in this new place, but is bound by the prescription of the former place. (*u*)

SECTION VII.

OF FOREIGN MARRIAGES.

It seems to be generally admitted, and is certainly a doctrine of English and American law, that a marriage which is valid * in the place where it is contracted is valid every- * 593 where. (*v*) The necessity and propriety of this rule are

(*u*) *Beckford v. Wade*, 17 Ves. 87. And see *Shelby v. Guy*, 11 Wheat. 861.

(*v*) In England this may be considered an established law, at least since 1768, when the case of *Compton v. Bearcroft* was decided. That case is thus stated in *Buller's Nisi Prius*, pp. 118, 114: "The appellant and respondent, both English subjects, and the appellant being under age, ran away, without the consent of her guardian, and were married in Scotland, and on a suit brought in the spiritual court to annul the marriage, it was held that the marriage was good." An account of this case will be found also in *Middleton v. Janverin*, 2 Hagg. Consist. R. 443. The case of *Conway v. Beazley*, 3 Hagg. Consist. R. 639, has been supposed to hold an opposite doctrine; but this case only decides that a Scotch divorce, where the husband and wife were domiciled in England at the time, and had been married in England, is void there. See remarks on this case in *Bishop's valuable work on Marriage and Divorce*, §§ 127, 128. The same rule is generally held in this country. Thus, in *Medway v. Needham*, 16 Mass. 157, where parties incapable by the law of Massachusetts, of contracting marriage with each other,

by reason of one of them being a white person and the other a negro, went, for the express purpose of evading the law, into Rhode Island, where such marriages are allowed, and were there married, and immediately returned, it was held, that the marriage, being good in Rhode Island, was good in Massachusetts. And *Parker*, C. J., said: "According to the case settled in England by the ecclesiastical court, and recognized by the courts of common law, the marriage is to be held valid or otherwise according to the laws of the place where it is contracted; although the parties went to the foreign country with an intention to evade the laws of their own. This doctrine is repugnant to the general principles of law relating to contracts; for a fraudulent evasion of the laws of the country where the parties have their domicil could not, except in the contract of marriage, be protected under the general principle. Thus, parties intending to make a usurious bargain cannot give validity to a contract, in which more than the lawful interest of their country is secured, by passing into another territory where there may be no restriction of interest, or where it is established at a higher rate, and there

* 594 so obvious and so * stringent, that it can hardly be called in question. Nevertheless it must be subject to some quali-

executing a contract before agreed upon. The exception in favor of marriage so contracted must be founded on principles of policy, with a view to prevent the disastrous consequences to the issue of such marriages, as well as to avoid the public mischief which would result from the loose state in which people so situated would live." So in *Putnam v. Putnam*, 8 Pick. 488, where parties, both resident in Massachusetts, where one of them having been divorced for his adultery, was therefore prohibited under a general statute from contracting marriage while his late wife was living, went, in order to evade this statute, into the adjoining State of Connecticut, where no such prohibition existed, and were there married, and immediately returned, the marriage was held to be good in Massachusetts. *Parker*, C. J., in delivering the judgment of the court, after referring to the case of *Medway v. Needham*, said: "This decision covers the whole ground of the present case, and to decide this against the petitioner would be to overrule that decision. The court were aware of all the objections to the doctrine maintained in that case, and knew it to be *vera quæstio* among civilians; but they adopted the rule of the law of England on this subject, on the same ground it was adopted there, namely, the extreme danger and difficulty of vacating a marriage, which by the laws of the country where it was entered into was valid. The condition of parties thus situated, the effect upon their innocent offspring, and the outrage to public morals, were considered as strong and decisive reasons for giving place to the laws of the foreign country, not merely on account of comity, for that would not be offended by declaring null a contract made in violation of the laws of the State in which the parties lived, by evasion, but from general policy; nor will the same principle be necessarily applied to contracts of a different nature,—usurious, gaming, or others made unlawful by statute or common law; for comity will not require that the subjects of one country shall be allowed to protect themselves in the violation of its laws, by assuming obligations under another jurisdiction, purposely to avoid the effect of those laws. The law on this subject having been declared by this court ten years ago, in the case before cited, it is binding upon us and the community, until the legislature shall see fit to alter it. If it shall be found inconvenient, or repugnant

to sound principle, it may be expected that the legislature will explicitly enact, that marriages contracted within another State, which if entered into here would be void, shall have no force within this Commonwealth. But it is a subject which whenever taken into consideration, will be found to require the exercise of the highest wisdom." This judgment was pronounced in 1829. But in 1835, at the time of the passage of the Revised Statutes, the legislature interfered by enacting as follows: "When any persons, resident in this State, shall undertake to contract a marriage, contrary to the preceding provisions of this chapter, and shall, in order to evade those provisions, and with an intention of returning to reside in this State, go into another State or country, and there have their marriage solemnized, and shall afterwards return and reside here, such marriage shall be deemed void in this State." Rev. Stat. ch. 76, sect. 6. As to what cases this statute embraces, see *Sutton v. Warren*, 10 Met. 451; *Commonwealth v. Hunt*, 4 Cush. 49. The case of *Williams v. Oates*, 6 Ired. 536, contains a doctrine materially different from that of the Massachusetts cases above cited. That was a petition by the plaintiff, as widow of the defendant's intestate, for an allowance out of his estate. It appeared that the plaintiff had formerly intermarried with one Allen in North Carolina, both being domiciled there. Her husband afterwards instituted a suit against her for a divorce for cause of adultery on her part, in which there was a decree divorcing him *a vinculo matrimonii*. Afterwards the plaintiff and the defendant's intestate, both being citizens of North Carolina, and domiciled there, with the purpose of evading the laws of that State, which prohibited her from marrying again, went into South Carolina and there intermarried, according to the laws of that State, and immediately returned to North Carolina, and continued to live there for several years as husband and wife, until the death of the intestate. And the Supreme Court of North Carolina held this latter marriage to be void. *Ruffin*, C. J., said: "It is unquestionable, that if this second marriage, in this case, had been celebrated in this State, it would have subjected the plaintiff to the pains of bigamy, and would have been void. The case stands, as to her, precisely as if there never had been a divorce; and, *pro hac vice*, the first marriage is still subsisting.

fication. A marriage made elsewhere * would not be acknowledged as valid in a State the law of which forbade it * 595

We conceive the second marriage acquires no force by the celebration of it having been in South Carolina. We have been at some loss to determine in what sense we are to understand the phrase in the case, that the parties married in South Carolina, 'according to the laws of that State.' We suppose it was meant to say thereby merely that the ceremony was duly celebrated with the formalities, and by the persons, and with the witnesses, there requisite to constitute a marriage. It would be great injustice to our sister State to assume that by her laws her own citizens can marry a second time, a former marriage not being dissolved by death or divorce; or that she makes it lawful for citizens of other States, who have married at home, and by their domestic laws cannot marry a second time, to leave their own State and go into South Carolina expressly to evade their own laws, and, without acquiring a domicil in South Carolina, contract a marriage there. We cannot suppose that South Carolina allows of polygamy, either by her own citizens or those of any other country. Therefore we might cut the case short at that point, upon the presumption that, the contrary not expressly appearing, the law of South Carolina does not tolerate this marriage more than our own law does. Indeed, we believe that in truth she does not so much, as we have been informed that she grants no divorces. But if it were otherwise, we should still hold the marriage void. We do not undertake at present to say what might be the effect of a marriage of a person, in the situation of this plaintiff, contracted in another State in which she had become *bona fide* domiciled. . . . The case before us is not one of a domicil out of North Carolina, but it is stated that the parties were domiciled here, and went to South Carolina in fraud of our law. Now if the law of South Carolina allow of such a marriage, and although it be true that generally marriages are to be judged by the *lex loci contractus*, yet every country must so far respect its own laws, and their operation on its own citizens, as not to allow them to be evaded by acts in another country purposely to defraud them. It cannot allow such acts abroad, under the pretence that they were lawful there, to defeat its own laws at home, in their operation upon persons within her own territory. If a person contract marriage here, and, living the other party, he goes to Turkey, and mar-

ries half a dozen wives, contrary to the laws of this State, it would be impossible that we could give up our whole policy regulating marriages and inheritances, and allow all those women and children to come in here, as wives and heirs, with the only true wife and heirs according to our law. And it would be yet more clear, if two persons were to go from this country to Turkey, merely for the sake of getting married at a place in which polygamy is lawful, and then coming back to the place where it is not lawful. . . . Certainly every country should be disposed to respect the laws of another country; but not more than its own. That ought not to be expected. If a Turk with two wives were to come here, we would administer to them the justice due to the relations contracted by them at home. But an American marries at home, where plurality of wives is excluded, and then, contrary to his engagement with that wife, takes another, where a plurality of wives is tolerated, and the first wife claims the benefit of the law of her own country from the courts of her own country, while the second wife claims from the same courts the immunities and rights conceded to her in the law of her original country. These claims are incompatible, and one only can be granted; and it is easy to see that the obligations arising out of the first contract are to be sustained by the country in which they were assumed; and that our courts must hold the second marriage void in our law, which denied the capacity to contract it. For the same reason we must obey the positive injunction of our statute, which applies to this case." — In *Dickson v. Dickson*, 1 Yerg. 110, which was a petition for dower, it appeared that the plaintiff had formerly been married in Kentucky, and had been there divorced, she being the offending party. She afterwards removed to Tennessee and was married again, her former husband living. It further appeared, that, by the law of Kentucky, a divorce obtained in that State does not release the offending party from the pains and penalties of bigamy, if he or she afterwards marry. Under these circumstances the question arose whether the second marriage should be held valid by the courts of Tennessee. And it was held that it should. *Catron, J.*, said: "Mary May was legally divorced from her husband, Benjamin May, by the Union Circuit in Kentucky; being a court of competent jurisdiction over the sub-

* 596 as incestuous; (*w*)¹ although a question * might be made whether it would be held incestuous, so far as to avoid the marriage, if within the degrees prohibited by the law of the State in which the question arose, or only if it be between kindred who are too near to marry by the law of the civilized world. (*x*) Thus, if it be the law in England that a man shall not marry the sister of his deceased wife, the validity of such a marriage contracted abroad might be determined in England by a reference to the

ject-matter and the parties — the decree dissolving the marriage is conclusive on all the world. The statute of Kentucky provides, that the offending party (the petitioner in this case) shall not be released from the marriage contract, but shall be subject to all the pains and penalties of bigamy. It is impossible, in the nature of things, that all the relations of wife shall exist when she has no husband; who, as soon as the decree dissolving the marriage was pronounced, was an unmarried and single man, freed from all connections and relations to his former wife; and equally so was the petitioner freed from all marriage ties and relations to Benjamin May, in reference to whom she stood like unto every man in the community. Therefore, he has no right to complain of the second marriage. Who has? Not the commonwealth of Kentucky, whose penal laws cannot extend beyond her own territorial jurisdiction, and cannot be executed or noticed in this State, where the second marriage took place, and the violation of said laws was effected. Had Mary May married a second time in Kentucky, such second marriage would not be void because she continued the wife of Benjamin May, but because such second marriage in that State would have been in violation of a high penal law against bigamy; and it being a well-settled prin-

ciple of law that any contract which violates the penal laws of the country where made shall be void. The inquiry with this court is not, however, nor cannot be, whether the laws of Kentucky have been violated by this second marriage,—but have our own laws been violated? The act of 1820, ch. 18, against bigamy, declares it felony for any person to marry having a former husband or wife living. Mary May had no husband living, and is not guilty of bigamy by our statute; nor has she violated the sanction of any penal law of this State." See further, on the proposition stated in the text, *Scrimshire v. Scrimshire*, 2 Hagg. Consist. R. 396; *Herbert v. Herbert*, id. 263, 3 Phillim. 58; *Swift v. Kelly*, 3 Knapp, 257; *Munro v. Saunders*, 6 Bligh, 468; *State v. Patterson*, 2 Ired. 346; *Fornhill v. Murray*, 1 Bland, Ch. 479; *Dumaresly v. Fishly*, 3 A. K. Marsh. 368; *Wall v. Williamson*, 8 Ala. 48; *Lacon v. Higgins*, 3 Stark. 178; *Morgan v. McGhee*, 5 Humph. 18.

(*w*) *Greenwood v. Curtis*, 6 Mass. 358, 378; *Sneed v. Ewing*, 5 J. J. Marsh. 460, 488; *Sutton v. Warren*, 10 Met. 451. And see *Wightman v. Wightman*, 4 Johns. Ch. 843.

(*x*) See *Sutton v. Warren*, 10 Met. 451, and *Bonham v. Badgley*, 2 Gilman, 622, as cited *ante*, p. * 82 n. (*g*).

¹ Where Portuguese first cousins were married in England according to English law, and returning to Portugal did not cohabit as husband and wife, such marriages there being illegal, as incestuous, unless dispensation is granted, it was held that, the parties being by the law of the country of their domicil under a personal disability to contract marriage, their marriage ought to be declared void. *Sottomayor v. De Barros*, 3 P. D. I. "As in other contracts, so in that of marriage, personal capacity must depend on the law of domicil; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both at the time of their marriage subjects of, and domiciled in, the country which imposes this restriction, wherever such marriage may have been solemnized." Per Cotton, L. J. *Kinney v. Commonwealth*, 30 Grat. 858, held that the marriage of a white man and a negro woman in the District of Columbia, there celebrated to evade the laws of Virginia, was void.

question of domicil. That is, an Englishman going abroad, and there marrying his wife's sister, might, on his return, be held not to have legally married; while two Americans contracting such a marriage here, where it is certainly lawful, would be held to be husband and wife in England. We should have said, however, that both here and in England, the law of the place of the marriage would prevail in such a case over the law of the domicil, were it not for the case of *Brook v. Brook*, recently decided there, and mentioned on page * 598. (y) But if a married man, a citizen of one of our * States, journeyed into a Mormon * 597 territory, and there married again, he certainly would not be held on his return to be the lawful husband of two wives.

(y) See preceding note. In *Warrender v. Warrender*, 9 Bligh, 89, 112, Lord *Brougham* said, *obiter* however: "We should expect that the Spanish and Portuguese courts would hold an English marriage avoidable between uncle and niece, or brother and sister-in-law, though solemnized under papal dispensation, because it would clearly be avoidable in this country. But I strongly incline to think that our courts would refuse to sanction, and would avoid by sentence, a marriage between those relatives contracted in the Peninsula, under dispensation, although beyond all doubt such a marriage would there be valid by the *lex loci contractus*, and incapable of being set aside by any proceedings in that country." In *True v. Ranney*, 1 Foster, 55, *Gilchrist*, C. J., extends the exception to the rule, that marriages valid where celebrated are valid everywhere, to cases in which the marriage is opposed to "the municipal institutions of the country" where the rule is sought to be applied. See *ante*, p. * 81, n. (c). But we think this is going rather too far. In *Greenwood v. Curtis*, 6 Mass. 358, 878, the court say: "If a foreign State allows of marriages incestuous by the law of nature, as between parent and child, such marriage could not be allowed to have any validity here. But marriages not naturally unlawful, but prohibited by the law of one State, and not of another, if celebrated where they are not prohibited, would be held valid in a State where they are not allowed. As in this State, a marriage between a man and his deceased wife's sister is lawful, but it is not so in some States. Such a marriage celebrated here would be held valid in any other State, and the parties entitled to the benefits of the matrimonial contract."

And Mr. Justice *Story*, after quoting this language, says: "Indeed, in the diversity of religious opinions in Christian countries, a large space must be allowed for interpretation, as to religious duties, rights, and solemnities. In the Catholic countries of continental Europe, there are many prohibitions of marriage, which are connected with religious canons and establishments, and in most countries there are some positive or customary prohibitions, which involve peculiarities of religious opinion or of conscientious doubt. It would be most inconvenient to hold all marriages celebrated elsewhere void which are not in scrupulous accordance with the local institutions of a particular country." *Confl. of Laws*, § 116. It is to be remembered that even incestuous marriages are not void at common law, but only voidable; and voidable only during the lives of both parties; for, after the death of either, they are valid, as to the legitimacy of the children, and it would seem all other purposes. See 1 Bl. Com. 434, 485, and 2 Inst. 614. See also *Bonham v. Badgley*, 2 Gilman, 622; *Sutton v. Warren*, 10 Met. 458; *Ray v. Sherwood*, 1 Curteis, 198, 199. The rule is, that for civil disabilities, such as prior marriage, idiocy, and the like, the marriage may be declared either *before* or *after* the death of the parties, or either of them, to have been void from the beginning; but for canonical disabilities, only during the lives of both; and canonical disabilities are said to be consanguinity, affinity, and certain corporal infirmities. See *Elliott v. Gurr*, 2 Phill. 16; *Gathings v. Williams*, 5 Ired. 487. The Statute of 6 Wm. IV. ch. 54, makes some of these marriages absolutely void.

And it may be, at least, conjectured, that if a Mormon came into Massachusetts or New York with half a dozen wives, he would not be held there to be the lawful husband of all of them. (z)

The fact that the parties went abroad for the purpose of contracting a marriage there, which would be illegal at home, ought, it might seem, to destroy the validity of the marriage at home. But the contrary doctrine appears to have been held, and to be established in England and in this country. (a)¹ There must, however, be some limit to this. The common case of Gretna Green marriages only shows that persons may be married in Scotland, and then regarded in England as husband and wife, who could not have been married *in that way* in England. At least

we are not aware of any English case recognizing the validity of a marriage contracted abroad between * English subjects

who could not, in any way, become legally husband and wife by any marriage contracted in England; and quite recently it has been held in England, that the marriage of an Englishman to the sister of his deceased wife, both parties being domiciled in England, would be unlawful in that country, and therefore invalid, although performed in Denmark, where such a marriage is allowed; and the children of the marriage were held to be illegitimate on the ground that the Statute of 5 & 6 William IV. ch. 54, declares all marriages within the prohibited degrees to be absolutely null and void, and that the *lex loci* did not apply to a contract prohibited by the positive law of the country of which both parties were subjects. (b) In Massachusetts the cases go somewhat further, but expressly except those foreign marriages "which would tend to outrage the principles and feelings of all civilized

(z) It might be a different question, whether his children by all his wives, who were equally his wives, were all, or were any of them legitimate. In *Wall v. Williamson*, 8 Ala. 48, the court say: "A parallel case to a Turkish or other marriage in an infidel country, will probably be found among all our savage tribes; but can it be possible that the children must be illegitimate if born of the second or other succeeding wife?"

And in reference to the case put in the text, *Rufin*, C. J., says, in *Williams v. Oates*, 5 Ired. 535, 541, cited *ante*, p. * 594, n. (v): "If a Turk with two wives were to come here, we would administer to them the justice due to the relations contracted by them at home."

(a) See *ante*, p. * 593, n. (v).

(b) *Brook v. Brook*, before *Stewart*, V. C., and *Cresswell*, J., 27 Law J. Ch. 400, 22 Law Reporter, 216.

¹ The text is confirmed in *Van Voorhis v. Brintnall*, 86 N. Y. 18, where a marriage in Connecticut by one divorced in New York for adultery, and therefore forbidden to marry again, was upheld, although the parties went to Connecticut expressly to evade the New York law, this law not prohibiting in terms marriages outside of New York; and further, *Thorp v. Thorp*, 90 N. Y. 602, decided that it is no defence to a libel for divorce in New York that the marriage sought to be annulled was so contracted.

nations." (c) It may, however, be remarked, that while the converse of this rule is also true, and a marriage which is void where contracted is valid nowhere, (d) there must also be some exceptions to this rule; as if two Americans intermarried in China, where the marriage was celebrated in presence of an American chaplain, according to the American forms. If such a marriage were perfectly void in China, it would nevertheless be held certainly valid here. (e) An interesting and instructive case has recently been decided in Massachusetts, involving many of the most * important principles and questions belonging to the subject of foreign marriage and legitimation. (f) And in a late case in England, it has been held that a marriage contracted in a country where polygamy is lawful, between parties professing a faith which permits polygamy, is not a marriage as understood in Christendom, and will not be recognized in the English Matrimonial Court as a valid marriage. (ff) The question arose in a suit for divorce from a Mormon marriage.

It is also the general rule, both in England and in this country, that the incidents of marriage, and contracts in relation to marriage, as settlements of property and the like, are to be construed by the law of the place where these were made; for any different construction cannot be supposed to carry into effect the intentions

(c) *Medway v. Needham*, 16 Mass. 157.

(d) *M'Culloch v. M'Culloch*, Ferg. Divorce Cases, 257; *Dalrymple v. Dalrymple*, 2 Hagg. Consist. R. 64; *Kent v. Burgess*, 11 Sim. 361; *Scrimshire v. Scrimshire*, 2 Hagg. Consist. R. 305.

(e) *Ruding v. Smith*, 2 Hagg. Consist. R. 371; *Kent v. Burgess*, 11 Sim. 361; *The King v. Brampton*, 10 East, 282; *Newbury v. Brunswick*, 2 Vt. 161. In *Harford v. Morris*, 2 Hagg. Consist. R. 430, Sir George Hay says: "Will anybody say, that before the act, a marriage solemnized by persons going over to Calais, or happening to be there, was void in this country, because such a marriage might be void by the laws of France, as perhaps it was, if solemnized by a Protestant priest, whom they do not acknowledge, or if in any way clandestine, or without consent; and that, therefore, it should be set aside by a court in England, upon account of its being void by the law of France? No." And on p. 432, he says: "And here I must observe, that I do not mean that every domicil is to give a jurisdiction to a foreign coun-

try, so that the laws of that country are necessarily to obtain and attach upon a marriage solemnized there; for what would become of our factories abroad, in Leghorn or elsewhere, where the marriage is only by the law of England, and might be void by the law of that country? Nothing will be admitted in this court to affect such marriages so celebrated, even where the parties are domiciled."

(f) *Loring v. Thorndike*, 5 Allen, 257. The circumstances of this case are not only very peculiar, but too complicated and intricate to admit of a brief abstract or analysis. The law as to foreign marriages decided by this case is clearly stated in the head note, as follows: The civil act of the free city of Frankfort-on-the-Main, requiring marriages to be solemnized in a particular form, does not apply to foreigners temporarily residing there; and a marriage in that city before the United States consul, between a citizen of Massachusetts and a woman not domiciled there, is valid.

(ff) *Hyde v. Hyde*, Law Rep. 1 P. & D. 130.

and agreements of the parties, or to deal with them justly. (*g*) This being the reason of the rule, it cannot apply to the construction of settlements and the like, where the parties are married while accidentally or transiently absent from their homes, without actual or intended change of domicil, and make their settlements or arrangements there, at the time of marriage; for in such cases the law of the domicil should govern, and the marriage, although actually foreign, should be regarded as constructively and virtually domestic. For, as a general rule, the rights of the parties, as springing from the relation of marriage, must be determined by the place where they then supposed themselves, and intended to be, domiciled. (*h*)¹

In respect to the capacity of the wife to contract with a third party, we are inclined to hold that the law of the place of the contract determines this, as well as other questions of

* 600 capacity, * at least in respect to personal contracts; although, in the absence of sufficiently direct adjudication, and in the conflict of opinion to be found in text writers, it is difficult to ascertain what the law is on this point.² And it must depend much on the circumstances. If an American wife, for instance, being only on a brief visit in some country where she

(*g*) *Feaubert v. Turst*, Prec. in Ch. 207, 1 Bro. P. C. 38; *Robertson's App. Cas.* 3; *Anstruther v. Adair*, 2 Mylne & K. 518; *Freemoult v. Dedire*, 1 P. Wms. 429; *Decouche v. Savetier*, 3 Johns. Ch. 190; *Crosby v. Berger*, 3 Edw. Ch. 538; *De Barante v. Gott*, 6 Barb. 492.

(*h*) *Le Breton v. Nouchet*, 3 Mart. (La.) 60; *Ford v. Ford*, 14 id. 574; *Allen v. Allen*, 6 Rob. (La.) 104; *Doe v. Vardill*, 5 B. & C. 438. It seems that parties cannot, by a contract made in Louisiana, provide effectually that the rights of the parties shall be determined by the provisions of a specified foreign law. *Bour-*

cier v. Lanusse, 8 Mart. (La.) 581. But though the contract be made in one country, and it refer to the law of another, it will be valid and effectual if both parties have agreed upon making that other country their place of residence, and do actually settle there. For, even without a contract, the rights of the husband to the wife's property are determined in such case by the law of the intended and actual subsequent domicil. *Le Breton v. Miles*, 8 Paige, 261; *Kneeland v. Ensley*, Meigs, 620; *Lyon v. Knott*, 2 Am. Law. Reg. 604.

¹ If there is no marriage contract, the wife's personal property rights are to be governed by the laws of the intended residence, *Mason v. Homer*, 105 Mass. 116; *Mason v. Fuller*, 36 Conn. 160. An antenuptial agreement made in one State, the maker of which immediately moves to another, is to be governed by the laws of the latter as to its validity and effect. *Davenport v. Karnes*, 70 Ill. 465.

² In *Milliken v. Pratt*, 125 Mass. 374, it appeared that a married woman domiciled in Massachusetts made by letter sent there a contract of guaranty in Maine, which, under the laws of Massachusetts at the time, she was incapable of making, but which the laws of Maine allowed her to make, and upon which she was sued in Massachusetts. It was held that the action could be maintained. *Gray, C. J.*, in a learned opinion, reviews all the authorities, and arrives at the conclusion that the validity of a contract, even as regards the capacity of the parties, is generally to be determined by the law of the State in which it is made. See *Bell v. Packard*, 69 Me. 105.

may contract, does so on some accidental occasion, it might be more doubtful whether the contract, though valid where made, would have any force on her return to this country. But if husband and wife go abroad, and visit a country for business purposes, and there enter into business contracts obligatory on both by the law of that place, although it might be difficult to enforce the contract against the wife in America, while the husband lived, we should think the contract would be valid, and enforceable here after her husband's death, and perhaps against a second husband. (i)¹

There is one peculiar result of marriage, which seems to be an exception. In some places, if the parents of a child intermarry after his birth, this marriage legitimates him. In England it does not; and it has been held in England, that such subsequent marriage in Scotland, where it legitimates the child, did not so far legitimate him in England as to enable him to take by inheritance land situated in England. (j) The rule would be otherwise as to personal property, the law of the domicil of the parents determining the legitimacy as to that. And we think that such a marriage in Scotland, supposing parents and child afterwards to come to America and be naturalized here, would be held here to make the child an heir, as well as to give him all other rights of legitimacy. (k) We have, however, considered the subject of illegitimate children in our first volume.

The place of marriage does not determine absolutely as to the domicil acquired by marriage. It would be obviously unreasonable * to permit the domicil of the parties to depend * 601 upon the mere place where the marriage is celebrated, while the parties are perhaps only *in transitu*. This question is therefore settled by their actual domicil at the time; the husband's

(i) In the absence of much direct adjudication, we refer the reader to the following authorities, as bearing more or less directly upon this question. Polydore v. Prince, Ware, 402; Drue v. Thorne, Aleyn, 72; Thompson v. Ketcham, 8 Johns. 189; Garnier v. Poydras, 13 La. 177; Potter v. Brown, 5 East, 131.

(j) Doe v. Vardill, 5 B. & C. 438, 9 Bligh, 82.

(k) Such seems very certainly to be the doctrine of the greater number and most authoritative of the civilians. See Story on Conf. of Laws, § 93 *a et seq.*

¹ Wheeler v. Constantine, 39 Mich. 62, decided that an Indiana woman could not evade the payment of notes given by her for goods purchased in Michigan without showing her disqualification under the Indiana laws; and that if the Michigan law authorized such notes, it could not be presumed that they were void, nor could it be conceded that if made in Michigan they were not governed by its laws.

domicil is determined by the two elements of actual residence and intent, as in other cases; while the wife acquires by marriage the domicil of the husband, and changes it as his changes. (?)

* 602 And in such case the wife's rights in and to the * property of the husband, or her own, would be determined by the law of that domicil, so far at least as relates to the personal property of both, and the real property of the husband. If the wife had real property in the country of her own domicil, hers and her husband's rights in respect to it might now be governed by the *lex loci rei sitae*.

(?) See ante, p. * 581, n. (b). But the wife may, so far as the question of divorce is concerned, have a domicil distinct from that of the husband. In *Harteau v. Harteau*, 14 Pick. 181, *Shaw*, C. J., after considering certain questions arising in the case which have no direct bearing upon this point, says: "This suggests another course of inquiry, that is, how far the maxim is applicable to this case, that the domicil of the wife follows that of the husband. Can this maxim be true, in its application to this subject, where the wife claims to act, and by law, to a certain extent and in certain cases, is allowed to act adversely to her husband? It would oust the court of its jurisdiction, in all cases where the husband should change his domicil to another State before the suit is instituted. It is in the power of a husband to change and fix his domicil at his will. If the maxim could apply, a man might go from this county to Providence, take a house, live in open adultery, abandoning his wife altogether; and yet she could not libel for a divorce in this State, where, till such change of domicil, they had always lived. He clearly lives in Rhode Island; her domicil, according to the maxim, follows him; she, therefore, in contemplation of law, is domiciled there too; so that neither of the parties can be said to live in this Commonwealth. It is probably a juster view, to consider that the maxim is founded upon the theoretic identity of person and of interest between husband and wife, as established by law, and the presumption, that from the nature of that relation the home of the one is that of the other, and intended to promote, strengthen, and secure their interests in this relation, as it ordinarily exists, where union and harmony prevail. But the law will recognize a wife as having a separate existence, and separate interests, and separate rights, in those cases

where the express object of all proceedings is to show that the relation itself ought to be dissolved, or so modified as to establish separate interests, and especially a separate domicil and home, bed and board being put, a part for the whole, as expressive of the idea of *home*. Otherwise, the parties in this respect would stand upon very unequal grounds; it being in the power of a husband to change his domicil at will, but not in that of the wife." Mr. Bishop, in his work on Marriage and Divorce, § 730, after quoting from the preceding case, says: "And the doctrine that, for purposes of divorce, the wife may have a domicil separate from her husband, is well established in the American tribunals, although some of the authorities would seem to take the distinction (it is submitted without proper foundation), that a wife cannot lose her domicil by the husband's change of residence after the offence is committed, yet cannot on the other hand acquire a new one. Indeed it has been distinctly laid down, that the wife cannot, by a removal of her habitation after the commission of the offence, acquire a new jurisdiction in which to prosecute her claim for divorce, though it is believed that the preponderance of American authority, as well as weight of argument, is greatly the other way." See further, on this question, *Irby v. Willson*, 1 Dev. & Bat. Eq. 568, 582; *Frary v. Frary*, 10 N. H. 61; *Harding v. Alden*, 9 Greenl. 140; *Sawtell v. Sawtell*, 17 Conn. 284; *Brett v. Brett*, 5 Met. 233; *Tolen v. Tolen*, 2 Blackf. 407; *Jackson v. Jackson*, 1 Johns. 425; *Maguire v. Maguire*, 7 Dana, 181; *Fawling v. Willson*, 18 Johns. 192, 208. If the husband and wife have been separated by a judicial decree, and are living separate, the domicil of the wife is independent of that of the husband. *Williams v. Dorner*, 2 Robb, Ecc. R. 505, 9 Eng. L. & Eq. 598.

SECTION VIII.

OF FOREIGN DIVORCES.

The relation of the law of place to the subject of divorce presents questions of much difficulty. And although many cases involving some of these questions, have been decided after very full consideration, both in England and in this country, some topics remain, in relation to which there exists at present much uncertainty.

The law of divorce differs greatly in different countries, because marriage itself is viewed under so great a diversity of aspect. The Catholic Church regards it as a sacrament, over which the civil law and civil tribunals have no power whatever, and which can only be dissolved by the supreme spiritual power of the Church. Protestants deny it to be a sacrament. They regard it as a civil contract, of a religious character it may be, and therefore properly associated with religious ceremonies ; but wholly within the power of the civil authority. But England, which was Catholic while its common law was in course of formation, had no means provided for effecting divorce after it became Protestant ; and in that country, complete divorce *a vinculo*, was effected only by parliament, until the statute of 20 and 21 Vict. ch. 85, constituted a special court for the trial of such questions, with full power to decree a dissolution of the marriage. We suppose that in all Protestant countries judicial tribunals may grant divorces *a vinculo*. In the States of this Union, divorce is granted by the tribunals, for reasons which * are defined by statute. * 603 In some States these causes are limited to adultery, and facts of equivalent character ; and in others are extremely liberal, not to say lax. And in some of the States it is the custom of the legislatures to grant divorces by private acts, and in practice this is sometimes done for very feeble reasons, and almost without other reason than the request.

The question must therefore be one of much difficulty how far a State will recognize the validity of a foreign divorce, granted, perhaps, for causes which the law of the tribunal trying the question would hold to be wholly insufficient.

The general rule is certainly this. A divorce granted in a State in which both parties had their actual domicil, *and also* were married, is valid everywhere. (*m*) Then it may be said that, generally, every State recognizes the validity of a divorce granted where both parties have their actual domicil, if granted according to the law of that place. (*mm*) It has been very authoritatively declared to be the law of England, that the tribunals of that country acknowledge no foreign divorce of an English marriage. (*n*)¹ A more careful consideration of the cases

(*m*) Story's Conf. of Laws, § 201; 2 Kent, Com. 108. It would not be easy to find this rule established by distinct adjudications, for the reason that it is too well settled to be questioned.

(*mm*) Standridge v. Standridge, 31 Ga. 228.

(*n*) In Lolley's case, Russ. & Ry. Cr. Cases, 237, English subjects were married in England; the husband went to Scotland, there he was divorced *a vinculo*; he returned to England and married there, his first wife living; he was indicted for bigamy, convicted, and sentenced to transportation. Lord Brougham, in deciding M'Carthy v. Decaix, 2 Russ. & M. 614, 619, comments upon Lolley's case, and upon Lord Eldon's remarks upon it, and says: "I find, from the note of what fell from Lord Eldon on the present appeal, that his lordship labored under considerable misapprehension as to the facts in Lolley's case; he is represented as saying he will not admit that it is the settled law, and that therefore he will not decide, whether the marriage was or not prematurely determined by the Danish divorce. His words are, 'I will not without other assistance take upon myself to do so.' Now, if it has not validly and by the highest authorities in Westminster Hall been holden, that a foreign divorce cannot dissolve an English marriage, then nothing whatever has been established. For what was Lolley's case? It was a case the strongest possible in favor of the doctrine contended for. It was not a question of civil right, but of felony. Lolley had *bona fide*, and in a confident belief, founded on the authority of the Scotch lawyers, that the Scotch divorce had

effectually dissolved his prior English marriage, intermarried in England, living his first wife. He was tried at Lancaster for bigamy, and found guilty; but the point was reserved, and was afterwards argued before all the most learned judges of the day, who, after hearing the case fully and thoroughly discussed, first at Westminster Hall, and then at Sergeant's Inn, gave a clear and unanimous opinion, that no divorce or proceeding in the nature of divorce in any foreign country, Scotland included, could dissolve a marriage contracted in England; and they sentenced Lolley to seven years' transportation. And he was accordingly sent to the hulks for one or two years; though in mercy the residue of his sentence was ultimately remitted. I take leave to say, he ought not to have gone to the hulks at all, because he had acted *bona fide*, though this did not prevent his conviction from being legal. But he was sent notwithstanding, as if to show clearly that the judges were confident of the law they had laid down; so that never was there a greater mistake than to suppose that the remission argued the least doubt on the part of the judges. Even if the punishment had been entirely remitted, the remission would have been on the ground that there had been no criminal intent, though that had been done which the law declares to be felony. I hold it to be perfectly clear, therefore, that Lolley's case stands as the settled law of Westminster Hall at this day. It has been uniformly recognized since; and in particular it was repeatedly made the subject of discussion, before Lord Eldon himself, in the two appeals of Tovey v. Lindsey, 1 Dow, 117, 181, in the House of

¹ As to divorce in England of foreign subjects, see Le Sueur v. Le Sueur, 1 P. D. 139; Niboyet v. Niboyet, 3 P. D. 52. An English divorce court will recognize a Scotch divorce of persons there domiciled who were married in England, Harvey v. Farnie, 5 P. D. 153; but not a divorce in the United States of persons married in England if one party went there without the other involuntarily, or without a transfer of domicil, Briggs v. Briggs, 5 P. D. 163.

would, * however, lead to the conclusion, that the *established* rule in England goes no further, than that an English marriage cannot * be terminated by a foreign divorce, * 605 unless both parties are actually domiciled in the country where the divorce takes place. All the courts in this country, and all our legislatures, do not go so far as this; for some hold and practise upon the rule, that if the parties, or indeed if only the party seeking the divorce, is within the jurisdiction of the court by a present domicil, it is enough, without asking whether

Lords, when I furnished his lordship with a note of Lolley's case, which he followed in disposing of both those appeals, so far as it affected them. That case then settled that no foreign proceeding in the nature of a divorce in an ecclesiastical court could effectually dissolve an English marriage." But in *Conway v. Beazley*, 3 Hagg. Ecc. R. 639, 648, Dr. *Lushington* says: "Cases have been cited in which it is alleged, that a final decision has been pronounced by very high authority upon the operation of a Scotch divorce on an English marriage; that it has been determined that a marriage celebrated in England cannot be dissolved by the sentence of a Scotch tribunal; that the contract remains forever indissoluble. The authorities principally relied upon for establishing that position are the decisions of the twelve judges in Lolley's case, and the decision of the present Lord Chancellor on a very recent occasion. If those authorities sustained to its full extent the doctrine contended for, the court would feel implicitly bound to adopt it; but I must consider whether in Lolley's case it was the intention of those very learned persons to decide a principle of universal operation, absolutely and without reference to circumstances, or whether they must not almost of necessity be presumed to have confined themselves to the particular circumstances that were then under their consideration. Lolley's case is very briefly reported, none of the authorities cited on the one side or on the other are referred to, nor are the opinions of the learned judges given at any length; all that we have is the decision. It is much to be regretted that some more extended reports of the very learned arguments which I well remember were urged upon that occasion, and the multitude of authorities quoted, have not been communicated to the profession and to the public. In that case the indictment stated, that on the 18th of July, Lolley was married at Liverpool to Ann Levaia,

and afterwards to Helen Hunter, his former wife being then living. It was proved that both marriages were duly solemnized at Liverpool, that the first wife was alive a week before the assizes, and that the second wife agreed to marry the prisoner if he could obtain a divorce. The jury did not find that any fraud had been committed, but there does not appear to have been any discussion upon the very important question of domicil. A case in which all the parties are domiciled in England, and resort is had to Scotland (with which neither of them have any connection) for no other purpose than to obtain a divorce *a vinculo*, may possibly be decided on principles which would not altogether apply to a case differently circumstanced; as where, prior to the cause arising on account of which a divorce was sought, the parties had been *bona fide* domiciled in Scotland. Unless I am satisfied that every view of this question had been taken, the court cannot, from the case referred to, assume it to have been established as a universal rule, that a marriage had in England, and originally valid by the law of England, cannot under any possible circumstances be dissolved by the decree of a foreign court. Before I could give my assent to such a doctrine (not meaning to deny that it may be true), I must have a decision after argument upon such a case as I will now suppose, namely, a marriage in England,—the parties resorting to a foreign country, becoming actually *bona fide* domiciled in that country, and then separated by a sentence of divorce pronounced by the competent tribunal of that country. If a case of that description had occurred, and had received the decision of the twelve judges, or the other high authority to which allusion had been made, then indeed it might have set this important matter at rest, but I am not aware that that point has ever been distinctly raised, and I think I may say with certainty that it never has received any express decision."

the party came there merely for the purpose of obtaining the divorce. (o)

In this country, the law on this subject is regulated very generally by statutes; and those differ very much, and are still * 606 subject * to not unfrequent change. In the absence of statutory provision, we should incline to think, that the courts would generally hold a divorce which was valid where granted, and was obtained in good faith, valid everywhere. Perhaps it may be said, that the tendency of American law is towards a recognition of a divorce obtained in another State, for causes which would be sufficient ground for divorce in the State whose tribunal tries the question, but not otherwise. For the courts of each State go behind a cause of divorce in another State, so far as to inquire into the *sufficiency* of the cause; but not so far as to deny the

(o) There is but little uniformity among our different States, either as to statutory provisions on this subject, or the principles belonging to it as settled by adjudication, or the application of these principles to cases, or in the practice and usage of legislatures in relation to legislative divorces. Mr. *Bishop*, from a very full consideration of the American cases, deduces the following rules: "1. The tribunals of a country have no jurisdiction over a cause of divorce, wherever the offence may have occurred, if neither of the parties has an actual *bona fide* domicil within its territory. Nor is this proposition at all modified by the fact, that one or both of them may be temporarily residing within reach of the process of the court, or that the defendant appears and submits to the suit. This is the firmly established doctrine both in England and America." As authorities for this rule he cites *Conway v. Beazley*, 3 Hagg. Eccl. R. 631; *Rex v. Lolley, Russ. & Ry. Cr. Cas.* 237; *Sugden v. Lolley*, 2 Clark & F. 587, n.; *Fellows v. Fellows*, 8 N. H. 180; *Hanover v. Turner*, 14 Mass. 227; *Barber v. Root*, 10 Mass. 200; *Pawling v. Bird*, 18 Johns. 192; *Jackson v. Jackson*, 1 Johns. 424; *Bradshaw v. Heath*, 18 Wend. 407; *Maguire v. Maguire*, 7 Dana, 181; *Tolen v. Tolen*, 2 Blackf. 407; *Freeman v. Freeman*, 3 West. Law Jour. 476; *White v. White*, 5 N. H. 476. — "2. To entitle the court to take jurisdiction, however, it is sufficient that one of the parties be domiciled in the country; it is not necessary that both should be, nor that the citation, when the domiciled party is plaintiff, should be served personally upon the de-

fendant, if such personal service cannot be made." *Harteau v. Harteau*, 14 Pick. 181; *Harding v. Alden*, 9 Greenl. 140; *Mansfield v. McIntyre*, 10 Ohio, 27; *Tolen v. Tolen*, 2 Blackf. 407; *Hull v. Hull*, 2 Strobb. Eq. 174. — "3. The place where the offence was committed, whether in the country in which the suit is brought, or a foreign country, is quite immaterial. This is the universal doctrine; it is the same in the English, Scotch, and American courts, and there is no conflict upon the point. — 4. The domicil of the parties, at the time the offence was committed, is of no consequence; the jurisdiction depends upon their domicil at the time the proceeding is instituted, and judgment rendered. A contrary doctrine has been maintained in New Hampshire and Pennsylvania, in which States it is held, that the tribunals of the country in which the parties were domiciled when the *delictum* occurred, have alone the jurisdiction." In support of the New Hampshire and Pennsylvania rule, he cites *Clark v. Clark*, 8 N. H. 21; *Frary v. Frary*, 10 id. 61; *Smith v. Smith*, 12 id. 80; *Greenlaw v. Greenlaw*, id. 200; *Batchelder v. Batchelder*, 14 id. 380; *Dorsey v. Dorsey*, 7 Watts, 849; *Hollister v. Hollister*, 6 Penn. St. 449. — "5. It is immaterial to this question of jurisdiction, in what country, or under what system of divorce laws the marriage was contracted. — 6. The view we have taken is in no way controlled by that provision in the United States Constitution which prohibits the States from passing laws impairing the obligation of contracts." See *Bishop on Marriage and Divorce*, § 721 & seq.

existence of the cause, if ascertained by a competent tribunal, on a regularly conducted trial. (*oo*)¹

In many of our States a woman divorced for her adultery cannot marry again whilst her husband lives. But it is also provided that she may marry, with leave of the court; and it has been said that she may have this leave on proof of good conduct since the divorce, and in the absence of any especial objection to her marrying. (*op*)

SECTION IX.

FOREIGN JUDGMENTS.

The principle, that questions which have been distinctly settled by litigation shall not be again litigated, has been in many cases extended to foreign judgments; and, although the whole law on this subject is not perhaps definitely settled, (*p*) it may be considered as the rule, both in England and in this country, that a question settled abroad, by courts of competent jurisdiction, between actual parties, after trial, will not be opened at home. (*q*)² It will be presumed, that all the defences which the losing party has, were made, and were insufficient. But it may be said, that the foreign judgment will not be entitled to this respect, when it appears that the foreign law, or foreign process on which the foreign judgment rested, conflicts with reason and justice; (*r*) or

(*oo*) See on this subject, *Hood v. Hood*, 11 Allen, 196; *Kirrigan v. Kirrigan*, 2 M'Carter, 146; *Weatherbee v. Weatherbee*, 20 Wis. 499; *Winship v. Winship*, 1 Green, 107.

(*op*) *Cochrane, petitioner*, 10 Allen, 276.

(*p*) *Smith v. Nicolls*, 7 Scott, 147, 167.

(*q*) *Henderson v. Henderson*, 6 Q. B. 288; *Smith v. Lewis*, 3 Johns. 157; *Emory v. Greenough*, 3 Dall. 369, 372, n. In *Burrows v. Jemino*, Stra. 733, a foreign decree avoiding the acceptance of a bill of exchange, was held good.

(*r*) *Henderson v. Henderson*, 6 Q. B. 288, 298; *Vallee v. Dumergue*, 4 Exch.

¹ A divorce by a State court having jurisdiction will be upheld unless set aside by the same court. *Cheever v. Wilson*, 9 Wall, 108; *Hunt v. Hunt*, 72 N. Y. 217. If a husband has a domicil in one State and the wife in another, the courts of either have jurisdiction concerning the party resident, *Wright v. Wright*, 24 Mich. 180; *Dutcher v. Dutcher*, 39 Wis. 651; but if neither party has a domicil in the State, the courts of which grant a divorce, it is void, *Sewall v. Sewall*, 122 Mass. 156; *Hood v. State*, 56 Ind. 263; *Gettys v. Gettys*, 3 Lea, 260; *Litowich v. Litowich*, 19 Kan. 451; a residence for the mere purpose of suing for a divorce being insufficient, *Whitecomb v. Whitcomb*, 46 Ia. 437. See *Eaton v. Eaton*, 122 Mass. 276. A divorce against one domiciled in another State, no process being served or notice given, is of no effect out of the State in which it is granted, *Doughty v. Doughty*, 1 Stewart, 581. See *People v. Baker*, 76 N. Y. 78. Where there is no proof that a husband, seeking a divorce in another State, went there for that purpose, where the wife is served with notice, and appears by counsel, and where she subsequently, in a release reciting the divorce, gives up every claim against him, she cannot treat his subsequent marriage as a violation of his marital obligations to her. *Loud v. Loud*, 129 Mass. 14.

² *Ellis v. M'Henry*, L. R. 6 C. P. 228.

that the foreign court, in deciding a question depending
*** 607** * more or less upon the law of that other country in which
the foreign judgment comes under consideration, is found
to have mistaken the law of that country. (*s*)¹ And it is obviously essential to the application of the general rule, that the foreign judgment be definite, exact, final, and conclusive, in the court and country in which it was rendered. (*t*) Nor can it be necessary to say, that if the foreign judgment can be shown to have been obtained by, or to be founded upon fraud, it can have no force.

On the general ground stated above, a collection by a foreign attachment or trustee process, in a foreign country, is a bar. (*u*) So the pendency of a foreign attachment or trustee process in a foreign country may be pleaded in abatement. (*v*) But

290; Reynolds v. Fenton, 3 C. B. 187; *Cowan v. Braidwood*, 12 Scott, N. R. 138; *Ferguson v. Mahon*, 11 A. & E. 179; *Alivon v. Furnival*, 1 Cromp. M. & R. 277.

(*s*) *Novelli v. Rossi*, 2 B. & Ad. 757.

(*t*) *Sadler v. Robins*, 1 Camp. 253; *Maule v. Murray*, 7 T. R. 470.

(*u*) *Holmes v. Remsen*, 4 Johns. Ch. 460, 20 Johns. 229; *M'Daniel v. Hughes*, 3 East, 367; *Philips v. Hunter*, 2 H. Bl. 402. In *Hull v. Blake*, 13 Mass. 158, in an action by the indorsee of a promissory note against the maker, the defendant pleaded in bar a judgment rendered against him by a county court in the State of Georgia, having jurisdiction of the cause, as the garnishee or trustee of the promisee, the defendant having in the said cause disclosed the said notes, the action, in which said judgment was rendered, having been commenced after the actual indorsement of the note to the present plaintiff; and the plea was held to be a good bar. And see *Gould v. Webb*, 4 Ellis & B. 933, 30 Eng. L. & Eq. 381, which was an action of assumpsit to recover damages for the breach of a special contract, made by defendant to pay plaintiff a certain salary as European correspondent of a newspaper called the "New York Courier and Enquirer." The declaration also contained the common counts. The defendant, among other things, pleaded as to £50, part of the plaintiff's demand in the money counts, that an action had been brought against the plaintiff in the Supreme Court of

New York, for a sum exceeding £50; that process duly issued out of said court, and executed on the defendant, the said sum of £50, due and owing from defendant to plaintiff, was attached in defendant's hands according to the laws of said State, to satisfy the demand in the action; that judgment was afterwards recovered in the said court, and execution was issued to the Sheriff of New York, whereupon the defendant was obliged by the laws of the State to pay, and did pay over to the sheriff, the value of the said sum of £50, deducting the necessary expenses of the attachment. The plea further alleged, that the defendant and the plaintiff were citizens of the said State, and the defendant was resident there, and subject to the jurisdiction and process of the said court; and that by the laws of the State the defendant was discharged and acquitted of the said sum of £50. Held, upon demurrer, that the plea was sufficient, and a good defence *pro tanto*. See also the reporter's learned note to *Andrews v. Heriot*, 4 Cowen, 521; *Bank of North America v. Wheeler*, 28 Conn. 433.

(*v*) *Embree v. Hanna*, 6 Johns. 101. In this case the defendant pleaded a foreign attachment pending in Maryland for the same demand. And *Kent*, C. J., said: "If the defendant would have been protected under a recovery had by virtue of the attachment, and could have pleaded such recovery in bar, the same principle will support a plea in abatement of an attachment pending, and commenced

¹ A defendant cannot set up as an excuse for not paying money awarded by a judgment of a foreign tribunal having jurisdiction over him and the cause, that the judgment proceeded on a mistake as to the English law, which was really a question of fact; and it makes no difference that the mistake appears on the face of the proceedings. *Godard v. Gray*, L. R. 6 Q. B. 139.

the * pendency of a suit in a foreign country, which began * 608 by process against the person, has not the same force with a foreign attachment; and will not abate a suit at home, before the foreign suit is carried to judgment. (w) And an action brought in this country directly on a foreign judgment, for the purpose of enforcing it, may be defeated by evidence going to set that judgment aside. Indeed, according to the weight of authority, it is no more than *prima facie* evidence, when an action is brought to enforce it; but where an action is brought for a cause of action which was litigated abroad between the same parties, then the foreign judgment against such cause of action is a bar to the new action brought at home. (x)

prior to the present suit. The attachment of the debt in the hands of the defendant fixed it there, in favor of the attaching creditors; the defendant could not afterwards lawfully pay it over to the plaintiff. The attaching creditors acquired a lien upon the debt, binding upon the defendant; and which the courts of all other governments, if they recognize such proceedings at all, cannot fail to regard. *Qui prior est tempore potior est jure.* In *Brook v. Smith*, 1 Salk. 280, Lord *Holt* held, that a foreign attachment before writ purchased in the suit, was pleadable in abatement. If we were to disallow a plea in abatement of the pending attachment, the defendant would be left without protection, and be obliged to pay the money twice; for we may reasonably presume, that if the priority of the attachment in Maryland be ascertained, the courts in that State would not suffer that proceeding to be defeated, by the subsequent act of the defendant going abroad, and subjecting himself to a suit and recovery here. And see *Wheeler v. Raymond*, 8 Cowen, 311.

(w) *Bowne v. Joy*, 9 Johns. 221. In this case the defendant pleaded the pendency of another action, between the same parties and for the same cause, in the Commonwealth of Massachusetts. And upon demurrer, judgment was given for the plaintiff. The court said: "The *exceptio rei judicata* applies only to final definitive sentences abroad, upon the merits of the case. *Goix v. Low*, 1 Johns. Cas. 345. Nor is this analogous to the case of the pendency of a prior foreign attachment, at the suit of a third person; for here the defendant would not be obliged to pay the money twice, since payment at least, if not a recovery in the one suit, might be pleaded *plus darren-*

continuance to the other suit; and if the two suits should even proceed *pari passu* to judgment and execution, a satisfaction of either judgment might be shown upon *audita querela*, or otherwise, in discharge of the other." In *Maule v. Murray*, 7 T. R. 470, a foreign judgment was disregarded, because it was taken subject to a case which had not then been decided, in respect to the amount.

(x) This distinction is clearly stated by *Eyre*, C. J., in *Phillips v. Hunter*, 2 H. Bl. 410. "It is," said he, "in one way only that the sentence or judgment of the court of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applied to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent to which it would be obligatory, perhaps, in the country in which it was pronounced, nor as obligatory to the extent to which, by our law, sentences and judgments are obligatory, not as conclusive, but as matter *in pais*, as consideration *prima facie* sufficient to raise a promise; we examine it, as we do all other considerations of promises, and for that purpose we receive evidence of what the law of the foreign State is, and whether the judgment is warranted by that law. In all other cases, we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us." Lord *Nottingham*, in *Cottington's case*, 2 Swanst. 328, n., and Lord *Hardwicke*, in *Boucher v. Lawson*, Cas. temp. Hardw. 80, seem to hold that the foreign judgment is conclusive, for all purposes. And see *Roach v. Garvan*, 1 Ves. Sen. 157. But *Eyre's* distinction is maintained by Lord *Mansfield*, in *Walker v. Witter*, Doug. 1; and by *Bulter*, J., in *Galbraith v. Neville*, Doug. 6,

* 609 * The very first essential to this, or to any efficacy of a foreign judgment, is, that the court by which it is pronounced has unquestionable jurisdiction over the case. (y) And

n. (3); and in *Houlditch v. Donegal*, 8 Bligh, 337, Lord *Brougham* gives his reasons at length for holding a foreign judgment to be only *prima facie* evidence. And see *Herbert v. Cook*, Willes, 36, n.; *Hall v. Odber*, 11 East, 118; *Bailey v. Edwards*, 8 Swanst. 708. But Lord *Kenyon*, in *Gilbraith v. Neville*, cited above, doubts whether a foreign judgment be not conclusive in English courts; and Lord *Ellenborough* at least implies a similar doubt, in *Tarleton v. Tarleton*, 4 M. & S. 20; and Sir *L. Shadwell*, in *Martin v. Nicolls*, 8 Sim. 468, rejected this distinction altogether, and therefore allowed a demurrer to a bill for a discovery, and a commission to examine witnesses abroad in aid of the plaintiff's defence to an action brought in England on a foreign judgment. The law on this subject cannot be considered as settled in England; but from *Smith v. Nicolls*, 5 Bing. N. C. 208, it may perhaps be inferred that in an action on a foreign judgment, the judgment is only *prima facie* evidence. It is believed, that in this country this distinction has been regarded in practice, but the reported adjudications do not authorize us to speak of it as established here. See *Cummings v. Banks*, 2 Barb. 602, where the question is discussed by *Edmonds*, J. In *Boston India R. F. v. Hoit*, 14 Vt. 92, it was held, that debt and not assumpsit should be brought on the judgment of another State; and in *Noyes v. Butler*, 6 Barb. 613, a judgment in another State was held conclusive as to all facts but those which went to show the jurisdiction of the court rendering the judgment. It must be remembered, however, that the question does not stand in this country, as between the courts of the several States, in the same position in which it stands in England, as between the courts of that country and those of foreign countries, by reason of the intervention of our constitutional provisions. Judgments rendered in any State have generally the same force and effect in all other States as in that in which they are rendered. See, for an account of the decisions on this subject, *Robinson v. Prescott*, 4 N. H. 450; 1 Kent, Com. 260, 261. See also *Downer v. Shaw*, 2 Foster, 277.

(y) *Buchanan v. Rucker*, 9 East, 192; *Thurber v. Blakbourne*, 1 N. H. 242; *Bissell v. Briggs*, 9 Mass. 462; *Aldrich v. Kinney*, 4 Conn. 380; *Shumway v.*

Stillman, 6 Wend. 447; *Curtis v. Gibbs*, 1 Penning, 399; *Don v. Lippman*, 5 Clark & F. 20; *Rogers v. Coleman*, Hardin, 418; *Borden v. Fitch*, 15 Johns. 121; *Benton v. Burgot*, 10 S. & R. 240. And see the reporter's note to *Andrews v. Herriot*, 4 Cowen, 524. From *Mills v. Duryee*, 7 Cranch, 481, apparently confirmed by Chief Justice *Marshall*, in *Hampton v. McConel*, 3 Wheat. 284, it might seem to be the established law of this country, that a judgment recovered in one State by a citizen thereof, against a citizen of another, was absolute and final, and perfectly exclusive of all inquiry into the jurisdiction of the court which rendered the judgment. But this question was very fully considered in *Bissell v. Briggs*, 9 Mass. 462; and it was there held, that a court of another State must have had jurisdiction of the parties, as well as of the cause, for its judgment to be entitled to the full faith and credit mentioned in the federal Constitution. The same question was again fully considered in *Hall v. Williams*, 6 Pick. 232, which was debt on a judgment of the Superior Court in Georgia; and it was held, that the defendant, under the plea of *sil debet*, might show that the court had no jurisdiction over his person. And *Parker*, C. J., in delivering the judgment of the court, said: "It cannot be pretended, we think, that a citizen of Massachusetts, against whom a judgment may have been rendered in Illinois or Missouri, he never having been within a thousand miles of those States, should be compelled by our courts to execute that judgment, it not appearing by the record that he received any manner of notice that any suit was pending there against him, and being ready to show that he never had any dealings with the party who has obtained the judgment; and yet this must be the consequence, if the doctrine contended for by some is carried to its full length, namely, that the record of a judgment is to have exactly the same effect here as it would have in Illinois or Missouri; for in those States, if the process has been served according to their laws, which may be in a manner quite consistent with an utter ignorance of the suit by the party without the State, the judgment would be binding there until reversed by some proceedings recognized by their laws. If it be said, that a party thus aggrieved may obtain redress by writ of error or a new trial, in the State

if the origin * of this jurisdiction do not appear, or if it * 610
be of the ordinary kind admitted among civilized nations,

where the judgment was rendered, it is a sufficient answer, that never having been within their jurisdiction, or amenable to their laws, he shall not be compelled to go from home to a distant State, to protect himself from a judgment which never, according to universal principles of justice, had any legal operation against him. The laws of a State do not operate, except upon its own citizens, *extra territorium*; nor does a decree or judgment of its judicial tribunals, except so far as is allowed by comity, or required by the Constitution of the United States; and neither of these can be held to sanction so unjust a principle. If the States were merely foreign to each other, we have seen that a judgment in one would not be received in another as a record, but merely as evidence of debt, controvertible by the party sued upon it. By the Constitution, such a judgment is to have the same effect it would have in the State where it was rendered, that is, it is to conclude as to every thing over which the court which rendered it had jurisdiction. If the property of a citizen of another State, within its lawful jurisdiction, is condemned by lawful process there, the decree is final and conclusive. If the citizen himself is there, and served with process, he is bound to appear and make his defence, or submit to the consequences; but if never there, there is no jurisdiction over his person, and a judgment cannot follow him beyond the territories of the State, and if it does he may treat it as a nullity, and the courts here will so treat it, when it is made to appear in a legal way that he was never a proper subject of the adjudication. These principles were settled in a most lucid and satisfactory course of reasoning by Chief Justice Parsons, in the opinion of the court delivered by him in the case of *Bissell v. Briggs*, 9 Mass. 402. And see *Dobson v. Pearce*, 2 Kern. 156. This exposition of the constitutional provision respecting the records and judicial proceedings, authenticated as the act of Congress requires, takes a middle ground between the doctrine as held by the court of this State, in the case of *Bartlett v. Knight*, 1 Mass. 401, and by the court of New York, in the case of *Hitchcock v. Aicken*, 1 Caines, 400; in both of which it was held, that the Constitution and act of Congress had produced no other effect than to establish definitively the mode of authentication, leaving in other respects such judgments entirely upon the footing

of foreign judgments, according to the principles of the common law. But in the case of *Bissell v. Briggs*, the principle settled is, that by virtue of the provision of the Constitution, and the act of legislation under it, a judgment of another State is rendered in all respects like domestic judgments, when the court where it was recovered had jurisdiction over the subject acted upon and the person against whom it was rendered, leaving open for inquiry in the court where it was sought to be enforced the question of jurisdiction, and taking the obvious distinction between the effect of the judgment upon *property* within the territory, and the *person*, who was without it. It was thought that this was carrying the sanctity of judgments of other States as far as was consistent with the safety of the citizen who was not amenable to their laws, and as far as is required by the spirit or letter of the Constitution of the United States. The doctrine thus established here has been approved and adopted by the courts of the great States of Pennsylvania and New York, in both of which before, it had been held, that the judgments of the several States were to be treated as foreign judgments. . . . The principle upon which this exception is made to the conclusiveness in every particular of the judgments of other States, is well expressed by Mr. Justice Johnson, of the Supreme Court of the United States, when dissenting from the decision of the court in the case of *Mills v. Duryee*. He says, it is an eternal principle of justice, 'that jurisdiction cannot be justly exercised by a State over property not within the reach of its process, or over persons not owing them allegiance, or not subjected to their jurisdiction by being found within their limits.' Indeed, so palpable is this principle, that no doubt could exist in the mind of any lawyer upon the subject, but for the construction supposed to be given to the Constitution of the United States, and the act of Congress following it, in the case of *Mills v. Duryee*, 7 Cranch, 481, and resanctioned in the case of *Hampton v. M'Connel*, 3 Wheat. 284, in the brief opinion delivered by Chief Justice Marshall. This construction, when first referred to in this court, in the case of the Commonwealth *v. Green*, was supposed to have put an end to all questions on this subject, and to have established, as the law of the land, that a judgment recovered

* 611 and established in an * authentic manner, it will be presumed to be legitimate ; if, however, it be of unusual origin or character, or not yet certainly established, then its legitimacy must be proved by the party relying upon it. (z) It is not however necessary, that the authority on which the jurisdiction of the tribunal rests, should be proved to be legitimate *de jure* as well

* 612 as *de facto*. * It is generally enough if it be *de facto* established, and the tribunal be commissioned by the government in which the sovereign power of the country is actually vested. (a)

in one State by citizen thereof, against a citizen of another, was absolute and incontrovertible, and would admit of no inquiry, even as to the jurisdiction of the court which rendered it. This court yielded a painful deference to the decision, without that close examination it would have received, if presented to them, otherwise than incidentally, and if its bearing had been of importance in the case then before the court ; but the notice taken of the case was merely the expression of opinion *arguendo*, and not a judicial determination of the question. And as a further reason for not receiving the doctrine implicitly as authority, it may be remarked, that the case to which it was applied was one clearly within the jurisdiction of the court which decided it, so that the point now raised was not brought into question. . . . The case of *Mills v. Duryee* has, as its importance merited, undergone a revision in almost every State court in the Union, of whose decisions we have any printed account, and the opinion has been unanimous, without the dissenting voice, so far as we can learn, of a single judge, that that case, however unqualified it may appear in the report, does not warrant the conclusion, that judgments of State courts are in all respects the same, when carried into another State to be enforced, as they are in the State wherein they are rendered, but that in all instances the jurisdiction of the court rendering the judgment may be inquired into. In truth, all of them sanctioning the principles, and some of them by express reference, which were asserted by this court in the case of *Bissell v. Briggs*, as the only just exposition of the provision in the Constitution of the United States in relation to the records and judicial proceeding of States. . . . With such a cloud of witnesses in favor of the construction given to the clause of the Constitution which is in question by this court, in the case of *Bissell v. Briggs*, we may well rest upon

that as the true construction, if it is not most clearly and explicitly overruled by the only tribunal whose authority ought to be submitted to, the Supreme Court of the United States. But notwithstanding all these decisions, many of which are subsequent in point of time to the case of *Mills v. Duryee*, and most of them commenting on it, we should be bound to give up the point, if that case settles the question as conclusively as it has been supposed it did. But all the State judges who have considered that case, are of opinion, that it was intended only to embrace judgments where the defendant had been a party to the suit, by an actual appearance and defence, or at least by having been duly served with process when within the jurisdiction of the court which gave it, and they formed their opinion upon the following clause in the opinion of Mr. Justice *Story*, namely : 'In the present case the defendant had full notice of the suit, for he was arrested and gave bail, and it is beyond all doubt that the judgment of the Supreme Court of New York was conclusive upon the parties in that State.' If this is all that was intended to be decided, the case harmonizes with the general course of decisions in the State courts as before cited, and it is in no respect different from the decision of this court, in the case of *Bissell v. Briggs*. That the doctrine of the two preceding cases is now the established doctrine throughout the country, see the authorities cited at the end of the preceding note. See also *Monroe v. Douglass*, 4 Sandf. Ch. 126. In this very long and interesting case the whole doctrine of the law of foreign judgments is examined with great ability. And see *Gleason v. Dodd*, 4 Met. 338; *D'Arcy v. Ketchum* 11 How. 165.

(z) *Snell v. Foussat*, 3 Binn. 229, n.; *Cheriot v. Foussat*, id. 220.

(a) *Bank of North America v. M'Call*, 4 Binn. 371.

Another essential is, that the defendant in the foreign action had such personal notice as enabled him to defend himself; or that his interests were otherwise actually and in good faith protected. (b) And the notice must be such as the court from which it issued has authority to give. (c) If it be by summons, and in the State in which it issued, that is equivalent to personal notice, it will so be held in other States as to the judgment founded upon it. (d)

It seems to be held, that a plaintiff who has recovered a judgment abroad may elect to sue at home on that judgment, or on the original cause of action, because there is no merger. (e)

The relations between the several States of the Union are peculiar. In some respects they are held to be foreign to each other, as they are for most purposes in the law of admiralty; and in other respects not foreign, excepting so far as this is necessarily implied in their independence of each other. On this subject the Constitution of the United States declares, that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." (f) In execution of this power, the First Congress passed a statute, providing "that the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the * said attestation is in due form. And the * 613 said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken." (g)

In the construction of these clauses, many questions have been raised, and a great diversity of opinion manifested. The more

(b) See *ante*, p. * 588, n. (l), and *supra*, n. (y).

(c) Therefore, where a court in Rhode Island ordered personal notice to be given a defendant in Massachusetts, which was done, it was not such a notice as would suffice for the foundation of a judgment on which an action could be maintained in Massachusetts. *Ewer v. Coffin*, 1 *Cush.* 28.

(d) *Rocco v. Hackett*, 21 *Law Rep.* 368; and see *Barringer v. King*, 5 *Gray*, 9.

(e) *Smith v. Nicolls*, 5 *Bing. N. C.* 208; *Hall v. Odber*, 11 *East*, 118.

(f) Art. 4, § 1.

(g) 1 *U. S. Stats. at Large*, 122, ch. xxxvii.

important of these questions we have, however, already considered.

It has been held, that the provisions of the statute must be strictly complied with. Thus, it will be noticed that the records are to be attested by the seal of the court, "if there be a seal;" therefore the records of a court not having a seal may be sufficiently attested otherwise. But there is no similar phraseology as to the attestation of the clerk; that is therefore absolutely requisite; and, consequently, the proceedings of a court which has no clerk, as a court held by a justice of the peace, cannot be authenticated in the terms of the statute, and therefore cannot be entitled to the whole privilege which purports to be given by the clause in the Constitution. (h)

There remains to be considered, the operation of the law of place upon the insolvent laws of this country. But these laws are, in this respect, principally influenced and affected by the clause in the Constitution which forbids the several States from passing laws impairing the obligation of contracts; and we shall advert to this subject when we speak specifically of that clause, and of the law of bankruptcy.

(h) This question is very fully considered in *Snyder v. Wise*, 10 Penn. St. 157; and the decision there is in accordance with the text, and with *Warren v. Flagg*, 2 Pick. 448; *Robinson v. Prescott*, 4 N. H. 450; *Maburin v. Bickford*, 6 id. 567; and *Silver Lake Bank v. Harding*, 5 Ohio, 546. But, for cases which incline to an opposite opinion, see *Bissell v. Edwards*, 5 Day, 368; *Starkweather v. Loring*, 2 Vt. 573; and *Blodgett v. Jordan*, 6 id. 580.

* CHAPTER III.

* 614

DEFENCES.

SECT. I.—*Payment of Money.*

1. OF THE PARTY TO WHOM PAYMENT SHOULD BE MADE.

PAYMENT to an agent in the ordinary course of business binds the principal, unless the latter has notified the debtor beforehand that he requires the payment to be made to himself. (*a*)¹ And circumstances might make a payment to the *debtor's* own agent sufficient. (*b*) So payment to an attorney is as effectual as if made

(*a*) *Favenc v. Bennett*, 11 East, 36; *Hornby v. Lacy*, 6 M. & S. 166; *Drinkwater v. Goodwin*, Cowp. 251. So if one allows an agent to trade in *his own name*, and as carrying on business for himself, payment to such agent is a bar to an action by the principal. *Gardiner v. Davis*, 2 C. & P. 49. And see *Coates v. Lewis*, 1 Camp. 444; *Moore v. Clementson*, 2 id. 24. And in *Capel v. Thornton*,

8 C. & P. 852, it was ruled by Lord *Tenterden*, that an agent authorized to sell goods has, in the absence of advice to the contrary, an implied authority to receive payment. But see *Jackson v. Jacob*, 5 Scott, 79; *Blackburn v. Scholes*, 2 Camp. 343.

(*b*) *Horsfall v. Fauntleroy*, 10 B. & C. 755. In this case, the plaintiff, who was an importer of ivory, had caused cata-

¹ Thus a payment to a corporation agent, held out as an agent with general powers, will bind the corporation. *Howe Machine Co. v. Ballmeg*, 89 Ill. 319. See *Drinan v. Nichols*, 115 Mass. 353; *Swett v. Southworth*, 125 Mass. 417; *Kinsman v. Kershaw*, 119 Mass. 140. Payment by a debtor to an agent, before notice of the revocation of the latter's authority to receive it, will discharge the liability. *Packer v. Hinckley Locomotive Works*, 122 Mass. 484; *Ins. Co. v. McCain*, 96 U. S. 84; *Braawell v. Am. Ins. Co.* 75 N. C. 8; *Ulrich v. McCormick*, 66 Ind. 243; *Meyer v. Hehner*, 96 Ill. 400; *Rice v. Barnard*, 127 Mass. 241. A principal must at once repudiate a payment made to an agent without authority to receive it. *Harris v. Zimmerman*, 81 Ill. 413; *Bertholf v. Quinlan*, 68 Ill. 297; *Aultman v. Lee*, 43 Ia. 404. Payments to one supposed to be a principal, before notice of his agency, were held good as against the real principal in *Peel v. Shepherd*, 58 Ga. 365; *Eclipse Windmill Co. v. Thorsen*, 46 Ia. 181. A broker, not being intrusted with the possession of goods, is not entitled to receive payment. *Whiton v. Spring*, 74 N. Y. 169; *Irvine v. Watson*, 5 Q. B. D. 102, 414. Payment to a selling agent by the buyer will not be good unless his principal has held him out as having such authority. *Clark v. Smith*, 88 Ill. 298. But payment to a travelling salesman, apparently authorized to collect, is payment to the principal, although the bills sent out for the goods were inscribed "Payable at office," the vendee not having seen these words. *Putnam v. French*, 53 Vt. 402. It has been held that payment to the servant of a contractor who is to furnish materials and labor, made without the contractor's knowledge and before any proceedings in the nature of a mechanic's lien have been begun by the servant, is not a payment to the contractor. *Walker v. Newton*, 53 Wis. 336; and that payment to a *de facto* officer appointed by a board of fire commissioners is a defence to an action by a *de jure* officer against a city for his salary during the time that he was wrongfully displaced, *Terhune v. Mayor, &c. of New York*, 88 N. Y. 247. Payment to an agent in Confederate money was held good in *Maloney v. Stephens*, 11 Heiskell, 738.

to the principal himself; (c) but not so to an agent of the attorney * appointed by the attorney to sue the debtor. (d)¹

And where one contracts to do work and sues for the price, the defendant may prove that the plaintiff had a partner in the undertaking, and that he has paid that partner. (e) Payment to the creditor's wife will not be a good payment; (f) unless she was his agent, either expressly or by course of business. (g) She has no authority, as wife, to receipt for her husband's claims, although she be the meritorious cause. (h) An auctioneer or other agent employed to sell *real estate* has no implied authority to receive payment. (i) In case of sales by auction, the auctioneer has usually, by the conditions of sale, authority to receive the deposit, but not the remainder of the purchase-money. (j)²

logues to be circulated, stating that a quantity of ivory was to be sold on his account on a certain day by auction, subject to the condition, among others, that payment was to be made on delivery of the bills of parcels. The defendant, having received one of the catalogues, instructed his broker to purchase certain lots on his account. The broker did so, and shortly after drew bills on the defendant for the amount, which were accepted and paid at maturity. In an action by the plaintiff against the defendant for the price of the ivory, the court held, that the payment of the bills drawn by the broker constituted a good defence, inasmuch as the plaintiff, by the condition of sale contained in his catalogues, had authorized the defendant to believe that the ivory had been paid for by the broker on delivery of the bills of parcels.

(c) Powell v. Little, 1 W. Bl. 8; Yates v. Freckleton, 2 Doug. 623; Hudson v. Johnson, 1 Wash. Va. 10; Branch v. Burnley, 1 Call, 147. And an attorney has authority to receive payment as well after judgment has been recovered as before. Brackett v. Norton, 4 Conn. 517; Erwin v. Blake, 8 Pet. 18; Gray v. Wass, 1 Greenl. 257; Lewis v. Gamage, 1 Pick. 347. But an attorney has no authority to receive anything but money in payment of his client's debt, nor a part in satisfaction of the whole, nor to assign the execution. Savoury v. Chapman, 8 Dowl. 656; Jackson v. Bartlett, 8 Johns. 381; Kellogg v. Gilbert, 10 id. 220; Carter v. Talcot, 10 Vt. 471; Gullett v. Lewis,

8 Stew. 23; Kirk v. Glover, 5 Stew. & P. 340; Wilson v. Wadleigh, 36 Me. 496.

(d) Yates v. Freckleton, 2 Doug. 622. For an attorney-at-law, by virtue of his ordinary powers, cannot delegate his authority to another, so as to raise a privity between such third person and his principal, or to confer on him as to the principal, his own rights, duties, and obligations. Johnson v. Cunningham, 1 Ala. 249; Kellogg v. Norris, 6 Eng. (Ark.) 18. So payment to a sheriff employed by an attorney to serve a writ will not discharge the debt. Green v. Lowell, 3 Greenl. 373; Waite v. Delesdernier, 15 Me. 144.

(e) Shepard v. Ward, 8 Wend. 542. And it is a general rule, that payment to one partner is good, and binds the firm. Duff v. The East India Co. 16 Ves. 198; Yandee v. Lefavour, 2 Blackf. 371; Gregg v. James, Breese, 107; Porter v. Taylor, 8 M. & S. 156; Scott v. Trent, 1 Wash. (Va.) 77. Even after dissolution. King v. Smith, 4 C. & P. 108. And see Morse v. Bellows, 7 N. H. 568. So payment to one of two joint creditors is good, although they are not partners in business. Morrow v. Starke, 4 J. J. Marsh. 367.

(f) Offley v. Clay, 2 Scott, N. R. 372; Spencer v. Tisue, Addia, 316; Seaborne v. Blackston, 2 Freem. 178; Thrasher v. Tuttle, 22 Me. 335.

(h) Offley v. Clay, *supra*.

(i) Mynn v. Joliffe, 1 Moody & R. 326.

(j) Mynn v. Joliffe, *supra*; Sykes v. Giles, 5 M. & W. 645.

¹ Nor to a person in an attorney's office, who gave a receipt in the attorney's name. O'Connor v. Arnold, 53 Ind. 203.

² An auctioneer has no authority to receive a check in payment where the terms of sale require payment in cash. Broughton v. Sillaway, 114 Mass. 71.

One may be justified in making payments to a party who is sitting in the creditor's counting-room, and apparently intrusted with the transaction of the business, and authorized to receive the money, although he be not so in fact. (*k*)¹ In general it is only a money payment that binds the principal; (*l*) so that he is not affected by any claim which the debtor may have against the agent. (*m*)² And an agent authorized to receive payment in * money cannot bind his principal by receiving goods, (*n*)³ * 616 or a bill or note. (*o*)

Payment by bankers to one of several persons who have jointly deposited money with them, and who are not partners, or to one of several joint trustees, does not discharge the bankers as to the others, unless they had authorized the payment. (*p*) And pay-

(*k*) *Barrett v. Deere, Moody & M.* 200. And see *Wilmot v. Smith*, id. 288; *Moffat v. Parsons*, 5 *Taunt*. 307. But payment to an apprentice, not in the usual course of the creditor's business, but on a collateral transaction, has been held not to discharge the debt, although made at the creditor's counting-room. *Sanderson v. Bell*, 2 *Cromp. & M.* 304.

(*l*) *Thorold v. Smith*, 11 *Mod.* 71.

(*m*) Thus, where an assured who resided at Plymouth employed an insurance broker in London to recover a loss from the underwriters, and the latter adjusted the loss by setting off in account against it a debt due from him to the underwriters for premiums, and the broker became bankrupt, and never paid the money to the assured, it was held, that the set-off in account between the underwriters and the broker was not payment to the assured, inasmuch as the broker had only authority to receive payment in money. *Bartlett v. Pentland*, 10 *B. & C.* 760.

(*n*) *Howard v. Chapman*, 4 *C. & P.* 508.

(*o*) *Sykes v. Giles*, 5 *M. & W.* 645; *Ward v. Evans*, 2 *Ld. Raym.* 928. And

see *Townsend v. Inglis, Holt, N. P.* 278. But *quare* whether, in those States where the giving of a negotiable promissory note is regarded as *prima facie* payment, an agent would not be authorized to receive payment by such bill or note.

(*p*) *Innes v. Stephenson*, 1 *Moody & R.* 145. The depositors here were co-signees of a bankrupt, and the money had been drawn out on the check of two out of three depositors, but the name of one of the two was forged. Lord *Tenterden* said, "that the case was a very clear one; that money was paid to bankers by three persons not partners in trade; that it had been stated that one of them could draw checks so as to bind the others, but that was not the law, and to allow it would defeat the very object of paying the money in jointly; and it must be well known to the jury that it was not the practice, unless the persons drawing stood in the relation of partners." And see, to the same effect, *Stone v. Marsh, Ryan & M.* 384. But this rule as to bankers is peculiar. "It is a general rule," says Mr. Justice *Maule*, "that a man may pay a debt to one of several persons with whom he has contracted

¹ A shopman, to receive payment over the counter only, cannot receive it elsewhere. *Clark v. Smith*, 88 *Ill.* 298. See *Harris v. Simmerman*, 81 *Ill.* 413; *Eclipse Windmill Co. v. Thorson*, 46 *Ia.* 181.

² See *Hogarth v. Wherley*, L. R. 10 C. P. 630. Delivery of money is in itself evidence of payment of a debt and not of a loan. *Downey v. Andrus*, 43 Mich. 65. The setting off an agent's debt by a debtor is not payment as against the principal. *Bevis v. Heflin*, 63 *Ind.* 129; *Aultman v. Lee*, 43 *Ia.* 404.

³ As "wheat" in part payment for a threshing machine as agreed by an agent. *Aultman v. Lee*, 43 *Ia.* 404. See *Drain v. Doggett*, 41 *Ia.* 682. Or a "piano," although the principal confirmed the previous act of the same agent in receiving a pipe and a watch and chain. *Bertholf v. Quinlan*, 68 *Ill.* 297. *Harris v. Simmerman*, 81 *Ill.* 413, held, that the receiving an old safe, taken by an agent in part payment for a new one, which he forwarded, rendered such payment valid.

ment to one of two or more joint creditors of a part of the debt, does not so alter the nature of the debt as to permit the other creditors to sue alone for the remainder. (q) But payment to one of several executors is held to be sufficient. (r) Whether payment to one of several assignees of a bankrupt is sufficient, may be doubtful; it seems clear that it is not, if shown to have been

against the will of the co-assignees. (s) A voluntary pay-

* 617 ment by a principal to the assignees * of a bankrupt agent, with a full knowledge of the facts, cannot be recovered back, when the principal so paying subsequently compromises with third parties for the default of his agent. (t) In general a payment to a trustee is effectual against his *cestui que trust* at law, even in cases where it would be relieved against in equity. (u)

If one of several plaintiffs, or a nominal plaintiff suing for the benefit of another, discharge the debt by a collusive receipt, without payment of money, a court of law will prevent the defendant

jointly. In the case of a banker he cannot do so; but that arises from the particular contract which exists between him and his customer." *Husband v. Davis*, 10 C. B. 645, 4 Eng. L. & Eq. 342.

(q) *Hatsall v. Griffith*, 4 Tyrwh. 488. In this case two of three part-owners of a vessel, acting for themselves and the other part-owner, employed an agent to sell the whole vessel. He did so, and paid the two their proportion of the proceeds. The other part-owner brought an action against the agent to recover his proportion. It was held, that he could not sue alone, as the agent was employed by all the owners. The case of *Garret v. Taylor*, 1 Esp. 117, contra, is not law. See *ante*, vol. i. p. *29, n. But this rule does not apply in cases founded upon tort. *Sedgworth v. Overend*, 7 T. R. 279.

(r) "Because," says Lord Hardwicke, "they have each a power over the whole estate of the testator, and are considered as distinct persons." *Can v. Read*, 3 Atk. 695.

(s) In *Can v. Read*, *supra*, if the report is correct, Lord Hardwicke stated in general terms, that payment to one assignee would not be a discharge without a receipt from the others also. In *Smith v. Jameson*, 1 Esp. 114, Lord Kenyon ruled, at *Nisi Prius*, that one assignee of a bankrupt estate might receive the money belonging to the estate, and give a legal and valid discharge for it. Afterwards, in *Bristow v. Eastman*, 1 Esp.

172, the same question was presented to Lord Kenyon again. That was an action of assumpit for money had and received, brought by the assignees of a bankrupt. At the trial the defendant produced a receipt from one of the assignees. But, upon its being shown that it had been given against the will of the co-assignee, the learned judge said, "that all the rights of property of the bankrupt centred in the assignees, and though the act of one in receiving part of the bankrupt estate might, if fairly done, bind the estate by any discharge he might give for it, that it could never be, that where one assignee had shown his express dissent that the other might give a receipt, binding on the estate; as such a construction would enable one assignee to dissipate and destroy the estate, in despite of his brother trustee." See also *Williams v. Walsby*, 4 Esp. 220; *Stewart v. Lee, Moody & M.* 168.

(t) *Barber v. Pott*, 4 H. & N. 759.

(u) This is because the *cestui que trust* is obliged to proceed in a court of law in the name of the trustee; and as a court of law can only consider the parties on the record, whatever is an answer as to the trustee is an answer to the action. *Gibson v. Winter*, 5 B. & Ad. 98. In modern times, however, courts of law have been in the habit of exercising an equitable jurisdiction on motion, and preventing a defendant from availing himself of such a defence unjustly. See the next note.

from availing himself thereof on application by the plaintiff, made as soon as may be after a knowledge of the fraud. (v)

After the lapse of twenty years, there is a presumption of payment at law; and it has been held that it may arise earlier if there be additional circumstances tending to prove payment. (vv)

*2. OF PART PAYMENT.

* 618

It has been said, that the payment of a part of a debt, or of *liquidated damages*, is no satisfaction of the whole debt, even where the creditor agrees to receive a part for the whole, and gives a receipt for the whole demand; and a plea of payment of a small sum in satisfaction of a larger is bad even after verdict. (w)¹ But this rule must be so far qualified as not to include

(v) *Barker v. Richardson*, 1 Young & J. 382; *Leigh v. Leigh*, 1 B. & P. 447; *Innell v. Newman*, 4 B. & Ald. 419; *Mountstephen v. Brook*, 1 Chitty, 390; *Manning v. Cox*, 7 J. B. Moore, 617; *Johnson v. Holdsworth*, 4 Dowl. P. C. 63; *Payne v. Rogers*, Doug. 407; *Hickey v. Burt*, 7 Taunt. 48; *Alner v. George*, 1 Camp. 392; *Strong v. Strong*, 2 Aikens, 373; *Green v. Beatty*, Coxe, 142. But a release from one of the several plaintiffs will not be set aside, unless a clear case of fraud is made out between the *releasor and the releasee*. Fraud upon the releasor alone is not a sufficient ground for calling upon the *equitable jurisdiction* of the court, since that may be replied. *Wild v. Williams*, 6 M. & W. 490. "If such a release," says Baron *Parke*, Phillips v. Clagett, 11 M. & W. 93, "is a fraud in point of law upon one of the parties to it, the court would not interfere; that is the proper subject for a replication; they can only interfere when it is a fraud on third persons, and when a court of equity would clearly set aside the release, not merely as between the parties one of whom releases, but where they would set it aside as against the defendant." So in the still later case of *Rawstorne v. Gandell*, 15 M. & W. 304, the rule was laid down that the court will not set aside a plea of a release by one of several co-plaintiffs, unless it is clearly shown to have been made in fraud of the other plaintiffs, or unless the releasor be a mere nominal party to the action, hav-

ing no interest whatever in the subject-matter of it. In the case of *Alner v. George*, 1 Camp. 392, Lord *Ellenborough* ruled that this equitable jurisdiction could not be exercised by a single judge at *Nisi Prius*.

(vv) *Baker v. Stonebreaker*, 36 Mo. 388.

(w) *Pinnel's case*, 5 Rep. 117; *Cumber v. Wane*, Stra. 426; *Thomas v. Heathorn*, 2 B. & C. 477; *Fitch v. Sutton*, 5 East, 230; *Blanchard v. Noyes*, 3 N. H. 518; *Wheeler v. Wheeler*, 11 Vt. 60; *Bailey v. Day*, 26 Me. 88; *Down v. Hatcher*, 10 A. & E. 121; *Geiser v. Kershner*, 4 Gill & J. 305; *Watkinson v. Ingleby*, 5 Johns. 888; *Dederick v. Leman*, 9 Johns. 333; *Seymour v. Minturn*, 17 Johns. 169; *Robbins v. Alexander*, 11 How. Pr. Rep. 100; *Hinckley v. Arey*, 27 Me. 362. But it has been held, that upon a plea of payment, the acceptance of a less sum may be left to the jury as evidence that the rest has been paid. *Henderson v. Moore*, 5 Cranch, 11; *Blanchard v. Noyes*, 3 N. H. 518.—Payment of a debt alone, without the costs, made after suit brought, is not a good payment to bar the action. Costs with nominal damages may still be recovered, at least up to the time of payment. *Stevens v. Briggs*, 14 Vt. 44; *Goinga v. Mills*, 1 Pike, Ark. 11. And see *Horsburgh v. Orme*, 1 Camp. 558, note; *Godard v. Benjamin*, 3 Camp. 381; *Goodwin v. Cremer*, 18 Q. B. 767, 16 Eng. L. & Eq. 90; *Kemp v. Ballis*, 10

¹ If a creditor, upon payment of part of an undisputed account, gives a receipt in full, he can recover the balance, although the receipt was given knowingly and there was no error or fraud. *Ryan v. Ward*, 48 N. Y. 204. But the acceptance of part of an unliquidated claim in discharge of the whole is a payment of the whole. *Hilliard v. Noyes*, 58 N. H. 312.

the common case of a payment of a debt by a fair and well-understood compromise, carried faithfully into effect, even though
 * 619 there were no release under seal. (x)¹ Some exceptions * to

Exch. 607, 28 Eng. L. & Eq. 498. So if two actions be commenced on a bill or note against separate parties, and the debt and costs in one suit be paid, this is not such a payment as will defeat the other action; but the plaintiff is entitled to nominal damages and costs. *Randall v. Moon*, 12 C. B. 261, 14 Eng. L. & Eq. 243; *Goodwin v. Cremer, supra*, and editor's note. But in *Beaumont v. Greathead*, 3 Dowl. & L. P. C. 681, it was held, that payment and acceptance of the amount of a promissory note after it becomes due, and when the holder is entitled to nominal damages, will support a plea of payment and acceptance in discharge of the debt and damages; and that consequently the holder, after such payment and acceptance, cannot maintain an action for such nominal damages. And per *Maule*, J.: "The point is, whether, after default on a simple contract for £50, in respect of which the defendant is liable to nominal damages, if the party accept that sum, he can afterwards sue for those nominal damages. I think he cannot. Those nominal damages, in fact, are introduced solely for a technical purpose, because the statute of Gloucester (6 Ed. I. c. 1, § 2) says 'damages'; and are, in effect, only a peg to hang costs on. The creditor, for example, says, You owe me a debt of £50, and a nominal sum; the debtor thereupon takes out £50 and pays it to him, saying, Here is the £50 debt, and the nominal sum. That nominal sum means in fact no sum at all; it is not merely an insignificant sum, but a sum which does not exist, in point of quantity, at all. It has a mere fictitious existence; and therefore, I say, a man may well receive £50 in satisfaction and discharge of a debt of £50, and nominal damages." And see *Cooper v. Parker*, 15 C. B. 828, 29 Eng. L. & Eq. 241.

(x) *Milliken v. Brown*, 1 Rawle, 391. There a creditor of three joint debtors, accepted from one of them one-third of the debt, with intent to exonerate him. This was held to operate as a release as to him, and therefore as to the other two also. *Huston*, J., said: "There was a time in the history of the law, when, like everything else of that day, it was a system of metaphysics and logic; and when the cause was decided without the

slightest regard to its justice, solely on the technical accuracy of the pleads on the several sides; defect of form in the plea was defect of right in him who used it. This period of juridical history, however, was in some respects distinguished by great men, of great learning, and abounds with information to the student. At the time I speak of, payment of debt and interest on a bond, the next day after it fell due, was no defence in a court of law; nay, it was no defence to prove payment without an acquittance before the day; nay, if you pleaded and proved a payment, which was accepted in full of the debt, yet you failed unless your plea stated that you paid it in full, as well as that it was accepted in full; or perhaps because you pleaded it as a payment, when you ought to have pleaded it as an accord and satisfaction. An act of parliament or two, and the constant interference of the Court of Chancery, granting relief, have changed this in a great measure; but it is not a century since it was solemnly decided, that if a creditor, finding his debtor in failing circumstances, and being afraid of losing his debt, proposed to give him a discharge in full if he paid half the money, and the debtor borrowed the money, and paid the one-half on the day the bond fell due, and got an acquittance in terms as explicit as the English language could afford, yet, if sued, he must pay the rest of the debt; for it was impossible, say the court, payment of part could be a satisfaction of the whole; but, if part was paid before the day, it was a good satisfaction of the whole. I mention this not from a general disrespect to the law or lawyers of the days I speak of, but for another purpose. It has, alas! become too common for men of good character and principles, but who trade on borrowed capital, to fail, and their creditors are glad to receive fifty cents in the dollar, and give a discharge in full; and I do not know the lawyer who would be hardy enough to deny the validity of such discharge, although given after the money was due, and although the discharge was not under seal, or although it might be doubtful whether it could more properly be called a receipt or a release, or a covenant never to sue, if the meaning can be certainly ascertained, and no

¹ *Paddleford v. Thacher*, 48 Vt. 574.

the rule have always been acknowledged; as if a part be paid before all is due, (y) or in a way more beneficial to the creditor than that prescribed by the contract; (z)¹ here it is said there is a new consideration for the release of the whole debt. And if a stranger pay from his own money, or give his own note, for a part of a debt due from another, in consideration of a discharge of the whole, such discharge is good. (a) * If a creditor by his own act and choice compel a payment of a part of his claim by process of law, this will generally operate as an extinguishment of his whole claim, under the rule that he shall not so divide an entire cause of action as to give himself two suits upon it. (b) He may often bring his action for a part; but a recovery in that action bars a suit for the remainder. As if one has

fraud, concealment, or mistake at the giving it, it is effectual. It avails little, then, to go back to the last century, or further, to cite cases in which a matter was of validity or effect, according as it was couched in this or that form. Universally the law is, or ought to be, that the meaning or intention of the parties is, if it can be distinctly known, to have effect, unless the intention contravenes some well-established principle of law." See *Keen v. Vaughan*, 48 Penn. St. 477.

(y) *Pinnel's case*, 5 Rep. 117; *Brooks v. White*, 2 Met. 288; *Smith v. Brown*, 3 Hawks, 580.

(z) As if the debtor give his own negotiable note for part of the debt. *Sibree v. Tripp*, 15 M. & W. 23, where the cases of *Cumber v. Wane*, 1 Stra. 426, and *Thomas v. Heathorn*, 2 B. & C. 477, are somewhat shaken. Or if the debtor pay a part at a more convenient place than stipulated for in the contract, this will be a good satisfaction for the whole, if so received. *Smith v. Brown*, 3 Hawks, 580. So if the debtor give and the creditor receive a *chattel*, in satisfaction of a whole debt, this is a good defense, although the chattel may not be of half the value of the debt. *Andrew v. Boughey*, Dyer, 75, a; *Pinnel's case*, 5 Rep. 117; and see *Sibree v. Tripp*, 15 M. & W. 35, *Parke*, B.; *Brooks v. White*, 2 Met. 285, 286, *Dewey*, J.; *Jones v. Bullett*, 2 Litt. 49; *Douglass v. White*, 3 Barb. Ch. 621. So if the debtor render certain services, by consent of the creditor, in full payment of a debt, this is a

good discharge, whatever the nature of the services. *Blinn v. Chester*, 5 Day, 350. Or assign certain property. *Watkinson v. Inglesby*, 5 Johns. 386; *Eaton v. Lincoln*, 13 Mass. 424.

(a) *Brooks v. White*, 2 Met. 288; *Boyd v. Hitchcock*, 20 Johns. 76; *Kellogg v. Richards*, 14 Wend. 116; *Le Page v. McCrea*, 1 Wend. 164; *Sanders v. Branch Bank*, 18 Ala. 363; *Lewis v. Jones*, 4 B. & C. 506; *Steinman v. Magnus*, 11 East, 380.

(b) *Ingraham v. Hall*, 11 S. & R. 78; *Smith v. Jones*, 15 Johns. 229; *Farrington v. Payne*, id. 432; *Willard v. Sperry*, 16 Johns. 121; *Phillips v. Berick*, id. 136. So assigning a part of his claim will not enable a creditor to subject his debtor to two suits. *Ingraham v. Hall*, 11 S. & R. 78; *Cook v. The Genesee Mut Ins. Co.* 8 How. Pr. Rep. 514; *Field v. The Mayor, &c. of New York*, 2 Seld. 179; *Palmer v. Merrill*, 6 Cush. 282. Nor can a creditor, after having compelled payment of a part of his claim by process of law, avail himself of the residue by way of set-off in an action against him by the other party. *Miller v. Covert*, 1 Wend. 487. And the same rule applies to torts. If a person by one and the same act convert several of the plaintiff's articles, he cannot have a separate action for each article. *Farrington v. Payne*, 15 Johns. 432. But the general rule stated in the text must be confined to cases where the claim is single and indivisible. *Phillips v. Berick*, 16 Johns. 136.

¹ So where the debtor pays the costs and expenses of an action brought to recover a liquidated debt in addition to a part payment of the same. *Mitchell v. Wheaton*, 46 Conn. 315.

the responsibility of the solvency of the bank would seem from some cases to rest upon the payee. (*i*) But if the debtor knew of the insolvency, and did not disclose it, or if he might have known it, and his ignorance was the result of his negligence, he certainly is not discharged by such payment. (*j*) And the majority of our cases appear to take the ground, that where bills of a bank that has failed are paid and received in ignorance of such failure, the loss falls on the party paying; putting such bills on the same footing as forged bills, and as equally a nullity. (*k*) But if * 623 such a rule were adopted, it would undoubtedly * be so far qualified, that where both parties were entirely and equally ignorant, and the creditors by receiving and retaining the bills without notice, deprived the debtor of any remedy or indemnity he might have, the debtor was then discharged. (*l*)

son, 4 Gill & J. 468. See also *ante*, vol. i. p. *284. But such forged notes (and the same applies to forged coin) must be returned by the receiver in a reasonable time, or he must bear the loss. *Pindall v. The Northwestern Bank*, 7 Leigh, 617; *Sims v. Clarke*, 11 Ill. 187. But payment made to a bank, *bond fide*, in its own notes, which are received as genuine, but afterwards ascertained to be forged, is good, and the bank must bear the loss. See *ante*, vol. i. p. *284. This seems to be on the ground that the bank, or its officers, having superior means of determining the genuineness of their own bills, are guilty of negligence in receiving them without examination. But payment to a bank by its own notes, which have been stolen from such bank, is no payment. *State Bank v. Welles*, 3 Pick. 394.

(*i*) *Lowrey v. Murrell*, 2 Port. 280; *Bayard v. Shunk*, 1 Watts & S. 92; *Scruggs v. Gass*, 8 Yerg. 175. Perhaps these cases rest upon the ground that the identical bills given and received were received as payment, *per se*, whether they were good or bad. Possibly, also, there may be a difference between bills received in payment of an antecedent debt and bills passed in payment at the time of a purchase. In the latter case, perhaps, the doctrine of *caveat emptor* applies to the receiver of the bills, as well as to the purchaser of the goods. *Sed quare.*

(*j*) See *Commonwealth v. Stone*, 4 Met. 48.

(*k*) *Wainwright v. Webster*, 11 Vt. 576; *Gilman v. Peck*, id. 616; *Fogg v. Sawyer*, 9 N. H. 365; *Frontier Bank v.*

Morse, 22 Me. 88; *Lightbody v. Ontario Bank*, 11 Wend. 1, 18 Wend. 101; *Houghton v. Adams*, 18 Barb. 545. See also *ante*, vol. i. p. *284. In *Timmins v. Gibbons*, 18 Q. B. 722, 14 Eng. L. & Eq. 64, M. W. deposited certain country banknotes, payable in London, representing £80 in value, with a banking company, and received the following memorandum, signed by the manager: "Received of M. W. £80, for which we are accountable, £80, at three per cent. interest, with fourteen days' notice." The notes were sent on the same evening by post to the London agents of the banking company, and were presented on the next day, and refused payment. They were transmitted by that night's post to the banking company, who on the following day gave notice of dishonor to M. W., and tendered to him the notes, which he refused. It turned out that the bank which had issued the notes had stopped payment upon the day when M. W. made the deposit with the banking company, but that neither M. W. nor the company were then aware of this. It was held, that under the above circumstances M. W. could not maintain an action, either for money lent, or for money had and received, against the banking company.

(*l*) Thus, where a banking company paid notes, on which the name of the president had been forged, and neglected for fifteen days to return them, it was held, that they had lost their remedy against the person from whom the notes had been received. *Gloucester Bank v. Salem Bank*, 17 Mass. 88.

5. OF PAYMENT BY CHECK.

Payment is also often made by the debtor's check upon a bank. A check is a draft, and the law of bills and notes is generally applicable to it. If given in the ordinary course of business, and unattended by especial circumstances, it is not presumed to be received as absolute payment, even if the drawer have funds in the bank. The holder is not bound by receiving it, but may treat it as a nullity if he derives no benefit from it, provided he has been guilty of no negligence which has caused an injury to the drawer. (m)¹ Nor is it necessary to preserve the payee's rights that it should be presented on the day on which it is received. (n) And if drawn on a bank in which the drawer * has no funds, it need not be presented at all in order to sustain an action upon it. (o) The drawing of such a check knowingly is a fraud, which deprives the drawer of all right of presentation or demand.

(m) *Cromwell v. Lovett*, 1 Hall, 56. The holder of the check in such a case becomes the agent of the drawer to collect the money. And certainly if the check is conditional, as if it is stated to be for the "balance due" the creditor, this would be no payment, and the creditor need not return it before commencing suit on the original cause of action. *Hough v. May*, 4 A. & E. 954. And if a creditor is offered either cash, in payment of his debt, or a check of the debtor's agent, and he prefers the latter, this does not discharge the debt if the check is not paid; although such agent afterwards fails with a large balance of the debtor's funds in his hands; for the check

of the agent is considered, in such a case, as the check of the principal debtor. *Everett v. Collins*, 2 Camp. 515. See also *Tapley v. Martens*, 8 T. R. 451; *Bolton v. Richard*, 6 T. R. 139; *Brown v. Kewley*, 2 B. & P. 518.

(n) *The Merchants Bank v. Spicer*, 6 Wend. 443; *Robeson v. Bennett*, 2 Taunt. 396; *Rickford v. Ridge*, 2 Camp. 537; *Gough v. Staats*, 13 Wend. 549. Checks are considered as inland bills of exchange, and the holder must use the same diligence in presenting them for payment as the holder of such bill. *Marcy, J.*, in *Bank v. Spicer*, 6 Wend. 443.

(o) *Franklin v. Vanderpool*, 1 Hall, 78.

¹ A check is said to be a particular form of cash payment, and if dishonored the seller may resort to his original claim, on the ground of failure of the condition on which it was taken. *Hodgson v. Barrett*, 33 Ohio St. 63; *Phillips v. Bullard*, 58 Ga. 256; *Bair v. Wilson*, 28 Gratt. 163. Where a check is lost by or fraudulently obtained from the creditor and is paid to the finder or fraudulent holder on a forged indorsement of the payee, the debtor may be again called upon unless the check was taken in absolute payment. *Thomson v. Brit. No. Am. Bank*, 82 N. Y. 1. See *Syracuse, &c. R. Co. v. Collins*, 3 Lansing, 29; *First Bank v. Leach*, 52 N. Y. 350. That a check is but conditional payment, see *Marrett v. Brackett*, 60 Me. 524. Where a payee's collecting agent neglected to collect a check given in payment of the draft by the drawee, who subsequently became insolvent, the record of a judgment in an action by the payee against the drawer to the effect that the check was a payment which discharged the drawer, is conclusive evidence as between the payee and the agent that the former has suffered damage to the full amount of the draft. *First Bank v. Fourth Bank*, 89 N. Y. 412.

6. OF PAYMENT BY NOTE.

Payment is also often made by the debtor's giving his own negotiable promissory note for the amount.¹ In Massachusetts, such note is said in some cases to be an absolute payment and a discharge of the debt. (*p*) It is said that this rule has prevailed in that State from colonial times; and it rests upon the danger which the promisor would be under of being obliged to pay the note to an innocent indorsee, after he had paid the sum due on a suit brought by his creditor on the original contract. But most of the cases in Massachusetts treat it only as a presumption of payment, in the absence of circumstances going to show an opposite intention, and this may now be considered the settled rule in that State. (*q*)² And the same rule is recognized in Maine and Vermont. (*r*)³

(*p*) *Thacher v. Dinsmore*, 5 Mass. 299. *Whitcombe v. Williams*, 4 Pick. 228.

(*q*) *Watkins v. Hill*, 8 Pick. 522; *Reed v. Upton*, 10 id. 525; *Maneely v. McGee*, 6 Mass. 143; *Wood v. Bodwell*, 12 Pick. 268; *Isley v. Jewett*, 2 Met. 168. This presumption is but *prima facie*, and may be rebutted by proof of a different intent. *Butts v. Dean*, 2 Met. 76. And the fact that taking such note as payment would deprive the party taking it of a substantial

benefit, or, where he has other security for the payment, has a strong tendency to show that the note was not intended as payment. *Curtis v. Hubbard*, 9 Met. 328. And see *Thurston v. Blanchard*, 22 Pick. 18; *Melledge v. Boston Iron Company*, 5 Cush. 158; *Appleton v. Parker*, 15 Gray, 178; *Palmer v. Eliot*, 1 Clifford, 63.

(*r*) *Varner v. Nobleborough*, 2 Greenl. 121, and note *a*; *Descadillas v. Harris*,

¹ The effect of giving a note or a check is to suspend the remedy for the debt until its maturity. *Currie v. Misa*, L. R. 10 Ex. 153, 163; *Jagger Iron Co. v. Walker*, 76 N. Y. 521; *Wilbur v. Jernegan*, 11 R. I. 113; *Huse v. McDaniel*, 33 Ia. 406; *Stevens v. Park*, 73 Ill. 387; *Kermeyer v. Newby*, 14 Kan. 164. It may be agreed, however, that the note shall be absolute satisfaction. *Wilbur v. Jernegan*, 11 R. I. 113. And this may be implied. *Haines v. Pearce*, 41 Md. 221. See *Swire v. Redman*, 1 Q. B. D. 586, 540; *Miller v. Thorn*, 56 N. Y. 402; *Nightingale v. Chafee*, 11 R. I. 609. Where the buyer was to give up a note of the seller's and pay the balance of the price of goods in cash, it was held that on the buyer's refusal to give up the note, the seller might recover the full contract price. *Gray v. White*, 108 Mass. 228. And, equally, if the maker of a note is, without the knowledge of both parties, insolvent, the party taking it can recover the full amount of the original debt. *Roberts v. Fisher*, 43 N. Y. 159. See *Wright v. Lawton*, 37 Conn. 167. Unaccepted bills are not presumed to be payment. *Strang v. Hirst*, 61 Me. 9.

² This presumption is controlled where such effect would deprive the creditor of a security. *Parham, &c. Co. v. Brock*, 113 Mass. 194. See *Ely v. James*, 123 Mass. 36; *Lovell v. Williams*, 125 Mass. 439; *Re Clap*, 2 Lowell, 226, 230.

³ *Strang v. Hirst*, 61 Me. 9; *Mehan v. Thompson*, 71 Me. 492. Also in Illinois and Indiana and Oregon. *Morrison v. Smith*, 81 Ill. 221; *Frazer v. Bosa*, 66 Ind. 1; *Maxwell v. Day*, 45 Ind. 509; *Matasce v. Hughes*, 7 Oreg. 39. The receipt of the worthless note of a third person fraudulently represented by a vendee to be solvent will not prevent the vendor from recovering from the vendee the amount for which the note was accredited in payment of goods sold. *Vallier v. Ditson*, 74 Me. 553. In California, to make a note *prima facie* payment, there must be an express agreement. *Brown v. Olmsted*, 50 Cal. 162. In Pennsylvania a draft of a third person, for a pre-existing debt is presumed to be a conditional payment. *League v. Waring*, 85 Penn. St. 244. In West Virginia a note is not absolute payment unless it is so expressly agreed. *Poole v. Rice*, 9 W. Va. 73.

But even in this the law in those States differs from the rule as held in the courts of the United States, and of the State courts generally. There it is held that a negotiable promissory note is not payment, unless circumstances show that such was the intention of the parties. (s)¹

It would seem to be clear both on principle and on authority, that if one receives negotiable paper of any kind in payment of or as security for a debt, and by his laches destroys or diminishes the value of the paper, he makes the paper his own, and the loss must fall upon him. (ss)

*7. OF PAYMENT BY DELEGATION.

*626

Payment may be made by an arrangement, whereby a credit is given or funds supplied by a third party to the creditor, at the instance of the debtor. But such an arrangement must be carried into actual effect to have all the force of payment; and, in general, it may be compared with the delegation of the civil law. Thus, where a debtor directed his bankers to place to the credit of the creditor, who was also a customer of the bankers, such a sum as would be equal to a bill at one month, and the bankers agreed

8 Greenl. 298; Newall *v.* Hussy, 18 Me. 249; Bangor *v.* Warren, 34 Me. 324; Fowler *v.* Ludwig, id. 455; Shumway *v.* Reed, id. 560; Gilmore *v.* Bussey, 3 Fairf. 418; Comstock *v.* Smith, 23 Me. 302; Gooding *v.* Morgan, 37 Me. 419. But this rule never applies to notes not negotiable. Trustees, &c. *v.* Kendrick, 3 Fairf. 381; Edmond *v.* Caldwell, 15 Me. 340; Wait *v.* Brewster, 31 Vt. 516. It is likewise held, in Dixon *v.* Dixon, *et al.* 31 Vt. 460, as well settled, that a note received in payment of a pre-existing debt is received and held upon valid and valuable consideration.

(s) Peter *v.* Beverly, 10 Pet. 567; Sheehy *v.* Mandeville, 6 Cranch, 258; Wallace *v.* Agry, 4 Mason, 386; Smith *v.* Smith, 7 Foster, 244; Van Ostrand *v.* Reed, 1 Wend. 424; Burdick *v.* Green, 15

Johns. 247; Hughes *v.* Wheeler, 8 Cowen, 77; Booth *v.* Smith, 3 Wend. 66; Bill *v.* Porter, 9 Conn. 28; Davidson *v.* Bridgeport, 8 Conn. 472; Elliott *v.* Sleeper, 2 N. H. 525; Frisbie *v.* Larned, 21 Wend. 450; St. John *v.* Purdy, 1 Sandf. 9; Hawley *v.* Foote, 19 Wend. 516; Cole *v.* Sackett, 1 Hill, 516; Waydell *v.* Luer, 5 Hill, 448; Van Eps *v.* Dillaye, 6 Barb. 244; Pratt *v.* Foote, 5 Seid. 463; Commercial Bank *v.* Bobo, 9 Rich. 31; Mooring *v.* Mobile M. D. & M. I. Co. 27 Ala. 264. For the English law upon this point see Crowe *v.* Clay, 9 Exch. 604, 25 Eng. L. & Eq. 454; Maxwell *v.* Deare, 8 Moore, P. C. 363, 26 Eng. L. & Eq. 56; Seymour *v.* Darow, 31 Vt. 122. See post, p. 683.

(ss) Peacock *v.* Pursell, 14 C. B. (n. s.) 728.

¹ Wilbur *v.* Jernegan, 11 R. I. 113; Nightingale *v.* Chafee, id. 609; Paine *v.* Voorhees, 26 Wis. 522; Aultman *v.* Jett, 42 id. 488; Aultman, &c. Co. *v.* Hetherington, id. 622. See Burkhalter *v.* Second Bank, 42 N. Y. 538; May *v.* Gamble, 14 Fla. 467. See also Chamberlin *v.* Perkins, 55 N. H. 237, as to payment in purchaser's acceptances. In Brown *v.* Dunckel, 46 Mich. 29, where a debtor had sold to the plaintiff a horse which had previously been mortgaged to the defendant to secure a note, and subsequently a new note and mortgage were taken in place of the old, it was held in an action of replevin that the jury must determine whether under the circumstances the giving of the new note and mortgage amounted to a payment of the old.

so to do, and so said to the creditor who assented to the arrangement, and the bankers became bankrupt before the day on which the credit was to be given, this was held to be no payment, and the creditor was permitted to maintain an action against the original debtor on the original liability. (*t*) It would doubtless have been otherwise had there been a remittance or actual transfer on account of the debt; for it seems to be settled, that the actual transfer of the amount of the debt in a banker's books, from the debtor to the creditor, with the knowledge and assent of both, is equivalent to payment. (*u*) Where * bankers receive funds from a debtor, to be by them transmitted through their foreign correspondents to a foreign creditor, it seems that the bankers are not liable if they pass it to the credit of their foreign correspondents, and give notice to them to pay it over to the creditor, and afterwards accept bills drawn on them by the foreign correspondents, although the foreign correspondents become bankrupts before the notice reaches them, and do not transmit the money to the creditors. (*v*) The rule seems to rest on the fact that the bankers had done all that was to be expected of them, and all that they had undertaken to do.

8. OF STAKE-HOLDERS AND WAGERS.

Payment is sometimes made to a third party, to hold until some question be determined, or some right ascertained.¹ The third

(*t*) *Pedder v. Watt, Peake, Ad. Cas.* 41.

(*u*) *Eyles v. Ellis*, 4 Bing. 112. This was an action of covenant for rent due from the defendant to the plaintiff. At the trial before *Onslow*, Serjt., it appeared that the plaintiff, in October, authorized the defendant to pay in, at a certain banker's, the amount due. Owing to a mistake it was not then paid; but the defendant, who kept an account with the same bankers, transferred the sum to the plaintiff's credit on Friday, the 9th of December. The plaintiff, being at a distance, did not receive notice of this transfer till the Sunday following, and on the Saturday the bankers failed. The learned serjeant thought that this transfer amounted, under the circumstances, to payment. And this ruling was sustained by the Court of Common Pleas,

on a motion for a new trial. *Best, C. J.*, said: "The learned serjeant was right in esteeming this a payment. The plaintiff had made the Maidstone bankers his agents and had authorized them to receive the money due, from the defendant. Was it then paid, or was that done which was equivalent to payment? At first, not; but on the 8th a sum was actually placed to the plaintiff's account; and though no money was transferred in specie, that was an acknowledgment from the bankers that they had received the amount from Ellis. The plaintiff might then have drawn for it, and the bankers could not have refused his draft." See also *Bodenham v. Purchas*, 2 B. & Ald. 39, and *ante*, vol. i., pp. 217-220. See *Hewes v. Hansom*, 10 Gray, 336.

(*v*) *M'Carthy v. Colvin*, 9 A. & E. 607.

¹ As to the distinction between "bets or wagers," and "purses, prizes or premiums," and the driving of horses for either, see *Harris v. White*, 81 N. Y. 532.

party is then a stake-holder, and questions have arisen as to his rights and duties, and as to the rights of the several parties claiming the money. If it be deposited with him to abide the result of a wager, it seems to be the law in England, or to have been so before the recent statute of 8 & 9 Vict., that where the wager is legal, neither party to it can claim the money until the wager is determined; and then he is bound to pay it to the winning party. (w) That is, neither party can rescind the agreement; * although Lord *Ellenborough* said otherwise, in one case. (x) If the wager be illegal, either party may claim the money. If the loser claim money he has deposited on an illegal wager, and claim it even after the wager is decided against him, but before it is actually paid over, the stake-holder is bound to return it to him. (y)¹ But although the wager be illegal, if

(w) *Brandon v. Hibbert*, 4 Camp. 37. There the plaintiff laid a wager with a butcher that another butcher would sell him meat at a certain price. The wager was accepted, and the money placed in the defendant's hands, and the decision of the question was left to him, and he decided against the plaintiff, who then brought this action to recover his deposit; but *Dampier*, J., was of opinion that the action could not be maintained, and directed a nonsuit. In *Bland v. Collett*, id. 167, the plaintiff, in the presence of the defendant and one Porter, boasted of having conversed with Lord Kensington. Porter asserted that the plaintiff had never spoken to Lord Kensington in his life. A bet was talked of upon the subject, but none was then laid. Next morning the parties again met, when Porter asked, "What will you now lay that you conversed with Lord Kensington?" The plaintiff answered, "80 guineas to 10." The money was accordingly deposited in the hands of the defendant, as a stake-holder. Upon which Porter exclaimed, "Now I have you; I have made inquiries, and the person you conversed with was Lord Kingston, not Lord Kensington." The plaintiff owned his mistake; but said he had been imposed upon, and gave notice to the defendant not to pay over the money. This action was brought to recover back the deposit of eighty guineas, on the ground that it was a bubble bet. But per *Gibbs*,

C. J.: "I think the action cannot be maintained. There is nothing illegal in the wager. Nor can it be said that the point was certain as to one party, and contingent as to the other. The plaintiff relied upon his own observation, Porter upon the information he had received. The former was the more confident of the two; and either might have turned out to have been mistaken."

(x) *Eltham v. Kingsman*, 1 B. & Ald. 688. This was an action against a stakeholder to recover back a wager. Lord *Ellenborough* said: "I think there is no distinction between the situation of an arbitrator and that of the present defendant; for he is to decide who is the winner and who is the loser of the wager, and what is to be done with the stake deposited in his hands. Now an arbitrator's authority before he has made his award is clearly countervailable; and here, before there has been a decision, the party has countervailed the authority of the stake-holder." This position, however, was strongly doubted in the subsequent case of *Maryatt v. Broderick*, 2 M. & W. 309.

(y) *Cotton v. Thurland*, 5 T. R. 405; *Smith v. Bickmore*, 4 Taunt. 474; *Bate v. Cartwright*, 7 Price, 540; *Hastelow v. Jackson*, 8 B. & C. 221; *Hodson v. Terrell*, 1 Cromp. & M. 797; *Martin v. Hewson*, 10 Exch. 787, 29 Eng. L. & Eq. 424. In *Manning v. Purcell*, 7 De G., M. & G. 65, 81 Eng. L. & Eq. 452, a testator be-

¹ If a stake-holder in a presidential election bet pays over the money after forbidding so to do, an action will lie against him for the money, and it is immaterial that the reason for forbidding payment was that a question arose whether the wager was put an end to by the death of the presidential candidate after the election. *Fisher v. Hildreth*, 117 Mass. 558.

the stake-holder has paid it over to the winner, before notice or demand against him by the loser, he is exonerated. (z) But in New York it has been held, under a statute giving the losing party a right of action against the stake-holder for the stake, "whether the same shall have been paid over by such stakeholder or not, and whether any such wager be lost or not," that the stake-holder was liable to the losing party although he had paid over the stake by his directions. (a) But * in such a case he must declare on the statute and cannot recover at common law; (b) and though he has deposited the money of others as well as his own, he can only recover against the stake-holder the portion belonging to himself. (c) When the event has been determined, it is said that the winner may bring an action for the money against the stake-holder, without giving him notice of the happening of the event. (d)

The Statute 8 & 9 Vict. ch. 109, § 18, makes all wagers, or contracts or agreements by the way of gaming or wagering, null and void, and provides that no suit shall be maintained for the recovery of anything deposited to abide the event of any wager.¹ Many of the courts of this country have viewed wagers as entitled to no

fore his death had received sums of money, which he held as stake-holder for others, to abide the result of races, upon the event of which bets had been made by other persons. The testator had also placed about £6,000 in the hands of other parties, which by them had been deposited in a bank, to abide the result of a bet made by himself (but which failed by his death). In the administration of the estate the administratrix had paid £2,849 to persons who had paid these sums to the testator; the fact being, that part of the money was in respect of wagers which were decided before the testator's death, and part in respect of bets not decided at that time. Nothing had been done as to the £6,000 in the hands of the stake-holders. Held, that the payments made by the testatrix in respect of the wagers decided in the testator's lifetime could not be allowed against the estate; but that those made in respect of wagers not so decided were good payments,

those undecided wagers being illegal contracts which either party might determine, and which she by paying must be taken to have determined. Held, also, that the testatrix was not to be charged with the £6,000 in the hands of the stake-holders upon the bets made by the testator, because it, having been paid into the hands of the stake-holders, was not at any subsequent moment of his existence in his power of possession, he never having elected to withdraw from the bet.

(z) *Perkins v. Eaton*, 3 N. H. 152; *Howsen v. Hancock*, 8 T. R. 575; *M'Cullum v. Gourley*, 8 Johns. 147; *Livingston v. Wootan*, 1 Nott & McC. 178.

(a) *Ruckman v. Pitcher*, 1 Comst. 392. And see *Sutphin v. Crozer*, 1 Vroom, 257.

(b) See *Morgan v. Groff*, 4 Barb. 528; *Like v. Thompson*, 9 Barb. 315.

(c) *Ruckman v. Pitcher*, 20 N. Y. (6 Smith) 9.

(d) *Duncan v. Cafe*, 2 M. & W. 244.

¹ *Hampden v. Walsh*, 1 Q. B. D. 189, decided, on the authority of *Varney v. Hickman*, 5 C. B. 271; *Martin v. Hewson*, 10 Exch. 737; and *Graham v. Thompson*, I. R. 2 C. L. 64, that the St. 8 & 9 Vict. c. 109, § 18, did not apply to the recovery by a depositor of a sum so deposited if demanded by him before it was paid over. See also *Trimble v. Hill*, 5 App. Cas. 342.

favor; (*e*) but where they are in any degree legal contracts, they would doubtless be governed by the rules above stated.

An auctioneer is often made a stake-holder; and where he receives a deposit from a purchaser, to be paid over to the seller, if a good title to the property be made out, and in default thereof to be returned to the purchaser, he cannot return it to the purchaser on his demand, without such default. But on default, or a rescinding or abandonment of the contract, the auctioneer is bound to return it to the purchaser on his demand; and if he have paid it to the owner of the property, he has done so in his own wrong, and must refund it to the depositor. (*f*) If one deposits money in the hands of a stake-holder, to be paid to a creditor when his claim against the depositor shall be ascertained, and the stake-holder pays this money to the creditor on his giving an indemnity, before the claim is ascertained, without the assent of the depositor, it is said that such depositor may maintain an action against the stake-holder for money had and received, without any reference to the demand * of the creditor. (*g*) But if the check * 629 of the depositor be given to the stake-holder, the mere fact that he cashes it and holds the money is not such wrong-doing as makes him liable to be sued for the amount. (*h*) A stake-holder who cashes a check left with him, if the parties agree to regard it as money, is guilty of a breach of duty. (*i*)

(*e*) *Perkins v. Eaton*, 3 N. H. 152; *Bunn v. Ricker*, 4 Johns. 426; *McAllister v. Hoffman*, 16 S. & R. 147; *McAllister v. Gallaher*, 3 Penn. 468; *Wheeler v. Spencer*, 15 Conn. 28.

(*f*) *Edwards v. Hodding*, 5 Taunt. 815. In *Duncan v. Cafe*, 2 M. & W. 244, the plaintiff having deposited a sum with the auctioneer, until a good title was made out, was allowed to recover the deposit, without notice to the auctioneer that the contract had been rescinded by the parties. And see, to the same effect, *Gray v. Gutteridge*, 1 Man. & R. 614.

(*g*) *Cowling v. Beachum*, 7 J. B. Moore, 465. In this case the plaintiff had employed one Langdon, an auctioneer, to sell an estate, and disputed the sum charged by him for his expenses; whereupon it was agreed that the amount should be deposited with the defendant, until it should be ascertained whether the auctioneer was entitled to the whole of his demand or not. The defendant having

paid over the amount so deposited to the auctioneer on receiving his indemnity, without the knowledge or concurrence of the plaintiff, it was held, that the latter was entitled to recover it back in an action for money had and received. And, per *Burrough*, J., "The sum in question was deposited by the plaintiff with the defendant for an express purpose; it should, therefore, have remained in his hands until it was ascertained to what remuneration Langdon was entitled for selling the estate in question. The payment of it by him to Langdon, on his indemnity, was a wrongful act, and a breach of the trust reposed in the defendant by the plaintiff, and for which the sum in question was deposited in his hands, and which he cannot now possibly comply with, in consequence of his own act."

(*h*) *Wilkinson v. Godefroy*, 9 A. & E. 536.

(*i*) *Wilkinson v. Godefroy*, 9 A. & E. 536.

9. OF APPROPRIATION OF PAYMENTS.

There are many cases relating to the appropriation of a payment, where the creditor has distinct accounts against the debtor. In *Cremer v. Higginson*, (*j*)¹ Mr. Justice *Story* lays down with much precision the general rules governing these cases. First, a debtor who owes his creditor money on distinct accounts, may direct his payments to be applied to either, as he pleases.² Second, if the debtor makes no appropriation, the creditor may apply the money as he pleases. (*k*)³ Third, if neither party makes a specific appropriation of the money, the law will appropriate it as the justice and equity of the case may require.⁴ These rules seem to apply,

although one of the debts be due on specialty and the other * 630 on simple contract. (*l*)⁵ If one owe money in respect * of a debt contracted by his wife before marriage, and also a debt of his own, and pay money generally, the creditor may apply the payment to either demand. (*m*) And if one of the debts be

(*j*) 1 Mason, 338. And see *Franklin Bank v. Hooper*, 36 Me. 222; *Smuller v. Union Canal Co.* 37 Penn. St. 68.

(*k*) *Blackman v. Leonard*, 15 La. An. 59.

(*l*) *Brazier v. Bryant*, 2 Dowl. P. C. 477; *Chitty v. Naish*, id. 511; *Mayor, &c., of Alexandria v. Patten*, 4 Cranch, 317;

Peters v. Anderson, 5 Taunt. 596; *Hamilton v. Benbury*, 2 Hayw. 388; *Hargroves v. Cooke*, 15 Ga. 221; *Pierce, Clark, & Co. v. Knight*, 31 Vt. 701; *Heints v. Cahn*, 29 Ill. 308. And see *Pennypacker v. Umberger*, 22 Penn. St. 492.

(*m*) *Goddard v. Cox*, 2 Stra. 1194. In this case the defendant was indebted to

¹ See also *Bennett v. Austin*, 81 N. Y. 308.

² *Lee v. Early*, 44 Md. 40; *Champenois v. Fort*, 45 Miss. 355; *Levystein v. Whitman*, 59 Ala. 345; *Trullinger v. Kofoed*, 7 Oreg. 228. But one who as part consideration of a conveyance has agreed to discharge a mortgage and has made payments to the mortgagor, must be deemed to have made the payments on the mortgage, and cannot convert them into the consideration for a transfer of the mortgage debt, which he has induced the mortgagor to make. *Burnham v. Dorr*, 72 Me. 198.

³ *Commonwealth Bank v. Mechanics' Bank*, 94 U. S. 437, 439; *Harding v. Tiff*, 75 N. Y. 461; *Davis, &c. Co. v. Buckles*, 89 Ill. 237; *Coxwell v. De Vaughn*, 55 Ga. 643.

⁴ Where a note was given which both covered a debt secured by a mortgage and certain prior unsecured debts, payments made generally on the note must be applied *pro rata* to the secured and unsecured indebtedness. *Shelden v. Bennett*, 44 Mich. 634. And where several debts were secured by a mortgage, and an indorsed promissory note was given in extension of one of them at its maturity, the mortgagor is not bound to apply to the debt secured by the note the proceeds of a foreclosure sale, they being less than the entire sum secured. *West Coal Co. v. Kilderhouse*, 87 N. Y. 430. When the holder of a note is a bank at which the maker has an account, and the maker after maturity deposits a sum sufficient to cover it, but gives no directions to apply it in payment, this is not payment, nor does the bank discharge the indorsers by failing to so apply it. *Newburgh Bank v. Smith*, 66 N. Y. 271. Where the defence to a note was payment by a joint maker, the entry of a credit on a separate account of the joint-maker with the plaintiff is inadmissible to prove that the payment was applied to the account and not to the note. *Craig v. Miller*, 103 Ill. 605.

⁵ Funds arising from a security for a particular debt should be applied in its satisfaction. *Sanders v. Knox*, 57 Ala. 80.

barred by the statute of limitations, and the other not, and the money be paid generally, the creditor may apply the payment to the debt that is barred; (*n*)¹ but, by the weight of authority, he may not make use of this payment to revive the debt, and remove the bar of the statute. (*o*)

It is not necessary that the appropriation of the payment should be made by an express declaration of the debtor; for if his intention and purpose can be clearly gathered from the circumstances of the case, the creditor is bound by it. (*p*)² If the debtor, at the time of making a payment, makes also an entry in his own book, stating the payment to be on a particular * account, * 631

the plaintiff on account of debts contracted by his wife *dum sola*, and also on account of debts contracted by himself. His wife was also indebted to the plaintiff, as executrix. The defendant made payments to the plaintiff on account generally, without directing what debts they should be applied to. *Held*, that the plaintiff might elect whether to apply the payments to discharge the debts contracted by his wife *dum sola*, but could not apply them to discharge the debts due from the wife as executrix.

(*n*) *Mills v. Fowke*, 5 Bing. N. C. 455. In this case *Tindal*, C. J., said: "The civil law, it is said, applies the payment to the more burdensome of two debts, where one is more burdensome than the other; but I do not think that such is the rule of our law. According to the law of England, the debtor may, in the first instance, appropriate the payment; *solvitur in modum solventis*; if he omit to do so, the creditor may make the appropriation; *recipitur in modum recipientis*; but if neither make any appropriation, the law appropriates the payment to the earlier debt." See also *Williams v. Griffith*, 5 M. & W. 300; *Logan v. Mason*, 6 Watts & S. 9; *Livermore v. Rand*, 6 Foster, 85; *Watt v. Hoch*, 25 Penn. St. 411. But if a creditor has several claims, some of which are illegal, and so not by law recoverable, he cannot appropriate a general payment to such illegal claims. *Caldwell v. Wentworth*, 14 N. H. 431; *Wright v. Laing*, 3 B. & C. 165; *Arnold v. The*

Mayor, &c. of Poole, 4 Man. & G. 860; *Ex parte Randleson*, 2 Deacon & Ch. 534. But see, *contra*, *Philpott v. Jones*, 2 A. & E. 41; *Cruickshanks v. Rose*, 1 Moody & R. 100; *Treadwell v. Moore*, 34 Me. 112.

(*o*) *Mills v. Fowke*, 5 Bing. N. C. 455; *Nash v. Hodgson*, 6 De G. M. & G. 474, 31 Eng. L. & Eq. 555; *Pond v. Williams*, 1 Gray, 630. But the case of *Ayer v. Hawkins*, 19 Vt. 26, shows that a creditor having *several* notes against his debtor, all of which are barred by the statute of limitations, may appropriate a general payment of such debtor to any *one* of the notes, even the largest, and revive that particular note, but he cannot *distribute* such general payment upon all his claims and thus avoid the statute as to all.

(*p*) The question is always one of intent, which is a question for the jury under all the circumstances of the case. As to what circumstances will be held sufficient to warrant a finding of such appropriation by the debtor, see *Taylor v. Sandiford*, 7 Wheat. 14; *Mitchell v. Dall*, 2 Harr. & G. 159, 4 Gill & J. 361; *Fowke v. Bowie*, 4 Harris & J. 566; *Robert v. Garnie*, 3 Caines, 14; *West Branch Bank v. Moorehead*, 5 Watts & S. 542; *Scott v. Fisher*, 4 T. B. Mon. 387; *Stone v. Seymour*, 15 Wend. 19; *Newmarch v. Clay*, 14 East, 239; *Shaw v. Picton*, 4 B. & C. 715. If the debtor pay with one intent, and the creditor receive with another, the intent of the debtor shall govern. *Reed v. Boardman*, 20 Pick. 441.

¹ And this, too, without the consent of the debtor. *Phillips v. Moses*, 65 Me. 70; *Brown v. Burns*, 67 Me. 535. Where payments were made from time to time, without application, by a discharged bankrupt, upon a running account for goods sold partly before and partly after his discharge, the creditor who received no notice of the bankruptcy proceedings and was not named in the bankrupt's schedules, may, if the payments made after the discharge exceed the price of the goods purchased after that time, apply them to the first items in the account. *Hill v. Robbins*, 22 Mich. 475.

² *Pickett v. Memphis Bank*, 32 Ark. 346.

and shows the entry to the creditor, this is a sufficient appropriation by the debtor. (q) But the right of election of appropriation is not conclusively exercised by entries in the books of either party, until those entries are communicated to the other party. (r)

Although the payment be general, the creditor is not allowed in all cases to appropriate the same. As where he has an account against the debtor in his own right, and another against him as executor, and money is paid by the debtor without appropriation, the creditor must apply it to the personal debt of the debtor, and not to his debt as executor. (s) Nor can the creditor apply the payment to a debt not due when there is another which is due. (ss) Nor can he apply it to items for which he cannot maintain an action if there be those on which an action may be maintained. (st) But he may apply it to a debt on which the statute of frauds does not sustain an action. (su)¹

A general payment must be applied to a prior legal debt, in preference to a subsequent equitable claim. (t)² If the equitable claim be prior, it has been said that it may be preferred by the creditor; (u) but this does not seem to be certain. (v)

In general, the creditor's right of appropriation, springing from the neglect or refusal of the debtor to make such appropriation, exists only where the debtor has in fact an opportunity of making it; and not where the payment was made on his account by an-

(q) *Frazer v. Bunn*, 8 C. & P. 704.

(r) *Simpson v. Ingham*, 2 B. & C. 65.

(s) *Goddard v. Cox*, 2 Stra. 1194. And see *Fowke v. Bowie*, 4 Harris & J. 566; *Sawyer v. Tappan*, 14 N. H. 352. But where one debt is due to the creditor in his own right, and another to him as trustee or agent for another, and neither is secured, the creditor cannot apply the whole of a general payment to his own debt, but must apply it *pro rata* to both debts; for this is a part of his duty as trustee, to take the same care of the debts of his *cestui que trust* as of his own. See *Scott v. Ray*, 18 Pick. 361; *Barrett v. Lewis*, 2 id. 123; *Cole v. Trull*, 9 id. 325. (ss) *Bode's Heirs v. Stickney*, 36 Ala. 482.

(st) *Kidder v. Norris*, 18 N. H. 532.

(su) *Haynes v. Nice*, 100 Mass. 327.

(t) *Goddard v. Hodges*, 1 Cromp. & M. 33.

(u) *Bosanquet v. Wray*, 6 Taunt. 497.

(v) In *Birch v. Tebbutt*, 2 Stark. 74, A had certain bills of exchange accepted by B, and also a mortgage executed by B to a third person, but of which A might compel an assignment in equity to himself. B paid A money *on account*, which A received without prejudice to the claim he might have upon any securities. Lord *Ellenborough* held, that the money should be applied wholly towards the bills of exchange, and none on the equitable claims.

¹ *Murphy v. Webber*, 61 Me. 478; *Mueller v. Wiebracht*, 47 Mo. 468.

² So of two debts, one legal and one illegal, payment will be applied to the legal in absence of appropriation. *Dunbar v. Garrity*, 58 N. H. 575; *Albert v. Lindau*, 46 Md. 334; *Wilhelm v. Schmidt*, 84 Ill. 183. See *McKelvey v. Jarvis*, 87 Penn. St. 414. Where usurious interest has been paid without objection on certain notes, the excess of legal interest cannot be applied in payment of another note, although all the notes are secured by the same collateral. *Riddle v. Rosenfeld*, 103 Ill. 600.

other, or in any way which prevents or impedes his exercise of the right of election. (w)

Several rules may be gathered from the cases, by which courts are guided where the appropriation or application of payments is made by the law. Thus, the money is applied to the case of *the most precarious security, where there is nothing to control this application. (x)¹ But if one debt be a mortgage debt, and the other a simple account, it has been said the court will apply the money to the mortgage debt in preference, on the ground that it will be more for the interest of the debtor to have this debt discharged. (y). And if there be two demands, of different amounts, and the sum paid will exactly satisfy one of them, it will be considered as intended to discharge that one. (z) If one of the debtor's liabilities be contingent, as where the creditor is his indorser or surety but has not yet paid money for him, the court will apply a general payment to the certain debt, and will not permit the creditor to apply it to the contingent debt. (a)²

If a partner in a firm owe a private debt to one who is also a creditor of the firm, and make to this creditor a general payment, but of money belonging to the firm, the payment must be appropriated to the discharge of the partnership debt. (b)³

(w) *Waller v. Lacy*, 1 Man. & G. 54. Here an attorney, having several demands against his client, some of which were barred by the statute of limitations, and some not, received from a third person a sum of money on behalf of his client, and claimed the right to apply such sum to the payment of the earliest items in his own account against the client; but the court held that he had no such right.

(x) See *Field v. Holland*, 6 Cranch, 8; *Plomer v. Long*, 1 Stark. 153; *Smith v. Lloyd*, 11 Leigh, 512; *Stamford Bank v. Benedict*, 15 Conn. 437; *Vance v. Monroe*, 4 Gratt. 53.

(y) *Pattison v. Hall*, 9 Cowen, 747, 765. And see *Dorsey v. Gassaway*, 2 Harris & J. 402; *Gwinn v. Whitaker*, 1 id. 754; *Robinson v. Doolittle*, 12 Vt. 246; *Anonymous*, 12 Mod. 559. But see, contra, *Anonymous*, 8 Mod. 236; *Chitty v. Naish*, 2 Dowl. 511; *Field v. Holland*, *supra*:

Planters Bank v. Stockman, 1 Freem. Ch. 502; *Hilton v. Burley*, 2 N. H. 193; *Jones v. Kilgore*, 2 Rich. Eq. 64; *Moss v. Adams*, 4 Ired. Eq. 42; *Ramsour v. Thomas*, 10 Ired. 165.

(z) *Robert v. Garnie*, 3 Caines, 14. (a) *Niagara Bank v. Roosevelt*, 9 Cowen, 409; *Newman v. Meek*, 1 Smedes & M. Ch. 431; *Portland Bank v. Brown*, 22 Me. 295. So a general payment is to be referred to a debt due, rather than to one not yet due. *Seymour v. Sexton*, 10 Watts, 255; *Hammeraley v. Knowlys*, 2 Esp. 666; *Bacon v. Brown*, 1 Bibb, 334; *Stone v. Seymour*, 15 Wend. 19; *Baker v. Stackpole*, 9 Cowen, 420; *McDowell v. Blackstone Canal Co.* 5 Mason, 11. But by express agreement, a payment may be applied to a debt not yet due. *Shaw v. Pratt*, 22 Pick. 305.

(b) *Thompson v. Brown, Moody & M.* 40. And per *Abbott*, C. J.: "The general

¹ *Foster v. McGraw*, 64 Penn. St. 464.

² *Early v. Flannery*, 47 Vt. 253.

³ Where a partner was individually indebted to the creditor on a store account and a note and mortgage, and with his copartner on firm account, a general payment to be applied to the indebtedness will authorize the creditor to apply it as he pleases to either individual liability, but not to the partnership liability. *Miles v. Ogden*, 54 Wia. 573.

It seems to be settled, that where one of several partners dies, the firm being in debt, and the surviving partners continue their dealings with a particular creditor, and the latter blends his * 633 transactions with the firm before and after such death * together,

the payments made from time to time by the surviving partners must be applied to the old debt. (c)¹ It will be presumed that all the parties have agreed, and intend to consider the whole transaction as continuous, and the entire account as one account. (d) And, in general, the doctrine of appropriation, and the right of election, apply only where the debts or accounts are distinct in themselves, and are so regarded and treated by the parties. Where the whole may be taken as one continuous account, payments are, generally, but not universally, applied to the earlier items of the account. (e)²

The due exercise of the right of appropriation by the creditor may often be of great importance to the surety of the debtor.

rule certainly is, that when money is paid generally, without any appropriation, it ought to be applied to the first items in the account; but the rule is subject to this qualification, that when there are distinct demands, one against persons in partnership, and another against one only of the partners, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the payment of the debt of the individual; that would be allowing the creditor to pay the debt of one person with the money of others." And see *Fairchild v. Holly*, 10 Conn. 175; *Johnson v. Boone*, 2 Harring. 172; *Sneed v. Wiester*, 2 A. K. Marsh. 277.

(c) Per *Bayley*, J., in *Simson v. Ing-ham*, 2 B. & C. 65. And see, to the same effect, Clayton's case (*Devaynes v. Noble*), 1 Meriv. 529, 604; *Simson v. Cooke*, 1 Bing. 452; *Williams v. Rawlinson*, 3 id. 71; *Bodenham v. Purchas*, 2 B. & Ald. 39; *Toulmin v. Copland*, 3 Younge & C. 625, 1 West, 164; *Smith v. Wigley*, 3 Moore & S. 174; *Livermore v. Rand*, 6 Foster, 85. But if a new account is opened with the new firm, the creditor

may apply a general payment to the new account. *Logan v. Mason*, 6 Watts & S. 9.

(d) Per *Bayley*, J., in *Simson v. Ing-ham*, 2 B. & C. 65.

(e) Clayton's case (*Devaynes v. Noble*), 1 Meriv. 529, 609. This is the leading case upon this point. See also *Brooke v. Enderby*, 2 Brod. & B. 70; *United States v. Kirkpatrick*, 9 Wheat. 720; *Jones v. United States*, 7 How. 681; *Postmaster-General v. Furber*, 4 Mason, 332; *United States v. Wardwell*, 5 id. 82; *Gass v. Stinson*, 3 Sumner, 98; *Fairchild v. Holly*, 10 Conn. 175; *McKenzie v. Nevius*, 22 Me. 138; *United States v. Bradbury*, *Daveis*, 146. See also cases cited in preceding note. But payment will not be applied to the earliest items in an account, if a different intention is clearly expressed by the debtor, or by both parties, or where such intention can be gathered from the particular circumstances of the case. See *Taylor v. Kymer*, 3 B. & Ad. 320; *Henniker v. Wigg*, 4 Q. B. 792; *Capen v. Alden*, 5 Met. 268; *Dulles v. De Forest*, 19 Conn. 190; *Wilson v. Hirst*, 1 Nev. & M. 742; *Pierce v. Knight*, 31 Vt. 701.

Where money is due to a firm and to an individual member, and the latter has assigned his claim to the firm, it is immaterial to which account payments are applied. *Badger v. Daenicke*, 56 Wis. 678.

¹ *Hooper v. Keay*, 1 Q. B. D. 178; *Coleman v. Lansing*, 65 Barb. 54. See *Dawson v. Wilson*, 55 Ind. 216.

² *Jackson v. Johnson*, 74 N. Y. 607; *German Lutheran Trustees v. Heise*, 44 Md. 453; *Sprague v. Hazenwinkle*, 53 Ill. 419; *Hill v. Robbins*, 22 Mich. 475. See *City Discount Co. v. McLean*, L. R. 9 C. P. 692. This presumption will not be rebutted by the fact that the earliest items are for goods, the title to which is not to vest in the purchaser until they are paid for, although the seller enters a memorandum to that effect on his books. *Crompton v. Pratt*, 106 Mass. 255.

Generally, the law favors the surety, especially if his suretyship be not for a previously existing debt. So, where one has given security for the payment for goods to be afterwards supplied to his principal, and such goods are supplied, and general payments made by the principal, who was otherwise indebted to the party supplying the goods, it would be inferred in favor of the surety, that the payments were intended to be made in liquidation of the account which he had guaranteed. (f)¹ But * where an obligor makes a general payment to his obligee, to whom he is indebted, not only on the bond but otherwise, the surety of the obligor cannot require that the payment should be applied to the bond, unless aided by circumstances which show that such application was intended by the obligor. (g)

(f) *Marryatts v. White*, 2 Stark. 101. In this case a son-in-law of the defendant being indebted to the plaintiff, and wishing to obtain a further credit for some flour, the defendant became his surety by giving his note to the plaintiff, but with a stipulation that it should operate as a security for the flour to be delivered, and not for the debt which then existed. The term of credit on sale of flour was three months, and discount was allowed for earlier payment. After the delivery of the flour the son-in-law made several payments on account generally; but upon all those which were made within three months from the time the flour was delivered, the usual discount was allowed. *Held*, that this was evidence that all the payments were to go to pay for the flour, and not to discharge the pre-existing debt. And Lord *Ellenborough*, said: "I think that in favor of a surety, such payments are to be considered as paid on the latter account. In some instances the payments were immediate, and in others before the

time had expired within which a discount was allowed; *ex pluribus dicere omnes*. Where there is nothing to show the *animus solventis*, the payment may certainly be applied by the party who receives the money. The payment of the exact amount of goods previously supplied is irrefragable evidence to show that the sum was intended in payment of those goods; and the payment of sums within the time allowed for discount, and on which discount has been allowed, affords a strong inference, in the absence of proof to the contrary, that it is made in relief of the surety." See *Kirby v. The Duke of Marlborough*, 2 M. & S. 18; *Pierce v. Knight*, 31 Vt. 701.

(g) *Plomer v. Long*, 1 Stark. 153. In *Martin v. Brecknell*, 2 M. & S. 39, it was held, that the obligee of a bond, given by principal and surety, conditioned for the payment of money by instalments, who has proved under a commission of bankruptcy against the principal the whole debt, and received a dividend thereon of

¹ *Hansen v. Rounseavell*, 74 Ill. 238. The mere fact that there is a surety for one of two debts does not preclude the creditor from applying a payment received from the debtor, with no direction given, to the debt for which he has no security. *Harding v. Tift*, 75 N. Y. 461. *Hanford v. Robertson*, 47 Mich. 100, held, that where the debtor to obtain a loan gave two notes secured by a mortgage, one at the creditor's request being additionally secured by a surety, the proceeds of a foreclosure sale must be applied to discharge the note not secured by a surety. Where by an express agreement, or by a course of dealing, between a bank and one of its depositors, a certain note of the depositor is not included in the general account between them, any balance due from the bank to him when the note becomes payable is not to be applied in satisfaction of the note, even for the benefit of a surety thereon, except at the election of the bank. *National Mahaiwe Bank v. Peck*, 127 Mass. 298, in which case the doctrine of "appropriation" generally is discussed. Where a mortgage for \$10,000 was given to a bank to secure to that extent an indebtedness of \$17,000, the mortgagor's grantee, to whom the land was conveyed with warranty, can insist that payments to the amount of \$12,000, made generally by the mortgagor, shall be applied in extinguishment of the mortgage. *Fridley v. Bowen*, 103 Ill. 633.

In cases of payments which are not made by the debtor voluntarily, the creditor has no right of appropriation, but must apply the money towards the discharge of all the debts in proportion. (h)

* 635 * A question has been made as to the manner of making up the account where partial payments have been made at different times on bonds, notes, or other securities. Interest may be cast in three ways. It may be cast on the whole sum to the day of making up the account, and also upon each payment from the time when made to the same day, and the difference between these sums is the amount then due. Or interest may be cast on the whole sum to the day of the first payment, and added to the original debt, and, the payment being deducted, on the remainder, interest is cast to the next payment, and so on. The objection to this method is, that if the payment to be deducted is not equal to the interest which has been added to the original sum, then a part of this interest enters into the remainder, on which interest is cast, and thus the creditor receives compound interest. A third method is, to compute the interest on the principal sum from the

2s. and 7d. in the pound, may recover against the surety an instalment due, making a deduction of 2s. and 7d. on the amount of such instalment, and the surety is not entitled to have the whole dividend applied in discharge of that instalment, but only ratably in part payment of each instalment as it becomes due. See further *Williams v. Rawlinson*, 3 Bing. 71. The fact that a payment was made to a creditor having several demands against the same debtor, by a surety of such debtor on one of the debts, but with the debtor's own money, does not show that the debtor intended such payment to apply to the debt guaranteed. *Mitchell v. Dall*, 4 Gill & J. 361. In *Donally v. Wilson*, 5 Leigh, 329, it was held, that if A owes a debt to B, payable on demand, for which C is A's surety, and A assigns debts of others to B in part payment, and after such assignment, but before the assigned debts are collected, A contracts another debt to B, for which there is no security, B cannot in such case, after the collection of the assigned debts, apply the same to the payment of A's last debt contracted after the assignment was made, and recover the whole amount of the first debt from the surety.—A debtor cannot appropriate a payment in such manner as to affect the relative liability or rights of his different

sureties without their consent. *Postmaster-General v. Norvell, Gilpin*, 106.

(h) Thus, where a creditor recovered one judgment on several notes, some of which were made by the judgment debtor alone, and others were signed also by a surety, and took out an execution which was satisfied in part by a levy, it was held, that he could not appropriate this payment solely to the notes not signed by the surety, but that all the notes were paid proportionably. *Blackstone Bank v. Hill*, 10 Pick. 129. So where an insolvent debtor assigns his property for the benefit of such of his creditors as become parties to the assignment, and thereby releases their claims, and a dividend is received by one of such creditors, it must be applied ratably to all his claims against the debtor, as well to those upon which other parties are liable, or which are otherwise secured, as to those which are not so secured. "This is not a case," say the court, "in which the debtor or creditor has the right to make the application of any payment, for the application is made by law according to the circumstances and justice of the case." *Commercial Bank v. Cunningham*, 24 Pick. 270. See also *Merriam County Bank v. Brown*, 12 N. H. 320; *Waller v. Lacy*, 1 Man. & G. 54. But see, *contra*, *Portland Bank v. Brown*, 22 Me. 295.

time when interest became payable to the first time when a payment, alone, or in conjunction with preceding payments with interest cast on them, shall equal or exceed the interest due on the principal. Deduct this sum, and cast interest on the balance as before. In this way payments are applied first to keep down the interest, and then to diminish the principal of the debt, and the creditor does not receive compound interest. This last method has been adopted in Massachusetts by decision, and generally prevails. (i)

One holding a note on which interest is payable annually or semi-annually, may sue for each instalment of interest as it becomes payable, although the note is not yet due. (j) Although it has been held that after * the principal becomes * 636 due the unpaid instalments of interest become merged in the principal, and must therefore be sued for with the principal, if at all, (k) the better reason is that the promises to pay the principal and interest at different times are several and afford distinct causes of action. (kk)¹ And if he allows the time to run by without demanding interest, he cannot afterwards, in an action on the note, recover compound interest. (l)

SECTION II.

OF PERFORMANCE.

Having treated of payment as the specific defence to an action grounded on alleged non-payment, we will now speak of perform-

(i) *Dean v. Williams*, 17 Mass. 417; *Fay v. Bradley*, 1 Pick. 194; and see *Connecticut v. Jackson*, 1 Johns. Ch. 17; *French v. Kennedy*, 7 Barb. 452; *Williams v. Houghtaling*, 8 Cowen, 87, note; *Union Bank v. Kindrick*, 10 Rob. (La.) 51; *Hart v. Dorman*, 2 Fla. 445; *Jones v. Ward*, 10 Yerg. 160; *Spires v. Hamot*, 8 Watts & S. 17; *United States v. McLemore*, 4 How. 286; *Story v. Livingston*, 18 Pet. 359.

(j) *Greenleaf v. Kellogg*, 2 Mass. 568; *Cooley v. Rose*, 3 id. 221; *Herries v. Jamieson*, 5 T. R. 553. See also *Townsend v. Riley*, 46 N. H. 300. And see *ante*, p. * 620, note (c).

(k) *Howe v. Bradley*, 19 Me. 31.

(kk) *Sparhawk v. Wills*, 6 Gray, 163; *Andover Savings Bank v. Adams*, 1 Allen, 28.

(l) *Hastings v. Wiswall*, 8 Mass. 455; *Ferry v. Ferry*, 2 Cush. 92; *Doe v. Warren*, 7 Greenl. 48, and Bennett's note; *Connecticut v. Jackson*, 1 Johns. Ch. 13; *Van Benschoter v. Lawson*, 6 Johns. Ch. 313; *Attwood v. Taylor*, 1 Man. & G. 279; *Sparks v. Garrigues*, 1 Binn. 152, 165; *Leonard v. Adm'r of Villars*, 23 Ill. 377.

¹ *Dulaney v. Payne*, 101 Ill. 825, decided in the converse case that a judgment for unpaid instalments of interest obtained after the maturity of a note was no bar to a separate action for the principal sum thereby secured.

ance, generally, as the most direct contradiction and the most complete defence against actions for the breach of contract.

To make this defence effectual, the performance must have been by him who was bound to do it; and whatsoever is necessary to be done for the full discharge of this duty, although only incidental to it, must be done by him. Nor will a mere readiness to do, discharge him from his liability, unless he makes that manifest by tender or an equivalent act. (m)¹

By the statutes of the United States, known as the Legal Tender Acts, the promissory notes of the United States are made a legal tender. After much conflict and some fluctuation, these acts were held by a majority of the Supreme Court of the United States (the Chief-Judge and three side justices dissenting) constitutional and valid as applied to contracts made before their passage; the dissenting justices holding them valid only as to contracts made after their passage, on which point the court was unanimous. (mm)² The same court held that a note payable in

(m) Thus, if a tenant by deed covenants to pay rent in the manner reserved in the lease, but no place of payment is mentioned, the tenant must seek out the lessor on the day the rent falls due, and tender him the money. It would not be sufficient that he was on the premises leased, at the day, ready with the money to pay the lessor, and that the latter did not come there to receive it. *Haldane v. Johnson*, 8 Exch. 689, 20 Eng. L. & Eq. 498. And see *Poole v. Tunbridge*, 2 M. & W. 223; *Shep. Touch.* 378; *Rowe v. Young*, 2 Brod. & B. 165. In *Cranley v. Hillary*, 2 M. & S. 120, the plaintiff had agreed with the defendant, his debtor, to release him from the whole debt, if the debtor would secure him a part by giving

him certain promissory notes. The plaintiff never applied for the notes, nor did the defendant ever tender them, but he was ready to give them if they had been applied for. The plaintiff afterwards sued the defendant on the original cause of action, and the defendant relied upon the agreement to compound. *Held*, that the defendant should have offered the plaintiff the notes, and that as he had not, the plaintiff was not barred from his action. See *Soward v. Palmer*, 2 J. B. Moore, 274; *Reay v. White*, 1 Cromp. & M. 748, that a tender may be dispensed with under certain circumstances. See also *Eastman v. Rapids*, 21 Iowa, 590.

(mm) *Knox v. Lee*, and *Parker v. Davis*, 12 Wallace, 457.

¹ But where a vendor has a deed ready for delivery, the vendee's statement of his inability to comply with the terms of the contract will excuse an actual manual tender of the deed. *Lawrence v. Miller*, 86 N. Y. 131. Where a vendor refuses to receive the property back and to return the purchase-money to the purchaser, a formal tender is unnecessary to rescind the sale. *Potter v. Taggart*, 54 Wis. 395. Where the plaintiff hired a piano under an agreement that the rent should be applied in part payment of a new piano which he agreed to purchase, but on his offering to pay the balance due after deducting the rent, the defendant denied the agreement, it was held, that a tender of the balance was not necessary before suing. *Duffy v. Patten*, 74 Me. 396.

² The United States treasury notes are a lawful tender on contracts for the payment of money generally, whether the payment be optional or required by the contract. See *Longworth v. Mitchell*, 26 Ohio St. 334. *Lawrence v. Staigg*, 10 R. I. 681, decided

specie, could not be satisfied against the will of the holder by a tender of "legal tender" notes. (mn)

If the tender be of money, it can be a defence only when made before the action is brought, (n) and when the demand is of money, and is definite in amount or capable of being made so. It seems to be settled that a tender may be made to a *quantum meruit*, although once held otherwise; (o) but, generally, where the claim is for unliquidated damages, it has been * held in Eng- * 638

(mn) Trebilcock v. Wilson, 12 Wallace, 687.

(n) Bac. Abr. Tender (D); Suffolk Bank v. Worcester Bank, 6 Pick. 106. And in Hume v. Peploe, 8 East, 168, it was held, that a plea of tender *after the day of payment* of a bill of exchange, and *before action brought*, is not good, though the defendant aver that he was always ready to pay from the time of the tender, and that the sum tendered was the *whole money* then due, owing, or payable to the plaintiff in respect of the bill, with interest from the time of the default *for the damages* sustained by the plaintiff by reason of the non-performance of the promise. And Lord Ellenborough said: "In strictness a plea of tender is applicable only to cases where the party pleading it has never been guilty of any breach of his contract; and we cannot now suffer a new form of pleading to be introduced, different from that which has always prevailed in this case." And, per Lawrence, J.: "This is a plea in bar of the plaintiff's demand, which is for damages; and therefore it ought to show upon the record that he never had any such cause of action, but here the plea admits it." So in Poole v. Tumbridge, 2 M. & W. 223, where the defendant, the acceptor of a bill of exchange, pleaded that, *after the bill became due*, and before the commencement of the suit, he tendered to the plaintiff the amount of the bill, with interest from the day when it became due, and that he had always, *from the time when the bill became due*, been ready to pay the plaintiff the amount, with interest aforesaid; the court held the plea bad on special demurrer. And Parke, B., said: "I have no doubt this plea is bad. The declaration states the contract of the defendant to be, to pay the amount of the bill on the day it became due, and that promise is admitted by the plea. It is clearly settled that an indorsee has a right of action against the acceptor by the act of indorsement, without giving him any notice; when a party accepts a negotiable bill, he binds himself to pay the amount, without notice, to whomsoever may happen to be the holder, and on the precise day when it becomes due; if he places himself in a situation of hardship from the difficulty of finding out the holder, it is his own fault. It is also clearly settled that the meaning of a plea of tender is, that the defendant was always ready to perform his engagement according to the nature of it, and did perform it so far as he was able, the other party refusing to receive the money. Hume v. Peploe is a decisive authority that the plea must state, not only that the defendant was ready to pay on the day of payment, but that he tendered on that day. This plea does not so state, and is therefore bad." And see to the same point, City Bank v. Cutter, 3 Pick. 414; Dewey v. Humphrey, 5 id. 187. The case of Johnson v. Clay, 7 Taunt. 486, if correctly reported, is not law. Per Parke, B., in Poole v. Tumbridge, *supra*.

(o) This was settled in the case of Johnson v. Lancaster, Stra. 576. The report of that case is as follows: "It was settled on demurrer, that a tender is pleadable to a *quantum meruit*, and said to have been so held before in B. R. 10 W. 3; Giles v. Hart, 2 Salk. 622." In reference to this case of Giles v. Hart, the learned reporters, in a note to Dearle v. Barrett, 2 A. & E. 82, say: "In Johnson v. Lancaster this case is cited from Salkeld; and it is said to have been there decided that a tender is pleadable to a *quantum meruit*; but that does not appear from the report in Salkeld, and the report in 1 Lord Raymon, 255, states a contrary doctrine to have been laid down by Holt, C. J., and is cited accordingly, in 20 Vin. Ab. tit. *Tender* (S), pl. 6. The point is not expressly mentioned in the reports of the same case in Carth. 413, 12 Mod. 152, Comb. 443, Holt, 556." And see Cox v. Brain, 3 Taunt. 95.

that a tender of national bank notes, in pursuance of an order of court providing for the payment of money, was not a good tender, but that a tender of United States notes would be.

land, very strongly, that no tender is admissible. (p) In this country cases of accidental or involuntary trespass form an exception; in part by usage, or by an extension of the principle of the , 21 Jas. I. c. 16, or express statutory provision. (q) This seems to be settled in some States, and would, we think, be held generally. A tender may be pleaded to an action on a covenant to pay money. (r)

A plea of tender admits the contract, and so much of the declaration as the plea is applied to.¹ It does not bar the debt, as a payment would, but rather establishes the liability of the defendant; for, in general, he is liable to pay the sum which he tenders whenever he is required to do so. (s) But it puts a stop

(p) *Dearle v. Barrett*, 2 A. & E. 82. This was an action by a landlord against a tenant, for not keeping the premises in repair, &c. The defendant moved for leave to pay £5 into court by way of compensation, under statute 3 & 4 Will. IV. c. 42, § 21, and also that it might be received in court under a plea of tender before action brought. *Patteson*, J., said : "Is there any instance of such a plea to an action for unliquidated damages?" To which *White*, for the defendant, answered : "A plea of tender is allowed to a count on a *quantum meruit*. It was so settled in *Johnson v. Lancaster*, 1 Stra. 576. Although the contrary was once held in *Giles v. Hart*, 2 Salk. 622." Lord *Denman* added : "It does not follow, because you may plead a tender to a count on a *quantum meruit*, that you may also plead it to any count for unliquidated damages." And see *Green v. Shurtliff*, 19 Vt. 592.

(q) *New York Rev. St.* vol. ii. p. 553, §§ 20, 22; *Slack v. Brown*, 13 Wend. 390; *Mass. Pub. St. c.* 179, § 10; *Tracy v. Strong*, 2 Conn. 659; *Brown v. Neal*, 36 Me. 407.

(r) *Johnson v. Clay*, 7 Taunt. 486, 1 J. B. Moore, 200.

(s) *Cox v. Brain*, 3 Taunt. 95; *Huntington v. American Bank*, 6 Pick. 340; *Bennett v. Francis*, 2 B. & P. 550; *Seaton v. Benedict*, 5 Bing. 31; *Jones v. Hoar*, 5 Pick. 291; *Bulwer v. Horne*, 4 B. & Ad. 132; *Stafford v. Clark*, 2 Bing. 377.—The authorities and practice have not been entirely uniform as to the effect of a payment of money into court, either in actions of assumpsit or tort. In assumpit the modern doctrine is, that payment into court, when the counts are general, and there is no special count, is

an admission that the amount paid in is due in respect of some contract, but not that the defendant is liable on any particular contract upon which the plaintiff may choose to rely. *Kingham v. Robins*, 5 M. & W. 94 (1839); *Stapleton v. Nowell*, 6 M. & W. 9 (1840); *Archer v. English*, 1 Man. & G. 873 (1840); *Charles v. Branker*, 12 M. & W. 743 (1844); *Edan v. Dudfield*, 5 Jur. 317 (1841). On the other hand, if the declaration is on a special contract, and it seems on the same principle, if there are general counts and also a special count, the payment admits the cause of action as set forth in such special count, but does not admit the amount of damages therein stated. *Stoveld v. Brewin*, 2 B. & Ald. 116 (1818); *Guillod v. Nock*, 1 Esp. 347 (1795); *Wright v. Goddard*, 8 A. & E. 144 (1838); *Yate v. Wilan*, 2 East, 134 (1801); *Bulwer v. Horn*, 4 B. & Ad. 132 (1832); *Bennett v. Francis*, 2 B. & P. 550 (1801). In *Jones v. Hoar*, 5 Pick. 285 (1827), there were three counts, one upon a promissory note, one for goods sold and delivered, and a third for money had and received. The defendant brought in money generally "on account of, and in satisfaction of, the plaintiff's damages in the suit." The court thought this an admission of all the contracts set forth in the declaration, but under the circumstances the defendant had leave to amend and specify that the money was intended to be paid in upon the promissory note. So in *Huntington v. American Bank*, 6 Pick. 340 (1828), there were two counts, first, on an account annexed to the writ, for the plaintiff's services, claiming a specific sum; and, second, a count claiming a reasonable compensation for his services, and alleging their value at \$1,500. The

¹ The acceptance of a tender, accompanied by the expression of a wish for a more formal instrument, is sufficient to enable a court of justice to hold that a final agreement has been arrived at. *Lewis v. Brass*, 3 Q. B. D. 667.

* to accruing damages, or interest for delay in payment, and * 639
gives the defendant costs. (t) It need not be made by the defendant personally; if made by a third person, at his request, it is sufficient; (u) and if made by a stranger without his knowledge or request, it seems that a subsequent assent of the debtor would operate as a ratification of the agency and make the tender good. (v) Any person may make a valid tender for an idiot; and the reason of this rule has been held applicable to a tender for an infant by a relative not his guardian. (w) And if an agent, furnished with money to make a tender, at his own risk tenders more, it is good. (x) So a tender need not be made to a creditor personally; but it must be made to an * agent * 640 actually authorized to receive the money. (y)¹ If the

defendant paid \$300 into court. The principal question was, whether the defendant by paying the money into court generally, without designating the count on which it was paid in, admitted the contract of hiring, as set out in the second count, thus leaving no question for the jury, except the value of the plaintiff's services. The court held that it did. In *Spalding v. Vandercook*, 2 Wend. 431 (1829), the declaration contained a count on a promissory note for \$131, and also the common money counts. The defendant paid in \$89, and sought to reduce the amount of the plaintiff's demand to that sum, by showing that the consideration of the note failed. The court admitted evidence to that point, notwithstanding the plea. See *Donnell v. Columbian Insurance Company*, 2 Sumner, 366 (1836). In *Elgar v. Watson*, 1 Car. & M. 494 (1842), the action was assumpsit for use and occupation, and for money lent. *Coleridge*, J., held that a general payment by the defendant, acknowledged the plaintiff's right to recover *something* on every item in his bill of particulars, and it was for the jury to assess the amount. — In actions of *tort* the same general principles seem to be applied. If the declaration is *special*, payment into court operates as an admission of the cause of action, as set out in the declaration. Thus, in actions against railways for injuries received by the negligence of the company, or in an action against a town for a defect in the highway, payment into court admits the defendant's liability as set out, and leaves the question of damages for the jury.

Bacon v. Charlton, 7 Cush. 581; *Perren v. Monmouthshire Railway Co.* C. B. (1853), 20 Eng. L. & Eq. 258. And see *Lloyd v. Walkley*, 9 C. & P. 771. On the other hand, if a declaration in *tort* is *general*, as in trover for a number of articles, payment into court would admit a liability on *some* cause of action, but not any particular article mentioned in the declaration. *Schreger v. Carden*, 11 C. B. 581, 10 Eng. L. & Eq. 513; *Cook v. Hartle*, 8 C. & P. 568; *Story v. Finnis*, 6 Exch. 123, 3 Eng. L. & Eq. 548.

(t) *Dixon v. Clark*, 5 C. B. 365; *Wastell v. Atkinson*, 3 Bing. 290; *Law v. Jackson*, 9 Cowen, 641; *Coit v. Houston*, 3 Johns. Cas. 243; *Carley v. Vance*, 17 Mass. 389; *Raymond v. Bearnard*, 12 Johns. 274; *Cornell v. Green*, 10 S. & R. 14. A tender may be sufficient to stop the running of interest, although not a *technical* tender so as to give costs. *Goff v. Rehoboth*, 2 Cush. 475; *Suffolk Bank v. Worcester Bank*, 5 Pick. 106.

(u) *Cropp v. Hambleton*, Cro. Eliz. 48; 1 Rol. Abr. 421 (K.), pl. 2. A tender may be made by an inhabitant of a school district, on behalf of such district, without any express authority; and this, if ratified by the district, is a good tender. *Kincaid v. Brunswick*, 2 Fairf. 188.

(v) Per *Best*, C. J., in *Harding v. Davies*, 2 C. & P. 78. And see *Kincaid v. Brunswick*, 2 Fairf. 188; *Read v. Goldring*, 2 M. & S. 86.

(w) *Co. Litt.* 206 b; *Brown v. Dyer*, 1 Rawle, 408.

(x) *Read v. Goldring*, 2 M. & S. 86.

(y) *Kirtow v. Braithwaite*, 1 M. & W. 313; *Goodland v. Blewith*, 1 Camp. 477.

¹ A tender, however, to an attorney's clerk, in his office, who, saying that his master is out and that he had "no instructions," refuses the money, is good. *Finch v. Boning*, 4 C. P. D. 143.

money be due to several jointly, it may be tendered to either, but must be pleaded as made to all. (z) It perhaps is good if made to one appointed executor, if he afterwards prove the will. (a)

The whole sum due must be tendered, (b)¹ as the creditor is

Tender to a merchant's clerk, at the store, for goods previously bought there, is good, although the claim had then been lodged with an attorney for collection. Hoyt v. Byrnes, 2 Fairf. 475; McIneffe v. Wheelock, 1 Gray, 600. And this although the clerk had been forbidden to receive the money, if tendered. Moffat v. Parsons, 5 Taunt. 307. Tender to the attorney of a creditor who has the claim left for collection, is good. Watson v. Hetherington, 1 Car. & K. 36; Crozer v. Pilling, 4 B. & C. 28, 6 Dowl. & R. 132. And tender to such attorney's clerk, at his office, the principal being absent, may be good. Kirton v. Braithwaite, *supra*. And see Wilmot v. Smith, 3 C. & P. 453; Barrett v. Deere, Moody & M. 200. See Bingham v. Allport, 1 Nev. & M. 398. The debtor is not obliged to tender for such attorney's letter. Kirton v. Braithwaite, *supra*.

(z) Douglas v. Patrick, 3 T. R. 683. So a tender of a deed to one of two joint purchasers is sufficient. Dawson v. Ewing, 16 S. & R. 371.

(a) 1 Eq. Cas. Abr. 319. But see Todd v. Parker, Coxe, 45.

(b) Dixon v. Clark, 5 C. B. 365. In this case a declaration in debt on simple contract contained two counts, in each of which £26 were demanded. The defendants pleaded as to the causee of action, as to £5, parcel, &c., a tender. The plaintiff replied, that before and at the time of the tender, and of the request and refusal after mentioned, and until and at the commencement of the action, a larger sum than £5, namely, £13 15s., part of the money in the declaration demanded, was due from the defendants to the plaintiff as one entire sum, and on one entire contract and liability, and inclusive of, and not separate or divisible from, the said sum of £5, and the same being a contract and liability by which the defendants were liable to pay to the plaintiff the whole of the said larger sum, in one entire sum upon request; and that, after the last-mentioned and larger sum had become so due, and while the same remained unpaid, the plaintiff requested of the defendants payment of the last-mentioned and larger sum,

of which the said £5 in the plea mentioned was then such indivisible parcel as aforesaid, yet that the defendants refused to pay the said larger sum; wherefore the plaintiff refused the said £5. Held, on special demurrer, that the replication was a good answer to the plea, and that, if there was any set-off or other just cause for not paying the larger sum, it should have come by way of rejoinder. So in Boyden v. Moore, 5 Mass. 365, where the defendant had brought into court what she supposed justly due on the action, and the costs up to the time, but upon the trial it appeared that she had brought in too little by forty-one cents, and the judge directed the jury that they might still find a verdict for the defendant, if the balance appeared to them a mere trifle, and they found accordingly, a new trial was granted for the misdirection of the judge. And Parsons, C. J., said: "It is a well-known rule that the defendant must take care, at his peril, to tender enough, and if he does not, and if the plaintiff replies that there is more due than is tendered, which is traversed, the issue will be against the defendant, and it will be the duty of the jury to assess for the plaintiff the sum due on the promise; and if it be not covered by the money tendered, he will have judgment for the balance. If the present direction of the judge had been in the trial of such an issue arising on a plea of tender, we cannot think the direction to be right. The defendant cannot lawfully withhold from the plaintiff any money due to him, however small the sum, and if the defendant intended to tender as much money as the plaintiff could claim, but made a mistake in her calculation, she must suffer for her own mistake, and not the plaintiff; although the injury to him may be very small, and such as most men would disregard. From the calculation made by the judge in the hurry of the trial the deficiency was about fourteen cents, but, on a more correct calculation, it amounts to about forty-one cents. And if at the time the money was brought in, no action had been pending, and the plaintiff had then received and indorsed the payment, he

¹ Where a mortgage for \$600 was assigned to and, as the jury found, held by the defendant for \$300, a tender of \$300 and interest by the mortgagor discharged the mortgage. Stewart v. Brown, 48 Mich. 383.

* not bound to receive a part of his debt. But this does not * 641 mean the whole that the debtor owes to the creditor; for he may owe him many distinct debts; and if they are perfectly separable as so many notes, or sums of money otherwise distinct, the debtor has a right to elect such as he is willing to acknowledge and pay, and make a tender of them. And if the tender be for more than the whole debt, it is valid; (c) unless * it be accompanied with a demand of the balance, and the creditor objects for that reason. If the obligation be in the alternative,

might afterwards have commenced and maintained an action to recover the balance then due. That the law will not regard trifles, is, when properly applied, a correct maxim. But to this point it is not applicable. In calculating interest there may and probably must arise fractions not to be expressed in the legal money of account; these fractions are trifles, and may be rejected. In making payments it is sometimes not possible, from the value and divisions of the current coin, to make the exact sum;—if the payment be made as nearly as it can conveniently be made, the fractional part of a small coin may be neglected; it is a trifle. But the present case is not one of these trifles. A man may sue and recover on a note given for forty cents; also, on a larger note where forty cents remain unpaid. It is therefore our opinion that the jury ought to have been directed to calculate the interest on the second note, and deducting the payments, if a balance remained unpaid, to find that balance for the plaintiff. If any sum large enough to be discharged in the current coin of the country is a trifle, which, although due, the jury are not obliged by law to award to the plaintiff, the creditor; it will be difficult to draw a line and say how large a sum must be, not to be a trifle. The law gives us no rule." But a tender of the sum *justly due* by the condition of a *bond*, is good, although less than the penalty. *Tracy v. Strong*, 2 Conn. 659.

(c) *Astley v. Reynolds*, 2 Stra. 916; *Wade's case*, 5 Rep. 115; *Dean v. James*, 4 B. & Ad. 546; *Douglas v. Patrick*, 3 T. R. 683; *Black v. Smith, Peake*, 88; *Cadman v. Lubbock*, 5 D. & R. 289; *Bevans v. Rees*, 5 M. & W. 306. In this last case, the defendant, who owed the plaintiff £108 for principal and interest on two promissory notes, in consequence of an application from the plaintiff's attorney for the amount, sent a person to the attorney, who told him he came to settle the amount due on the notes, and desired to be informed what was due, and

laid down 150 sovereigns, out of which he desired the attorney to take the principal and interest, but the attorney refused to do so, unless a shop account, due from the plaintiff to the defendant, were fixed at a certain amount. *Held*, that this was a good tender of the £108, the fixing of the shop account being a collateral matter, which the attorney had no right to require. And Lord Abinger said: "I am not disposed to lay down general propositions, unless where it is necessary to the decision of the case; but I am prepared to say, that if the creditor knows the amount due to him, and is offered a larger sum, and, without any objection on the ground of want of change, makes quite a collateral objection, that will be a good tender." But the tender of a £5 bank-note in payment of a debt of £3 10s., and requesting the creditor to make the change, and return the balance, has been held a bad tender. *Betterbee v. Davis*, 3 Camp. 70. And see *Robinson v. Cook*, 6 Taunt. 336; *Blow v. Russell*, 1 C. & P. 365. If however the creditor does not object to the request for change, but claims that more is due than the *whole amount* tendered, and therefore refuses to receive the tender, the tender is good. *Black v. Smith, Peake*, 88; *Cadman v. Lubbock*, 5 D. & R. 289; *Saunders v. Graham, Gow*, 121. And so if he refuses the tender merely on the ground that the debtor will not pay, with the surplus, another and distinct debt, or unless the debtor will fix his own counter claim against the creditor at a certain sum. *Bevans v. Rees*, 5 M. & W. 306. If a creditor has separate claims against divers persons for different amounts, a tender of one gross sum for the debts of all, will not support a plea of tender, stating that a certain portion of the whole sum was tendered for the debt of one. *Strong v. Harvey*, 3 Bing. 304. But a tender of one gross sum upon several demands from the same debtor, without designating the amount tendered upon each, is good. *Thetford v. Hubbard*, 22 Vt. 440.

one thing or another as the creditor may choose, the tender should be of both, that he may make his choice. (d)

A tender must be made at common law, on the very day the money is due, if that day be made certain by the contract. (e) But the statutes and usages of our States, (f) generally permit the tender to be made after that day, but before the action is brought; and in some it may be made after the action is brought. It has been said that a tender cannot be made before the debt is due, as the creditor is not then obliged to accept it, even if it does not draw interest. But we should be inclined to believe, that the courts of this country would, generally, hold a tender valid that was made before the debt was due, provided the debt did not draw interest, or if, when the debt did draw interest, the tender included interest to the maturity of the debt. (g)¹

To make a tender of money valid, the money must be actually produced and proffered, (h) unless the creditor expressly

(d) *Fordley's case*, 1 Leon. 68.

(e) *City Bank v. Cutter*, 3 Pick. 414; *Dewey v. Humphrey*, 5 Pick. 187; *Maynard v. Hunt*, id. 240; *Gould v. Banks*, 8 Wend. 562; *Day v. Lafferty*, 4 Pike, 450; and see *ante*, p. * 637, n. (n). Perhaps on a contract for the payment of money, simply, when interest would be the only damages to be recovered, a tender of the principal and interest, to the day of tender, might be sufficient, if made before action brought. But see *ante*, p. * 637, n. (n).

(f) This is the rule in Connecticut from usage. *Tracy v. Strong*, 2 Conn. 659.

(g) There can be no doubt that a tender of a debt due at a certain day, before such day, without tendering also interest up to the day of maturity, is bad, where the debt is drawing interest. *Tillot v. Britton*, 4 Halst. 120; *Saunders v. Frost*, 5 Pick. 267, per *Parker*, C. J. It is not so clear that if a debt is not drawing interest, tender of the debt before the day it is due and payable, is not good; and one case has expressly held it valid. *M'Hard v. Whetcroft*, 3 Harris & McH. 85.

(h) *Suckling v. Coney*, Noy, 74. This case is stated in the book as follows: "Upon a special verdict, upon payment for a redemption of mortgage, the mort-

gagor comes at the day and place of payment, and said to the said mortgagee, 'Here, I am ready to pay you the £200, which was of due money, and yet held it all the time upon his arm in bags; and adjudged no tender, for it might be counters or base coin for anything that appeared.' And Mr. Justice *Anderson* said: 'It is no good tender to say, I am ready,' &c. So in *Comyns's Digest*, *Pleader* (2 W.) 28, it is said, 'If issue be upon the tender, there must be an actual offer. The tender alleged must be legal, and therefore it is not sufficient to say *paratus fuit solvere*, without saying, *et obtulit*.' See also *Thomas v. Evans*, 10 East, 101; *Dickenson v. Shee*, 4 Esp. 68; *Kraus v. Arnold*, 7 J. B. Moore, 59; *Leatherdale v. Sweepstone*, 3 C. & P. 342; *Finch v. Brook*, 1 Scott, 70; *Glasscott v. Day*, 5 Esp. 48; *Brown v. Gilmore*, 8 Greenl. 107. It is at all events essential, that the debtor have the money ready to deliver. It is not sufficient that a third person on the spot has the money which he would lend the debtor, unless he actually consents to lend it. *Sargent v. Graham*, 5 N. H. 440; *Fuller v. Little*, 7 N. H. 535. The rule is thus laid down in *Bakeman v. Pooler*, 15 Wend. 637: To prove a plea of tender, it must appear that there was a production and manual offer of

¹ A tender of the sum due on a note, with a demand for the collateral security, made at the time the note is expressed to be due, both parties treating the debt as due, and the payee refusing the tender unless additional unsecured claims were paid, is a valid tender so as to sustain an action for conversion of the security, although the days of grace had not expired. *Wyckoff v. Anthony*, 90 N. Y. 442.

* or impliedly waives this production ; (i) and he does this * 643 by declaring that he will not receive it. (ii) And it has been held that if the creditor refuses to take, touch, or count money tendered to him of a certain amount, if he afterwards take the ground that it was less in amount, he must prove this. (ij) And it seems that the creditor may not only waive the actual production of the money, but the actual possession of it in hand by the debtor. But it has been held, in one case, that if a debtor has offered to pay, and is about producing the money, and is prevented by the creditor's leaving him, this is not a tender. (j) The debtor is not bound to count out the money, if he has it and offers it. (k)

the money, unless the same be dispensed with by some positive act or declaration on the part of the creditor; it is not enough that the party has the money in his pocket, and says to the creditor that he has it ready for him, and asks him to take it, without showing the money. A tender of the creditor's own overdue notes is equivalent to a tender in cash. *Foley v. Mason*, 6 Md. 37.

(i) The decisions are nice, and perhaps not altogether harmonious upon the point of what constitutes a waiver of the production and offer of the money, so as to render a tender valid. In *Reed v. Goldring*, 2 M. & S. 86, the agent of the debtor pulled out his pocket-book, and told the plaintiff if he would go to a neighboring public house he would pay the debt. The agent had the necessary amount in his pocket-book, but no money was produced. The creditor refused to take the amount. Yet this was held a good tender. On the other hand, in *Finch v. Brook*, 1 Scott, 70, the defendant's attorney called at the plaintiff's shop to pay him the debt, having the money in his pocket for that purpose, and mentioned the precise sum, and at the same time put his hand into his pocket for the purpose of taking out the money, but did not actually produce it, the plaintiff saying he could not take it. And, *seemle*, that this was a sufficient tender, the plaintiff having dispensed with the actual production of the money; but *quere* whether such dispensation ought not to have been specially pleaded. And in *Breed v. Hurd*, 6 Pick. 356, a witness told the plaintiff that the defendant had left money with him to pay the plaintiff's bill, and that if the defendant would make it right, by deducting a certain sum, he would pay it, at the same time making a motion with his hand towards his desk, at which he was then standing; and he

swores that he believed, but did not know, that there was money enough in his desk, but, if there was not, he would have obtained it in five minutes, if the plaintiff would have made the deduction; but the plaintiff replied that he would deduct nothing. *Held*, that this was not a tender. And, per *Curiam*, "To our surprise there are cases very nearly like this, where the offer was held to be a valid tender, as in *Harding v. Davies*, 2 Car. & P. 77, where a woman stated 'that she had the money up stairs.' Here the witness said he could get the money in five minutes. We all think this was not a tender. The party must have the money about him, whereabouts to make the tender, though it is not necessary to count it. We think there was not a tender here, even on the broad cases in England." See *Strong v. Blake*, 46 Barb. 227.

(ii) *Rudolph v. Wagner*, 36 Ala. 698.

(ij) *Brewers v. Fleming*, 51 Penn. 102.

(j) *Leatherdale v. Sweepstone*, 3 C. & P. 342. In this case, in order to prove the tender a witness was called, who stated that he heard the defendant offer to pay the plaintiff the amount of his demand, deducting 14s. 0*1/2*d., which balance was the sum stated in the plea; that the defendant then put his hand into his pocket, but before he could take out the money the plaintiff left the room, and the money was therefore not produced till the plaintiff had gone. Lord *Tenterden* held this no tender. But this was only a *Nisi Pruis* case, and may perhaps be questionable. For if a tender be designedly avoided by the creditor, he ought not to object that no tender was made. *Gilmore v. Holt*, 4 Pick. 25; *Southworth v. Smith*, 7 Cuss. 391.

(k) *Wheeler v. Knaggs*, 8 Ohio, 169, 372; *Behaly v. Hatch, Walker (Miss.)*, 369; *Breed v. Hurd*, 6 Pick. 356.

*644 *The tender must be unconditional; so, at least, it is sometimes said; but the reasonable, and we think the true rule is, that no condition must be annexed to the tender, (?) which the creditor can have any good reason whatever for objecting to; as, for instance, that he should give a receipt in full of all demands. (m) It may not perhaps be quite settled that if the

(l) In *Bevans v. Rees*, cited *supra*, n. (c), *Maule*, B., said: "No doubt a tender must be of a specific sum, on a specific account; and if it be upon a condition which the creditor has a right to object to, it is not a good tender. But if the only condition be one which he has no right to object to, and he has still power to take the money due,—as if the condition were, 'I will pay the money if you will take it up,' or the like,—that does not invalidate the tender. Here the defendant offers the plaintiff the option of taking any amount which he says is due, and only offers it in satisfaction of that amount; there is no condition therefore which the plaintiff has a right to object to."

(m) It has been often adjudged, that if the debtor demand a receipt *in full* this vitiates his tender. *Glasscott v. Day*, 5 Esp. 48, seems to be a leading case on this point. The sum claimed in the action was £20. The defendant pleaded non-assumpsit, except as to £18, and as to a tender. The witness for the defendant, who proved the tender, stated, that he went to the plaintiff with the money, which he offered to pay on the plaintiff giving him a receipt *in full*. The plaintiff refused to receive it. And Lord *Ellenborough* held this not to be a good tender. *Thayer v. Brackett*, 12 Mass. 450, is also in point. The real debt was \$190.25. Part of this debt had been paid by the note of a third person, which was indorsed by the debtor to the plaintiff. If this note had been paid at maturity, the defendant would still have been indebted to the plaintiff in the sum of \$40, which he tendered, but required a receipt *in full of all demands*. The creditor refused to give this, as the note was still unpaid, but offered to give a receipt *in full of all accounts*; whereupon the tender was withdrawn. *Parker*, C. J., said: "The defendant lost the benefit of his tender by insisting on a receipt *in full of all demands*, which the plaintiff was not obliged to give him. The defendant should have relied on his tender and upon proof at the trial that no more was due. But he withdrew the tender, because the plaintiff would not comply with the terms which accompanied it. This cannot be deemed

a lawful tender, and, according to the agreement of the parties, judgment must be entered for the plaintiff for the balance of his account and for his costs." And see *Loring v. Cooke*, 3 Pick. 48. *Wood v. Hitchcock*, 20 Wend. 47, is a strong case to this point. It is there held, that a tender of money in payment of a debt to be available must be without qualification, i. e., there must not be anything raising the implication that the debtor intended to cut off or bar a claim for any amount beyond the sum tendered; and it was accordingly held in this case, that the tender of a sum of money *in full discharge* of all demands of the creditor was not good. And *Cowen*, J., said: "Very likely the defendant when he made the tender owed the plaintiff in the whole more than eighty-five dollars, but has succeeded, by raising technical difficulties, in reducing the report to that sum. Independent of that, however, the tender was defective. It was clearly a tender to be accepted as the whole balance due, which is holden bad by all the books. The tender was also bad, because the defendant would not allow that he was even liable to the full amount of what he tendered. His act was within the rule which says he shall not make a protest against his liability. He must also avoid all counter-claim, as of a set-off against part of the debt due. That this defendant intended to impose the terms, or raise the inference that the acceptance of the money should be in full, and thus conclude the plaintiff against litigating all further or other claim, the referees were certainly entitled to say. That the defendant intended to question his liability to part of the amount tendered is equally obvious, and his object was at the same time to adjust his counter-claim. It is not of the nature of a tender to make conditions, terms, or qualifications, but simply to pay the sum tendered, as for an admitted debt. Interlarding any other object will always defeat the effect of the act as a tender. Even demanding a receipt, or an intimation that it is expected, as by asking, 'Have you got a receipt?' will vitiate. The demand of a receipt *in full* would of course be inadmissible." The reason of this rule is obvious where the debtor does

* debtor demands a receipt for the sum which he pays, * 645 and if this be refused, retains the money, he will thereby (though always ready to pay it on those terms) lose the benefit of his tender. But the authorities seem to go in this direction. It has been recently held in New York, that a tender is valid although accompanied with a condition, if this be one which the debtor had a right to make and the creditor had no right to resist. (mm)¹ If, however, a tender be refused on some objection quite distinct from the manner in which it was made, as for the insufficiency of the sum or any similar ground, objections arising from the form of the tender are considered as waived, and cannot afterwards be insisted upon. (n) The tender may certainly be accompanied with words explanatory of the transaction, if they impose no condition. (m)

The tender should be in money made lawful by the State in which it is offered. (o) But if it be offered in bank-bills which are current and good, and there is no objection to them at the time on the ground that they are not money, it will be considered so far an objection of form, that it cannot afterwards be advanced. (p)

It has been said in England, that by a tender is meant, not merely that the debtor was once ready and willing to pay, but that he has always been so and still is; and that the effect of it will therefore be destroyed if the creditor can show a demand by him of the proper fulfilment of the contract, at the proper time, and a refusal by the debtor. (q) It is possible that a demand and

not in fact tender all that is due; for if a debtor tenders a certain sum as all that is due, and the creditor receives it, under these circumstances it might compromise his rights in seeking to recover more; but if the same sum was tendered unconditionally, no such effect could follow. Sutton v. Hawkins, 8 C. & P. 259. The reason why a tender has so often been held invalid, when a receipt in full was demanded, seems not to have been merely because a receipt was asked for, but rather because a part was offered in full payment. See Cheminant v. Thornton, 2 C. & P. 50; Peacock v. Dickerson, 2 C. & P. 51, n.; Sandford v. Bulkley, 30 Conn. 344. It is believed that no case has gone so far as to hold that a tender would be bad because a receipt for the sum tendered was requested.

(mm) Wheelock v. Tanner, 39 N. Y. 481.

(n) Cole v. Blake, Peake, 179; Richardson v. Jackson, 8 M. & W. 298; Bull v. Parker, 2 Dowl. (N. S.) 345.

(nn) Foster v. Drew, 39 Vt. 51.

(o) Wade's case, 5 Rep. 114; Halowell v. Howard, 13 Mass. 235; Moody v. Mahurin, 4 N. H. 296.

(p) This may be fairly inferred from the case of Warren v. Mains, 7 Johns. 476; and see Ball v. Stanley, 5 Yerg. 199; Wheeler v. Knaggs, 8 Ohio, 172; Brown v. Dysinger, 1 Rawle, 408; Snow v. Perry, 9 Pick. 542; Towson v. Havre-de-Grace Bank, 6 Harris & J. 53.

(q) Dixon v. Clark, 5 C. B. 365; and see Cotton v. Godwin, 7 M. & W. 147.

¹ So a tender of money for certain logs, held under a lien, may be coupled with a demand for an order on the person in charge of the logs to make delivery. Johnson v. Cranage, 45 Mich. 14.

refusal may in some cases have the effect of annulling a tender, even if they take place before the tender was * made ; although, as has been said, generally, if not universally, in this country, a tender is valid and effectual if made at any time after a debt is due ; and a demand made after the tender, if for more than the sum tendered, will not avoid the tender. (r)

Any tender made may be refused, and, if left with the party against his will, it is ineffectual ; but if it is so left, and when afterwards demanded by the tenderer is refused, it is then valid. (rr)

2. OF THE TENDER OF CHATTELS.

The thing to be tendered may not be money, but some specific article ; and the law in relation to the delivery of these under a contract, has been much discussed, and is not perhaps yet quite settled. We have alluded to some of the questions which this topic presents, when speaking of sales of chattels. Others remain to be considered.

It may be considered as settled, that acts which would constitute a sufficient tender of money, will not always have this effect in relation to chattels. Thus, if one who is bound to pay money to another at a certain time and place, is there with the money in his pocket for the purpose of paying it, and is prevented from paying it only by the absence of the payee, this has the full effect of a tender. (s) But if he is bound to deliver chattels at a particular *time* and *place*, it may not be enough if he has them there. They may be mingled with others of the like kind which he is not to deliver. Or they may need some act of separation, or identification, or completion, before they could become the property of the other party. (t) As in sales, * the property in chattels

(r) *Thetford v. Hubbard*, 22 Vt. 440. Certainly not, if the demand is for more than the real debt, although the excess was for another debt truly due. *Dixon v. Clark*, 5 C. B. 378. And see *Brandon v. Newington*, 3 Q. B. 915; *Hesketh v. Fawcett*, 11 M. & W. 356; apparently overruling *Tyler v. Bland*, 9 M. & W. 338.

(rr) *Rogers v. Rutter*, 10 Gray, 410.
(s) *Gilmore v. Holt*, 4 Pick. 258; *Southworth v. Smith*, 7 Cush. 391.

(t) *Veazy v. Harmony*, 7 Greenl. 91; *Wyman v. Winslow*, 2 Fairf. 398; *Lebällister v. Nash*, 24 Me. 316; *Bates v. Churchill*, 32 Me. 31; *Bates v. Bates*, 5 Walker, 401; *Newton v. Galbraith*, 5

Johns. 119. In this last case a note was payable in produce at the maker's house. The defendant pleaded payment, and proved that he had hay in his barn, and was there ready to pay, and the plaintiff did not come for it. He did not prove how much he had, nor its value. Held, no payment, nor tender. So in *Barney v. Bliss*, 1 D. Chip. 399, the Supreme Court of Vermont held, that a plea that the debtor had the property ready at the time and place, and there remained through the day, ready to deliver it, but that the creditor did not attend to receive it, and that the property is still ready for the creditor, if he will receive it, was not suf-

does not pass while any such act remains to be done; so, if there be an obligation to deliver these articles, it may be said, as a general rule, that the obligation is not discharged so long as anything is left undone which would prevent the property from passing under a sale. That is, it is no tender, unless so much is done that the other party has nothing to do but signify his acceptance, in order to make the property in the chattels vest at once in him. An exception would doubtless be made to this rule, in reference to chattels which could be ascertained and specified by weight, measure, or number. If one, bound to deliver twenty bushels of wheat at a certain time and place, came there with fifty bushels in his *wagon, all of the same quality, and in one * 648

ficient to discharge the contract, and vest the property in the payee. The debtor ought to have gone further, and set apart the chattels (boards), so that the payee could have identified and taken them. See also *Barns v. Graham*, 4 Cowen, 452; *Smith v. Loomis*, 7 Conn. 110. This last case denies to be sound law the case of *Robbins v. Luce*, 4 Mass. 474, in which the defendant had contracted to deliver the plaintiff 27 ash barrels, at the defendant's dwelling-house, on the 20th Sept. 1804. Being sued on the contract, the defendant pleaded in bar, that on the day he had the 27 barrels at his dwelling-house ready to be delivered, and had always had the same ready for delivery. The plea did not aver that the plaintiff was not there to receive them, but the plea was still held good on special demurrer. See also *Robinson v. Batchelder*, 4 N. H. 40; and *Brown v. Berry*, 14 N. H. 459, which tends to support *Robbins v. Luce*. In *M'Connel v. Hall*, Brayton, 228, the Supreme Court of Vermont held, that the promise to pay the plaintiff a wagon to be delivered at the defendant's store, was not complied with by the fact that the defendant had the wagon at the time and place ready to be delivered, according to the contract. But the question here arose under the *general issue*, and the court held, that the fact of readiness and willingness did not support the fact of payment or discharge of the contract; but the case does not decide that the defendant, had he pleaded in bar, that he was ready at the time and place to deliver the wagon, and that the plaintiff was not there to receive it, must have also proved that he so designated and set apart the wagon as to vest the property in the plaintiff. The same distinction between the defence of payment, and a defence founded upon special matter pleaded in bar, was recog-

nized in the subsequent case of *Downer v. Sinclair*, 15 Vt. 495. There the defendant had agreed to deliver at his shop, and the plaintiff had agreed to receive, certain "winnowing mills" in discharge of a debt. A part had been delivered and received at said shop, and their value indorsed on the claim. On the day the remainder were due the plaintiff called at the defendant's shop for them, but did not find the defendant at home, and went away without making any demand. On the same day the defendant returned, and being informed what had taken place, set apart for the plaintiff the number of mills requisite to complete the contract. These mills had ever since remained so set apart; the plaintiff never called again, but brought suit upon his original claim. The court held, that these facts would not support a plea of payment, since they were not given and received by the creditor, but that they would be a special defence to the action, and gave judgment for the defendant. See *Mattison v. Weescott*, 13 Vt. 258; *Gilman v. Moore*, 14 Vt. 457. But if a plea of readiness and willingness to perform, amounts to a defence, the plea should be full and positive; it should leave nothing open to inference. Thus in *Savary v. Goe*, 3 Wash. C. C. 140, the contract was to deliver to the plaintiff a quantity of whiskey in the month of May, 1809. The defendant being sued on the contract, pleaded that he was ready and willing at the time and place agreed upon to deliver the whiskey, according to the terms of the contract; but that the plaintiff was not then and there ready to accept the same; but the plea did not state that the defendant was at the place, in person or by agent, ready and prepared to deliver the whiskey, and for this omission the plea was held insufficient.

mass, with the purpose of measuring out twenty bushels ; and was prevented from doing so only by the absence of the promisee, this must be a sufficient tender. It is not necessary that the chattels should be so discriminated that they might be described and identified with the accuracy necessary for a declaration in trover ; because, except in some instances to be spoken of presently, the promisee does not acquire property in the chattels by a tender of them which he does not accept. He may still sue on the contract ; and to this action the promisor may plead a tender, and "that he always has been and now is ready" to deliver the same ; and then the promisee may take the goods and they become his property, and the contract is discharged. But the promisor need not plead the tender unless he choose to do so. He may waive it, and then the promisee recovers only damages for the breach of the contract, and acquires no property in the chattels.

When a tender is pleaded with a profert, the defendant should have the article with him in court. But this would be sometimes inconvenient, in the case of very bulky articles, and sometimes impossible. A reasonable construction is therefore given to this requirement ; and it is sufficient if the defendant be in actual possession of the article, and ready to make immediate delivery to the plaintiff, in a manner reasonably convenient to him. (*u*) In such case, however, it was a rule of the old law, and the reason would seem to exist now, that it should be averred in the plea that the thing cannot, by reason of its weight, conveniently be brought into court. (*v*)

The tender must be equally unconditional as if of money. It may be made to an agent, or by an agent ; but if the agent of the deliverer has orders to deliver the chattels to the receiver only if he will cancel and deliver up the contract, this is not a tender, although such agent had the chattels at the proper time and place. (*w*)

It is a good defence *pro tanto* to such a contract, that the * 649 * plaintiff accepted a part of the articles before the day specified in the contract ; (*x*) or that there was an agreement between the parties, which may be by parol, that the chattels should be delivered at another time and place, and that the plain-

(*u*) Bro. Abr. tit. *Tout temps prist*, pl. 3 ; 2 Rol. Abr. 524.

(*v*) Id.

(*w*) Robinson *v.* Batchelder, 4 N. H. 40.

(*x*) Id.

tiff was there, wholly ready to deliver them; (*y*) or that the defendant knew that the articles were delivered at another time and place, and did not dissent or object. (*z*)

Generally, if no time or place be specified, the articles are to be delivered where they are at the time of the contract, (*a*)¹ unless collateral circumstances designate a different place. (*b*) If the time be fixed, (*c*)² but not the place, then it will be presumed that the deliverer was to bring the articles to the receiver at that time; and, for that purpose, he must go with the chattels to the residence of the receiver, (*d*) unless something in their

* very nature or use, or some other circumstances of equivalent force, distinctly implies that they are to be left at some * 650

(*y*) *Id.*

(*z*) *Flagg v. Dryden*, 7 Pick. 53.

(*a*) *Bronson v. Gleason*, 7 Barb. 472; *Barr v. Myers*, 3 Watts & S. 295, a sale of 2,000 mulberry trees. The reason is, that the party to receive is to be the actor, by going to demand the articles; and until then, the other party is not in default by omitting to tender them. See also *Thaxton v. Edwards*, 1 Stew. 524; *McMurtry v. The State*, 6 Ala. 326; *Minor v. Michie, Walker*, 24; *Chambers v. Winn, Hardin*, 80, n.; *Dandridge v. Harris*, 1 Wash. (Va.) 326. A note payable in specific articles, without mentioning time or place, is payable only on demand, and should be demanded at the place where the property is. *Lobdell v. Hopkins*, 5 Cowen, 518; *Vance v. Bloomer*, 20 Wend. 196. In *Rice v. Churchill*, 2 Denio, 145, a note was given by the owner of a saw-mill, payable in lumber, when called for. It was held to be payable at the maker's mill, and that a special demand there was necessary to fix the maker, unless he had waived the necessity thereof.

(*b*) Thus, in *Bronson v. Gleason*, 7 Barb. 472, while the general rule was admitted, that the store of the merchant, the shop of the mechanic, or manufacturer, and the farm or granary of the farmer, is the place of delivery when the contract is silent on the subject; this rule was held inapplicable when the collateral circumstances indicated a different place. It was there held, that where goods are a subject of general commerce, and are purchased in large quantities for reshipment, and the purchaser resides at the place of reship-

ment, and has there a storehouse and dock for that purpose, a contract to deliver such purchaser "400 barrels of salt in *good order*, before the first of November," meant a delivery at the purchaser's place of residence.

(*c*) If the time fall on Sunday, tender on Monday is good. *Barrett v. Allen*, 10 Ohio, 426; *Stebbins v. Leowolf*, 3 Cush. 137; *Sands v. Lyon*, 18 Conn. 18; *Avery v. Stewart*, 2 id. 69; *Salter v. Burt*, 20 Wend. 205. — Questions often arise as to the *time of day* at which a tender may, or must be made. It seems that the debtor must have the property at the place agreed upon, at the last convenient hour of that day. See *Tierman v. Napier*, 5 Yerg. 410; *Aldrich v. Albee*, 1 Greenl. 120; *Savary v. Goe*, 3 Wash. C. C. 140. Unless by the acts of the parties this is waived. In *Sweet v. Harding*, 19 Vt. 587, a note was payable in grain, "*in January*." Tender was made early in the evening of the last day of that month, *but the payee was absent*. The tender or separation of the grain was at the debtor's own dwelling-house (where by the contract it was to be delivered), and the payee did not know of it. The tender was held to be too late, and no defense to the contract. But rent may be tendered to the lessor personally on the evening it falls due. *Id.* And see *Startup v. Macdonald*, 2 Scott, N. R. 485.

(*d*) *Barr v. Myers*, 3 Watts & S. 295; *Roberts v. Beatty*, 2 Penn. 63. In such cases the creditor has the right to appoint the place of delivery. *Aldrich v. Albee*, 1 Greenl. 120

¹ See *Edwards v. Hartt*, 66 Ill. 71.

² A tender must be made before sunset, so that the act may be completed by day light; but if made after sunset, it is good if the party to receive is present. *Hall v. Whittier*, 10 R. I. 530.

other place. (e) And it may happen, from the cumbrousness of the chattels, or other circumstances, that it is obviously reasonable and just for the deliverer to ascertain from the receiver, long enough beforehand, where they shall be delivered; and then he will be held to this as a legal obligation. (f) So too, in such a case, the receiver would have the right to designate to the deliverer, a reasonable time beforehand, a place of delivery reasonably convenient to both parties, and the deliverer would be bound by such direction. (g) If no place is indicated, and the deliverer is not in fault in this, he may deliver the chattels to the receiver, in person, at any place which is reasonably convenient. (h) And if the deliverer be under an obligation to seek or notify the receiver, he need not follow him out of the State for this purpose, for he is only bound to reasonable diligence and efforts. (i) And if the receiver refuses or neglects to appoint a place, or purposely avoids receiving notice of a place, the deliverer may appoint any place, with a reasonable regard to the convenience of the other party, and there deliver the articles. (j) But though he is not obliged to follow the receiver out of the State, yet if the receiver live out of the State, or even out of the United States, this perhaps does not exempt him from the obligation of inquiring from him where the chattels shall be delivered; (k) and the same rule * 651 seems to hold if the * promisor lives out of the United States and the promisee within. (l)

If no expression used by the parties, and nothing in the nature of the goods or the circumstances of the case, controls the presumption, then the place where the promise is made is the place where it should be performed. Nor will an action be main-

(e) If the time be fixed, and by the contract the payee has his election of the place, he must notify the payor of his election in a reasonable time before the day of payment, or the payor may tender the articles at any reasonable place, and notify the payee thereof. The right of the payee to elect the place of delivery in such cases, is not a condition precedent, but a mere privilege, which he may waive by a neglect to exercise it. *Peck v. Hubbard*, 11 Vt. 612; overruling *Bassett v. Kerne*, 1 Leon. 69; and see *Taylor v. Gallup*, 8 Vt. 340; *Townsend v. Wells*, 3 Day, 327; *Russell v. Ormabee*, 10 Vt. 274; *Livingston v. Miller*, 1 Kern. 80. And see *Gilbert v. Danforth*, 2 Seld. 585.

(f) *Co. Litt. 210, b; Barr v. Myers*, 3

Watts & S. 295; *Howard v. Miner*, 20 Me. 325; *Bixby v. Whitney*, 5 Greenl. 192; *Bean v. Simpson*, 16 Me. 49; *Mingus v. Pritchett*, 3 Dev. 78; *Roberts v. Beatty*, 2 Penn. 63.

(g) *Howard v. Miner*, 20 Me. 325; *Aldrich v. Albee*, 1 Greenl. 120.

(h) *Howard v. Miner*, 20 Me. 325.

(i) *Co. Litt. 210; Smith v. Smith*, 25 Wend. 408; 2 Hill, 351; *Howard v. Miner*, 20 Me. 325.

(j) *Id.*

(k) *Bixby v. Whitney*, 5 Greenl. 192.

(l) *White v. Perley*, 15 Me. 470. But *quare* if the two preceding cases can be reconciled with the cases and authorities cited *supra*, n. (i).

able upon such a promise, without evidence that the promisee was ready at that place and at the proper time to receive the chattel, or that the promisor was unable to deliver it at that place and time. (m) The plaintiff must show a demand or a readiness to receive, and notice equivalent to a demand, or else that the demand must have been nugatory, because the defendant could not have complied with it.

If the promise be to pay money at a certain time, or deliver certain chattels, it is a promise in the alternative; and the alternative belongs to the promisor. (n) He may do either the one or the other, at his election; nor need he make his election until the time when the promise is to be performed; but after that day has passed without election on his part, the promisee has an absolute right to the money, and may bring his action for it. (o)

* A contract to deliver a certain quantity of merchandise * 652 at a certain time, means, of course, to deliver the whole then; (p) and such is its meaning, though the delivery is to be

(m) But in a note payable in specific articles at a certain time and place, it has been held, the plaintiff may maintain his action without proving a demand at the time and place. If the defendant was there ready and willing to comply with the contract, that might be a good defence to the action; but that must come in by way of defence; and on failure of such proof, the plaintiff may recover the amount of his note in money. Fleming v. Potter, 7 Watts, 380. And see Thomas v. Roosa, 7 Johns. 461; Townsend v. Wells, 3 Day, 327; White v. Perley, 15 Me. 470; Games v. Manning, 3 Greene, 251.

(n) A promise to pay a certain sum in money, at a certain time, but "which may be discharged in good leather," is a conditional contract, leaving the debtor the option of paying in that manner if he elect, at the time of payment. It is a condition for the debtor's benefit, and he should notify the other party of his desire to pay in leather, or the right to the money becomes absolute. Plowman v. McLane, 7 Ala. 775. If the leather rises in value, the debtor is not bound to pay in that article. Id. If the specific property is not delivered at the time and place agreed upon, and this without the fault of the payee, his right to recover the money is absolute. Stewart v. Donnelly, 4 Yerg. 177. And the payee is not bound to receive the property before the day of payment. Orr v. Williams, 5 Humpf. 423. In Gilman v. Moore, 14 Vt. 457, the note was payable "in the month of February;" the property was

set apart on the last day of January, and kept there in a suitable condition from that time through the month of February. The tender was adjudged sufficient to pass the property and extinguish the debt.

(o) Townsend v. Wells, 3 Day, 327. This was an action on a note for \$80, payable in rum, sugar, or molasses, at the election of the payee, within eight days after date. It was held not necessary to prove that the payee made his election and gave notice thereof to the maker, but that if the defendant did not tender either of the articles within eight days, he became immediately liable on his note, and the amount might be recovered in money. And see Roberts v. Beatty, 2 Penn. 63; Wiley v. Shoemak, 2 Greene, 205; Church v. Peterow, 2 Penn. 301; Vanhooser v. Logan, 3 Scam. 389; Elkins v. Parkhurst, 17 Vt. 105. If a promise be in the alternative to deliver one article at one place, or another article at another place, at the election of the debtor, he ought to give the creditor reasonable notice of his election. Aldrich v. Albee, 1 Greenl. 120.

(p) Roberts v. Beatty, 2 Penn. 63. If, however, the party accepts a part without objection, he thereby disaffirms the entirety of the contract, and is liable to pay for so much as he receives. Id.; Oxendale v. Wetherell, 9 B. & C. 386; Booth v. Tyson, 15 Vt. 515; Bowker v. Hoyt, 18 Pick. 555. Deducting, it seems, any damage sustained by the non-fulfilment of the contract. Id. And see ante, p. *519 et seq.

made on an event which may happen at one time as to one part, and at another time as to another ; as on its arrival at a certain port; for, if a part only arrives there, the promisor is not bound to deliver, (*q*) nor if he tenders is the promisee bound to receive such part. The contract is entire, and the obligation of each party is entire. But as it is certainly competent for them to contract that a part shall be delivered at one time, and a part at another, so this construction may be given to a contract, either by its express terms, or by such facts and circumstances in the transaction, or in the nature of the chattels to be delivered, as would distinctly indicate this as the meaning and intention of the parties.

Whenever chattels are deliverable by contract on a demand, this demand must be reasonable; that is, reasonable in time, and place, and manner. (*r*) And the conduct of the promisor will always receive a reasonable construction. Thus, in general, if a proper demand be made upon him, his silence will be held equivalent to a refusal to deliver the chattels. (*s*) And by application of the same universal principle, all the obligations of both parties receive a reasonable construction. Thus, if the promise be to do within a certain time a certain amount of labor on materials furnished, they must be furnished in season to permit that work to

be done within that time, by reasonable exertions. (*t*) And

* 653 if certain work is to be done, that certain * other work may be done, all to be completed and the whole delivered within a certain period, the work first to be done, must be finished early enough to permit the other work to be done in season. (*u*)

If, by the terms of the contract, certain specific articles are to be delivered at a *certain time* and *place*, in payment of an existing debt, this contract is fully discharged, and the debt is paid, by a complete and legal tender of the articles at the time and place, although the promisee was not there to receive them, and no action can be thereafter maintained on the contract. (*v*)¹

(*q*) *Russell v. Nicoll*, 3 Wend. 112.

this last case the *time of the delivery* was

(*r*) *Higgins v. Emmons*, 5 Conn. 76.

rendered certain by the contract, but no

(*s*) *Higgins v. Emmons*, 5 Conn. 76.

place. The debtor tendered the property

And see *Dunlap v. Hunting*, 2 Denio, 643.

at the place where it was (it being cum-

(*t*) *Clement v. Clement*, 8 N. H. 210.

brous articles); but the creditor refused

See also *Goodwin v. Holbrook*, 4 Wend.

to receive it there, and then appointed

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another place, but the same not being

(*u*) *Clement v. Clement*, 8 N. H. 210.

delivered, he brought his action on the

(*v*) *Mitchell v. Merrill*, 2 Blackf. 87;

contract, which was either to deliver the

Slingerland v. Morse, 8 Johns. 474. In

property or pay a certain sum of money.

¹ See *Council Bluffs Iron Works v. Cuppey*, 41 Ia. 104.

* But the property in the goods has passed to the creditor, * 654 and he may retain them as his own. (w) These two things

The tender was held to be a *bar* to the action, and the creditor was held bound to resort to the specific articles tendered, and to the person in whose possession they were. See also *Curtis v. Greenbanks*, 24 Vt. 536; *Zinn v. Rowley*, 4 Barr, 169; *Gaines v. Manning*, 2 Greene, 254. *Garrard v. Zachariah*, 1 Stew. 272, is to the same effect. *Case v. Green*, 5 Watts, 262, is a strong case to the same point. There the creditor was prevented by sickness from attending at the time and place designated to receive the articles. The debtor had the property there, and left it on the ground. The creditor afterwards brought suit on the *contract*, and the tender was *held* a good bar. *Parke, B.*, in *Startup v. Macdonald*, 6 M. & G. 625, said: "Where a thing is to be done anywhere, a tender a convenient time before midnight is sufficient; where the thing is to be done at a particular place, and where the law implies a duty on the party to whom the thing is to be done to attend, that attendance is to be by daylight, and a convenient time before sunset." See also *Lamb v. Lathrop*, 13 Wend. 95, which holds, that if the tender be not accepted, the creditor cannot, by a subsequent demand and refusal, revive his right to sue upon the contract; for the debtor is not bound, as in tender of money, to keep his tender always ready. After such tender he is but a *bailee* of the property for the creditor, and his rights and duties are the same as those of other bailees. Some cases hold, that a tender under the circumstances stated in the text, must always be kept good, and that a plea averring that the debtor was ready at the time and place to deliver the articles, but that the payee did not come to receive them, is bad, for not averring that the debtor was always and still is ready to deliver the same. *Nixon v. Bullock*, 9 Yerg. 414; *Tiernan v. Napier, Peck*, 213; *Miller v. McClain*, 10 Yerg. 245; and *dicta* in *Roberts v. Beatty*, 3 Penn. 63. But this, as we have seen, is not the generally recognized rule. The tender, however, must be such as to vest the property in the creditor. The articles should be so set apart, and designated, as to enable the payee to distinguish and know them from all others. The absence of the payee alone will not dispense with such designation and separation by the debtor. The fact that the latter had the articles at the time and place, *ready* to be delivered if the other party had been present, is not alone a sufficient tender to vest the property in

the other party, or to bar an action on the contract. *Smith v. Loomis*, 7 Conn. 110. In this case *Peters, J.*, said: "Though we find much confusion and contradiction in the books on this subject, our own practice seems to have been uniform for nearly sixty years, and establishes these propositions: 1. That a debt payable in specific articles, may be discharged by a tender of these articles, at the proper time and place. 2. That the articles must be set apart and designated so as to enable the creditor to distinguish them from others. 3. That the property so tendered vests in the creditor, and is at his risk. 4. That a tender may be made in the absence of the creditor." And see *M'Connell v. Hall, Brayton*, 223; *Newton v. Galbraith*, 5 Johns. 119; *Barns v. Graham*, 4 Cowen, 452; *Nichols v. Whiting*, 1 Root, 443. After such tender, the property vests in the creditor, and he may maintain trover for the same. *Rix v. Strong*, 1 Root, 55.

(w) See preceding note. In the celebrated case of *Weld v. Hadley*, 1 N. H. 295, a different doctrine was declared. It was there *held*, that when a creditor, to whom a tender of specific articles is made in pursuance of a contract, refuses to accept the tender, he acquires no property in the articles tendered, though the contract is discharged by such tender. That was an action of trover for leather. It appeared that Hadley gave Weld a note, dated August 9, 1808, for 300 dollars, payable in good merchantable leather at cash price, in two years from January 1, 1809. When the note became due, Hadley tendered to the plaintiff a quantity of leather; but a dispute arose as to the price of leather, and Weld thinking the quantity not sufficient to pay the note, refused to receive it, and Hadley took it away and used it. Weld then brought a suit upon the note; Hadley pleaded the tender in bar, and issue being joined upon the tender, the jury found that a sufficient quantity was tendered, and judgment was rendered in favor of Hadley. After that suit was determined, Weld demanded the leather of the defendant, and tendered the expenses of keeping. Hadley refused to deliver the leather, and thereupon this suit was brought. The case was argued with great ability on both sides. And *Richardson, C. J.*, in delivering the judgment of the court, said: "The plaintiff cannot prevail in this action, unless he has shown a legal title to the leather, which is the subject of contest, vested in

* 655 go * together. If the contract and its obligation are discharged by the tender, the property in the chattels passes by the tender; and on the other hand, if the property passes by the tender, the contract is discharged. And therefore, whenever a tender would discharge the contract, it must be so complete and perfect, as to vest the property in the promisee, and give

himself. The question then to be decided is, whether upon the tender of the leather by the defendant in pursuance of his contract, the property vested in the plaintiff, notwithstanding his refusal to accept it. It therefore becomes necessary to look into the nature and consequences of a tender and refusal. In some cases the debt or duty is discharged by a tender and refusal; and in other cases it is not. . . . In an obligation with condition for the delivery of specific articles, a tender and refusal of the articles is a perpetual discharge. Thus, if man make an obligation of £100, with condition for the delivery of corn, timber, &c., or for the performance of an award, or the doing of any act, &c., this is collateral to the obligation, and a tender and refusal is a perpetual bar. Co. Litt. 207; 9 Co. 79, H. Peytoe's case. So if a man be bound in 200 quarters of wheat for delivery of 100 quarters of wheat, if the obligor tender at the day the 100 quarters, he shall not plead *uncore priste*, because albeit it be parcel of the condition, yet they be *bona perfitura*, and it is a charge for the obligor to keep them. Co. Litt. 207. From a remark of Coke upon this example of an obligation for the delivery of wheat, it is very clear, that he was of opinion that the obligee had no remedy to recover the wheat tendered. For he says, 'and the reason wherefore in the case of an obligation for the payment of money, the sum mentioned in the condition is not lost by the tender and refusal, is not only for that it is a duty and parcel of the obligation, *and therefore* is not lost by the tender and refusal, but also for that the obligee hath remedy by law for the same.' This remark has no point whatever, unless the wheat is to be considered as lost by the tender and refusal. In the case of an obligation or contract for the delivery of specific articles, &c., the duty is not discharged by a tender or refusal, because any title to the thing tendered vests in him who refuses it, for in that case the condition or contract must be considered as performed, and should be so pleaded, but because the defendant having done all in his power to perform the condition or contract, and having been prevented by the fault of the other party, the non-performance is by law excused. This

is evident from many cases that are to be found in the books." The learned judge then cites and comments on several cases, and continues, "It is believed, that it may with great safety be affirmed that there is nothing in the English books, nor in the decisions of our own courts, that gives the least countenance to the supposition, that when specific articles are tendered and refused, the property still passes. It seems, however, that a different opinion formerly prevailed in Connecticut. 1 Root, 55 and 443; 1 Swift's Syst. 404. But it seems to have been formed without due consideration, and stands wholly unsupported by authority. Nor are we able to learn, either from Swift or Root, the grounds of the decision. It also seems from some remarks made by individual judges in the case of *Slingerland v. Morse*, 8 Johns. 474; and in *Coit et al. v. Houston*, 3 Johns. Cas. 243, that an opinion is entertained in New York that property may pass upon a tender and refusal. But in neither of those cases was that the point before the court, and although we entertain the highest respect for the talents and legal learning of the judges who seem to have intimated such an opinion, we cannot rely upon their *obiter dicta* on points not before them, in opposition to the whole current of authorities from the earliest times. . . . Had the plaintiff been well advised, he would not have rejected the tender at the risk of his debt, but would have received the leather and indorsed the quantity upon the note. He might then have brought an action upon the note to recover the balance, and have settled the question without incurring any hazard but that of costs. But he saw fit to take a different course. This was probably done through an innocent mistake, and if so, it was his misfortune, but cannot alter the law. However innocent the mistake may have been he has no right to ask an indemnity from the defendant, who seems to have been in all things equally innocent. And as he chose to exact of the defendant a rigid compliance with the terms of the contract, he must not complain if the defendant now chooses to shield himself under the rigid rules of the law." But this decision has not been approved of, and it probably would not now be considered as law in any jurisdiction.

him instead of the *jus ad rem* which he loses, an absolute *jus in re*.

If there be a contract to deliver wares or goods which are merchandise, and belong to a certain trade, this means wares or goods of the kind, fashion, and quality in common use in that trade, and not such as are antiquated and unsalable. (x) And the kind and quality of the goods should be such as would be necessary to make a sale of them legal. (y)

*3. OF THE KIND OF PERFORMANCE.

* 656

When the defence against an action on a contract is performance, the question sometimes arises whether the performance relied upon has been of such a kind as the law requires. The only general rule upon this point is, that the performance must be such as is required by the true spirit and meaning of the contract, and the intention of the parties as expressed therein. A mere literally accurate performance may wholly fail to satisfy the true purpose of the contract; and such a performance is not enough, if the true purpose of the contract can be gathered from it, according to the established rules of construction. Thus a contract for the conveyance of real estate, is satisfied only by a valid conveyance with good title. (z) But if the contract expresses and defines the exact method of conveyance, and that method is accurately fol-

(x) Dennett v. Short, 7 Greenl. 150.

(y) Thus when a statute required all leather offered for sale to be stamped G. or B., a tender of unstamped leather is not sufficient. Elkins v. Parkhurst, 17 Vt. 105. So if the law requires the article to be packed in a certain manner. Clark v. Pinney, 7 Cowen, 681. A contract to deliver *good coarse salt* is fulfilled by a delivery of coarse salt of a medium quality, of the kind generally used at the place and time of delivery. Goss v. Turner, 21 Vt. 437. In Crane v. Roberts, 5 Greenl. 419, there was a contract to deliver such hay as B should say was "*merchantable*." That which he did deliver, B called "a fair lot, say merchantable, not quite so good as I expected; the outside of the bundles some damaged by the weather." — *Held*, no compliance with the contract.

(z) Smith v. Haynes, 9 Greenl. 128. Here the agreement was "to sell certain land." It was held to be an agreement also to "convey" the land; but it was not determined whether the deed should contain a warranty or not. In Brown v.

Gammon, 14 Me. 276, the contract was "to convey a certain tract of land, the title to be a good and sufficient deed;" and this was held to be a contract to give a good title by deed. Lawrence v. Dole, 11 Vt. 549, bears upon the same point. It was there held, that if the contract be "to convey the land by a deed of conveyance," for a stipulated price, this is not fulfilled by executing a deed of conveyance merely. The party must be able to convey such a title as the other party had a right to expect, and this is to be determined by the fair import of the terms used with reference to the subject-matter. Redfield, J., said: "The contract is, not to execute a deed merely, but to convey, by a deed, &c., a certain tract of land. Could language be more explicit? What is implied in conveying land? Surely, that the title shall be conveyed." But it has been held in Ohio, that a contract for a *good title* was discharged by a tender of a quitclaim deed, the grantor having the whole title. Pugh v. Chesebeldine, 11 Ohio, 109.

lowed, although no good title passes, this is a sufficient performance. (a) But if the expression is, "a good and sufficient deed," the deed must not only be good and sufficient of itself, but it must in fact convey a good title to the land, because otherwise it would not be sufficient for the purpose of the contract. (b)

* 657 * If the contract be in the alternative, as to do a thing on one day or another, or in one way or another, the right of election is with the promisor, if there be nothing in the contract to control the presumption. (c)¹ It is an ancient rule, that "in case an election be given of two several things, always he that is the first agent, and which ought to do the first act, shall have the election." (d) But this same rule may give the election to the promisee, if something must first be done by him to create the

(a) *Hill v. Hobart*, 16 Me. 164; per *Redfield*, J., in *Lawrence v. Dole*, 11 Vt. 554. In *Tinney v. Ashley*, 15 Pick. 546, the obligors undertook to execute and deliver a "good and sufficient warranty deed" of certain land; and the court held, that the words "good and sufficient" were to be applied to the deed and not to the title, and that the condition was performed by making and delivering a deed good and sufficient in *point of form* to convey a good title, the remedy for any defect being upon the covenant of warranty in the deed; but see next note.

(b) *Tremain v. Liming*, Wright, 644. It was held that the words "good and sufficient deed" meant a deed of warranty conveying a fee-simple; and a deed without warranty, and not signed by the obligor's wife, was held no compliance with the contract. In *Hill v. Hobart*, 16 Me. 164, the contract was to make and execute "a good and sufficient deed to convey the title"; this was held not to be performed unless a good title passed by the deed. In this case also the distinction in the text was recognized, that if the contract is for the *conveyance* of land, or for a *title* to it, performance can be made only by the conveyance of a good title. But when it stipulated only for a deed, or for a conveyance by a deed described, it is performed by giving such a deed as is described, however defective the title may be. That the words "good and suf-

ficient," when used as descriptive of a deed, have reference to the title to be conveyed, and not to the mere form of the deed, see *Fletcher v. Button*, 4 Comst. 396; *Clute v. Robinson*, 2 Johns. 595; *Judson v. Wass*, 11 Johns. 525; *Stow v. Stevens*, 7 Vt. 27. But see *Aiken v. Sanford*, 5 Mass. 494; *Gazley v. Price*, 16 Johns. 268; *Parker v. Parmele*, 20 id. 130; *Stone v. Fowle*, 22 Pick. 166. See also *Tinney v. Ashley*, 15 Pick. 546, cited in preceding note. In this last case the court lay considerable stress on the fact that the deed was to contain a covenant of warranty, which showed that the party intended to look at that as his muniment of title.

(c) *Smith v. Sanborn*, 11 Johns. 59; *Layton v. Pearce*, Doug. 16, per Lord *Manfield*; *Small v. Quincy*, 4 Greenl. 497. In this case A contracted to deliver "from one to three thousand bushels of potatoes," and he was allowed the right to deliver any quantity he chose within the limits of the contract. And see *M'Nitt v. Clark*, 7 Johns. 465; 13 Edw. IV. 4 pl. 12. If the contract is to do one of two things by a given day, the debtor has until that day to make his election; but if he suffer that day to pass without performing either, his contract is broken and his right of election gone. *Choice v. Moesly*, 1 Bailey, 136; *M'Nitt v. Clark*, 7 Johns. 465.

(d) *Co. Litt. 145, a.* And see *Norton v. Webb*, 36 Me. 270.

¹ Money lent "for the term of nine or six months" is at the option of the borrower. *Reed v. Kilburn Co-operative Society*, L. R. 10 Q. B. 264. *Brandt v. Lawrence*, 1 Q. B. D. 344, decided that a contract for the shipment of a specified quantity of grain, "by steamer or steamers," within a certain time, contemplated its shipment in parcels, and therefore the purchaser was bound to accept a parcel shipped in time, although the remainder was shipped too late. See *Reuter v. Saha*, 4 C. P. D. 239.

alternative. (e) If one branch of the alternative becomes impossible, so that the promisor has no longer an election, this does not destroy his obligation, unless the contract expressly so provide; but he is now bound to perform the other alternative. (f)¹ An agreement may be altogether optional with one party, and yet binding on the other. (g)

*4. OF PART PERFORMANCE.

* 658

A partial performance may be a defence, *pro tanto*, or it may sustain an action, *pro tanto*; but this can be only in cases where the duty to be done consists of parts which are distinct and severable in their own nature, (h)² and are not bound

(e) Chippendale v. Thurston, 4 C. & P. 98.

(f) Stevens v. Webb, 7 C. & P. 60.

(g) Thus, where A agreed to deliver to B by the first of May, from 700 to 1,000 barrels of meal, for which B agreed to pay on delivery at the rate of six dollars per barrel, and A delivered 700 barrels, and also before the day tendered to B 300 barrels more, to make up the 1,000 barrels, which B refused; it was held, that B was bound to receive and pay for the whole 1,000 barrels; the delivery of any quantity between 700 and 1,000 barrels, being at the option of A only, and for his benefit. Disborough v. Neilson, 3 Johns. Cas. 81.

(h) Thus, in an entire contract of sale or manufacture of a large quantity of an article or articles, at an agreed price for each, the current of authorities holds, that a delivery and acceptance of part, gives a right to recover for that part, deducting whatever damages the other party sustained by the non-fulfilment of the contract. Bowker v. Hoyt, 18 Pick. 555, a sale of 1,000 bushels of corn at 85 cents per bushel. The plaintiff delivered only 410 bushels, and refused to deliver the remainder; the vendee kept what he had received, and was held bound to pay for it, deducting his damages. Oxendale v. Wetherell, 9 B. & C. 386, was a sale of 250 bushels of wheat at 85 cents per bushel. The vendor delivered only 130

bushels, when corn having advanced, he refused to deliver the remainder. *The jury found the contract to be entire*, but as the vendee had retained the corn delivered, until after the expiration of the time for the completion of the contract, the whole Court of King's Bench held him liable for the same. Champion v. Short, 1 Camp. 53, is to the same effect. There the defendant, who resided at Salisbury, ordered from the plaintiff, a wholesale grocer in London, "half a chest of French plums, two hogsheads of raw sugar, and 100 lumps of white sugar, to be all sent down without delay." The plums and raw sugar arrived nearly as soon as the course of conveyance would permit; but the white sugar not coming to hand, the defendant countermanded it, and gave notice to the plaintiff, that as he had wished to have the two sorts of sugar together, or not at all, he would not accept of the raw. The plums the defendant used, and this action having been brought to recover the price of the plums and the raw sugar, he tendered the price of the plums; and at the trial the question was, whether he was liable to pay for the sugar. And, per Lord Ellenborough: "Where several articles are ordered at the same time, it does not follow, although there be a separate price fixed for each, that they do not form one gross contract. I may wish to have articles A, B, C, and D, all of different sorts and of different values;

¹ As where one promises to return certain property or its money equivalent, and the former perishes, Drake v. White, 117 Mass. 10; or where a physician agrees to form a copartnership with another physician, or if the latter withdraws entirely from that "field of practice," to give him a pecuniary compensation, and then refuses to practise in co-partnership with him, Frothingham v. Seymour, 121 Mass. 409.

² An agreement by a preacher to allow one of the subscribers to his salary to pay the amount in preaching services will discharge the society to that extent. So held in Glover v. Dowagie Universalist Parish, 48 Mich. 595.

* 659 * together by expressions giving entirely to the contract.

It is not enough that the duty to be done is in itself severable, if the contract contemplates it only as a whole. (i)

If money is to be paid when work is done, and an action be

but without having every one of them as I direct, the rest may be useless to me. I therefore bargain for them jointly. Here, had the defendant given notice that he would accept neither the plums nor the raw sugar, as without the white sugar they did not form a proper assortment of goods for his shop, he might not have been liable in the present action; but he has completely rebutted the presumption of a joint contract, including all the articles ordered, by accepting the plums, and tendering payment for them. Therefore, if the raw sugar was of the quality agreed on, and was delivered in reasonable time, he is liable to the plaintiff for the price of it." And see *Barker v. Sutton*, 1 Camp. 55, n.; *Bragg v. Cole*, 6 J. B. Moore, 114; *Shaw v. Badger*, 12 S. & R. 275, recognize the same rule. In *Booth v. Tyson*, 15 Vt. 515, the contract was to mould for the defendant two hundred stove patterns; only a part was ever made, which the defendant used and disposed of, *as they were made*. The plaintiff gave up the contract without completing it; but he was allowed to recover on a *quantum meruit*, deducting the damages to the other party. In *Mavor v. Pyne*, 3 Bing. 235, also, it was held, that a contract to publish work in numbers, at so much a number, meant that each number should be paid for *as delivered*. *Shipton v. Cason*, 5 B. & C. 378, holds also, that an acceptance of part under an entire contract, gives a right of action for such part, although, in accordance with the suggestions in that case, it may be questioned whether the plaintiff can sustain an action for part, until after the expiration of the time for the delivery of the *whole*; for perhaps the vendee may conclude to return what he has received unless the *whole* is delivered, which cannot be known until the time has expired. See *Waddington v. Oliver*, 5 B. & P. 61. The New York courts adopt a different doctrine, and hold, that part performance, although accepted, furnishes no ground of recovery *pro tanto*, and repudiate the doctrine of *Oxendale v. Wetherell, supra*; *Champlin v. Rowley*, 13 Wend. 285, 18 id. 187; *Mead v. Degolyer*, 16 Wend. 632; *Paige v. Ott*, 5 Denio, 406; *McKnight v. Dunlop*, 4 Barb. 36; and see *ante*, p. * 523, n. (i).

(i) The most frequent cases where the entirety of a contract is sustained as a

good defence in law to an action for part performance, are, perhaps, contracts of labor and service for a *fixed time*. Here the current of authorities agrees that part performance gives no right to part compensation, unless the fulfilment of the contract is prevented by the act of the obligee. *Cutter v. Powell*, 6 T. R. 320, is well known as the leading case on this subject. There a sailor had taken a note from the master of a vessel to pay him 30 guineas, "provided he proceeded, continued, and did his duty as second mate *from Jamaica to Liverpool*." The sailor died on the voyage, and his administrator was not allowed to recover anything for the service actually performed. But as the sailor was by the contract to receive about four times as much, provided he completed the voyage, as was generally paid for the same service without any special contract, this fact might have had much influence upon the court in determining this contract to be entire and not apportionable. But in this country, sickness or death of the laborer has been frequently held a sufficient excuse for non-performance of the whole contract, and the laborer, or his administrator, may recover for the service actually rendered. *Fenton v. Clark*, 11 Vt. 557; *Dickey v. Linscott*, 20 Me. 453; *Fuller v. Brown*, 11 Met. 440. The same rule has been applied where the non-performance was caused by the act of law. *Jones v. Judd*, 4 Comst. 412. See *ante*, p. * 38, n. (j). Although in the same courts the general rule is fully recognized and constantly acted upon, that part performance of such a contract gives no right to part payment, if the non-performance is voluntary on the part of the plaintiff, and not caused by the defendant or by an act of God. See *St. Albans St. Co. v. Wilkins*, 8 Vt. 54; *Hair v. Bell*, 6 Vt. 35; *Philbrook v. Belknap*, 6 Vt. 383; *Brown v. Kimball*, 12 Vt. 617; *Ripley v. Chipman*, 13 Vt. 268; *Stark v. Parker*, 2 Pick. 267; *Olmstead v. Beale*, 19 Pick. 528. And see *ante*, p. * 36, n. (g) and *ante*, p. * 523, n. (i). So if rent is to be paid quarterly, and during a quarter the lessee delivers up and the lessor accepts possession of the premises, without anything said about rent *pro rata*, none is payable. *Grimman v. Legge*, 8 B. & C. 324; and see *Badeley v. Vigurs*, 4 Ellis & B. 71, 26 Eng. L. & Eq. 144.

brought for the money, non-performance of the work is of course a good defence ; but if there is a part performance, and this is a performance of the whole substance of the contract, and an omission only of what is incidental and unimportant, (*j*) it is a sufficient performance ; but the contract may expressly and in special terms, provide that these formal, incidental, and non-essential parts shall be done, and then they are made by the parties matters of substance. Thus, if the time be set in * which certain work is to be done, it is not in general so far of the substance of the contract, that if the work be done, but not until some days later, no compensation will be recovered ; but an action for the price will be sustained, leaving the defendant to show an injury he has sustained by the delay, and use it in reduction of damages, by way of set-off, or to sustain a cross action according to the circumstances of the case. (*k*) But if the parties see fit to stipulate in unequivocal language that no money shall be paid for the work unless it is done within a fixed time, both parties will be bound by their agreement. (*l*) Although we should say that even then the promisee would not be permitted to receive and retain the work after the due time of delivery, and make no compensation. Either his acceptance would amount to a waiver of the condition of time, or the other party might have his action on a *quantum meruit*.

(*j*) Thus, in *Gillman v. Hall*, 11 Vt. 510, A contracted to build \$60 worth of stone-wall for B, of a given length, height, and thickness. He built a wall worth \$60, but in some parts it was not of the given height, the deficiency being made up in extra length. He was allowed to recover on a *quantum meruit*, on the ground that there had been a substantial compliance. See also *Chambers v. Jaynes*, 4 Barr, 39, that a substantial *bond fide* compliance is all that is necessary. And see *ante*, p. * 523, n. (*i*).

(*k*) Thus in *Lucas v. Godwin*, 3 Bing. N. C. 737, A contracted to finish some cottages by the 10th of October. They were not finished until the 15th. The defendant then accepted them, and he was held bound to pay on a *quantum valebant*. See also *Porter v. Stewart*, 2 Aik. 417; *Warren v. Mains*, 7 Johns. 476; *Lindsey v. Gordon*, 18 Me. 60; *Smith v.*

Gngerty, 4 Barb. 614. But in most or all of these cases it is to be noted, that there had been an acceptance by the defendant after the time stipulated in the contract. See *ante*, p. * 523, n. (*i*).

(*l*) *Kent v. Humphreys*, 13 Ill. 573; *Westerman v. Means*, 12 Penn. St. 97; *Liddell v. Sims*, 9 Smedes & M. 596; *Tyler v. McCordle*, id. 230. In *Sneed v. Wiggins*, 3 Ga. 94, A recovered two judgments against B, who being about to appeal, A agreed in writing, that if he would not appeal, he (A) would give certain time for the payment of the amount due by instalments, "provided that if any of the instalments should not be paid at the time specified, then A should proceed with his execution." *Held*, that time was of the essence of the contract ; and that B having failed to pay one of the instalments when due, was not entitled to relief in equity.

5. OF THE TIME OF PERFORMANCE.

If the contract specifies no time, the law implies that it shall be performed within a reasonable time; (*m*) and will not permit * this implication to be rebutted by extrinsic testimony going to fix a definite term, because this varies the contract. (*n*) What is a reasonable time is a question of law. (*o*)

(*m*) Sansom v. Rhodes, 8 Scott, 544. In this case the defendant put up property for sale by public auction on the 18th September, subject (amongst others) to the following conditions: that the purchaser should pay down a deposit of 10 per cent. and sign an agreement for payment of the remainder of the purchase-money on or before the 28th November; that a proper abstract should be delivered within fourteen days from the day of the sale, and a good title deduced at the vendor's expense, having regard to the conditions; the conveyance to be prepared by and at the expense of the purchaser, and left at the office of the vendor's solicitors for execution on or before the 10th November; and that all objections to the title should be communicated to the vendor's solicitors within twenty-eight days after the delivery of the abstract. In an action by the purchaser to recover back the deposit, on the ground that the vendor had not deduced a good title by the 28th of November: *Held*, on special demurrer, that the declaration was bad for not averring that a reasonable time for deducing a good title had elapsed before the commencement of the action, the conditions of sale naming no specific time for that purpose. *Tindal*, C. J., said: "There does not appear on the face of the declaration to have been any express stipulation that the vendor should deduce a good title by any specific time; and, if no express time was stipulated, the law will in this, as in every other case, imply that a reasonable time was intended. Inasmuch, however, as it is not alleged in the declaration that a reasonable time for deducing a good title had elapsed, I think the demurser must prevail, and consequently, that the defendant is entitled to judgment." *Atwood v. Cobb*, 16 Pick. 227; *Roberts v. Beatty*, 2 Penn. 63; *Phillips v. Morrison*, 3 Bibb, 105; *Cocker v. Franklin Man. Co.* 3 Sumner, 530; *Atkinson v. Brown*, 20 Me. 67. And see *ante*, p. * 535, n. (c).

(*n*) *Shaw*, C. J., in *Atwood v. Cobb*, 16 Pick. 227. Unless it be in connection with other facts, as tending to show what

is a reasonable time under the circumstances of the case. *Cocker v. Franklin Man. Co.* 3 Sumner, 530; *Davis v. Tallcot*, 2 Kern. 184; *Ellis v. Thompson*, 3 M. & W. 445. And see *ante*, p. * 532, n. (e).

(*o*) *Stodden v. Harvey*, Cro. Jac. 204, where the court *held*, that the executor of a lessee for life had a reasonable time after his death to remove his goods, and that six days was reasonable. So in *Ellis v. Paige*, 1 Pick. 43, it was considered as a question for the court, what was a reasonable time for a tenant at will to quit after receiving notice, and that ten days were not enough. And where the maker of a note deposited goods with the holder to be sold to pay it, the court *held*, that a sale several years afterwards was not within a reasonable time. *Porter v. Blood*, 5 Pick. 54. Likewise in *Doe v. Smith*, 2 T. R. 436, where a lessor reserved in the lease a right for his son to terminate the lease, and to take possession upon coming of age, the court determined, that a week or a fortnight after coming of age would have been a reasonable time, but that a year was not. On the same principle it has been *held* to be a question for the court, whether notice of abandonment was given within a reasonable time after intelligence of the loss, and that five days was an unreasonable delay. *Hunt v. Royal Exch. Ass. Co.* 5 M. & S. 47. In *Atwood v. Clark*, 2 Greenl. 249, the purchaser of a crate of ware was to furnish the vendor with a list of the broken articles; and it was *held*, that the court must decide whether it was or was not done in a reasonable time. See also *Murry v. Smith*, 1 Hawks, 41; *Kingsley v. Wallis*, 14 Me. 57. It is not always a question for the court what is reasonable time; for if the facts are not clearly established, or if the question of time depends upon other controverted facts, or where the motives of the party enter into the question, it has been said that the whole must necessarily be submitted to a jury. *Hill v. Hobart*, 16 Me. 164; *Greene v. Dingley*, 24 Me. 131. See also *Cocker v. Franklin Man. Co.* 3 Sumner, 530, and *Ellis v. Thompson*, 3 M. & W. 445, for instances of rea-

And if the contract specify a place in which articles shall be delivered, but not a time, this means that they are deliverable on demand; but the demand must be sufficient to enable the promisor to have the articles at the appointed place with reasonable convenience. (*p*) If any period, as a month, be expressed, the promisor has a right to the whole of it. There is, perhaps, no exact definition, and no precise standard of reasonable time. The true rule * must be, that that is a reasonable time which pre- * 662 serves to each party the rights and advantages he possesses, and protects each party from losses that he ought not to suffer. Thus, in a case of guaranty, if the principal fails to pay when he should, the guarantor must be informed of the failure within a reasonable time; that is to say, soon enough to give him such opportunities as he ought to have to save himself from loss. If, therefore, the notice be delayed but a short time, but by reason of the delay the guarantor loses the opportunity of obtaining indemnity, and is irreparably damaged, he would be discharged from his obligation. But if the delay were for a long period, for months, and possibly for years, and it was nevertheless clear that the guarantor could have derived no benefit from an earlier notice, the delay would not impair his obligation. (*q*) And if the time be fixed by reference to a future event, the promisor has a right to all the time requisite for the happening of that event in the fullest and most perfect manner. (*r*)

Whether in computing time, the day when the contract is made shall be included or excluded, has been much disputed. It has been thought that this might be made to depend on the very words, as that "in ten days" includes the day of the making, and "in ten days from the day of the date," excludes it, while "ten days from the date" is uncertain. The later cases, however, seem to establish the principle, that a computation of this kind shall always conform to the intention of the parties, so far as that can be ascertained from the contract, aided by admissible evidence. (*s*) If, however,

sonable time decided by the jury. In *Howe v. Huntington*, 15 Me. 350, *Shepley*, J., enumerates several cases where this question is for the jury. And see *ante*, p. *535, n. (*d*).

(*p*) *Russell v. Ormsbee*, 10 Vt. 274. And see *Bailey v. Simonds*, 6 N. H. 159.

(*q*) *Clark v. Remington*, 11 Met. 361; *Craft v. Isham*, 18 Conn. 28; *Thomas v. Davis*, 14 Pick. 353; *Talbot v. Gray*, 18 Pick. 584.

(*r*) *Howe v. Huntington*, 15 Me. 350.

(*s*) *Pugh v. Leeds*, Cowp. 714, is the leading case upon this point. There, one Godolphin Edwards, under a power reserved in his marriage settlement to lease for twenty-one years in possession, but not in reversion, granted a lease to his only daughter for twenty-one years, to commence from the day of the date; and the question was whether this was a lease in possession or in reversion. The court held,

* 663 there is nothing in the *language or subject-matter of the contract, which clearly indicates the intention of the parties, time should be computed exclusive of the day when the contract was made. (*t*)¹

that the word "from" may mean either *inclusive* or *exclusive*, according to the context and subject-matter; and should be so construed as to effectuate the deeds of parties, and not destroy them, and therefore that in this case it should be construed as *inclusive*. Lord *Mansfield*, in delivering the judgment of the court, said: "The question is, 'whether this be a lease in possession?' And it turns upon this: 'Whether to commence from the day of the date in this deed, is to be construed *inclusive* or *exclusive* of the day it bears date?' I will first consider it as supposing this a *new* question, and that there never had existed any litigation concerning it. In that light, the whole will turn upon a point of construction of the particle 'from.' The power requires no precise form to describe the commencement of the lease; the law requires no technical form. All that is required is only enough to show that it is a lease in possession, and not in reversion; and therefore, if the words used are sufficient for that purpose, the lease will be a good and valid lease. In grammatical strictness, and in the nicest propriety of speech that the English language admits of, the sense of the word 'from' must always depend upon the context and subject-matter, whether it shall be construed *inclusive* or *exclusive* of the terminus *a quo*: and whilst the gentlemen at the bar were arguing this case, a hundred instances or more occurred to me, both in verse and prose, where it is used both inclusively and exclusively. If the parties in the present case had added the word 'inclusive,' or 'exclusive,' the matter would have been very clear. If they had said 'from the day of the date *inclusive*', the term would have commenced immediately; if they had said 'from the day of the date *exclusive*', it would have commenced the next day. But let us see whether the context and subject-matter in this case do not show that the construction here should be *inclusive*, as demonstrably as if the word 'inclusive' had been added. This is a lease made under a power: the lease refers to the

power, and the power requires that the lease should be a lease in *possession*. The validity of it depends upon its being in possession; and it is made as a provision for an only daughter. He must therefore intend to make a *good* lease. The expression, then, compared with the circumstances, is as strong in respect of what his intention was, as if he had said in express words, "I mean it as a lease in possession." I mean it shall be so construed. If it is so construed, the word 'from' must be *inclusive*. This construction is to support the deed of parties, to give effect to their intention, and to protect property. The other is a subtlety to overturn property, and to defeat the intention of parties, without answering any one good end or purpose whatsoever. And though courts of justice are sometimes obliged to decide against the convenience, and even against the seeming right, of *private* persons, yet it is always in favor of some great *public* benefit. But here, to construe 'from the day of the date,' to be *exclusive*, can only be to defeat the intention of the parties. If such a construction were right, it would hold good, supposing the lessee had laid out ever so much money upon the estate; and all would be alike defeated by a mere blunder of the attorney or his clerk. Therefore, if the case stood clear of every question or decision which has existed, it could not bear a moment's argument." His lordship then proceeded to a minute examination of the cases in their chronological order; and concluded that they were "yes and no, and a medium between them," and stood little in the way, "as binding authorities, against justice, reason, and common sense." So in *Lester v. Garland*, 15 Ves. 248, it was said to depend upon the reason of the thing, according to circumstances, whether the day should be included or excluded. And see *Phelan v. Douglass*, 11 How. Pr. Rep. 193.

(*t*) *Bigelow v. Willson*, 1 Pick. 485. In this case it was held that, in computing the time allowed by St. 1815, c. 137, § 1, for redeeming a right in equity, sold on

¹ In computing time from the date, or from the day of the date, or from a certain act or event, the day of the date is to be excluded, unless a different intention is manifested by the instrument or statute under which the question arises. *Bemis v. Leonard*, 118 Mass. 502. In this case *Gray*, C. J., elaborately reviews all the authorities on this question. The word "until" ordinarily includes the day to which it relates, but this construction yields to the manifest intention of the parties. *Kendall v. Kingsley*, 120

* Generally, where the party whose interests the computation affects, is not the one who may determine when the event shall happen, the longest time is given him, and therefore the day of the making is excluded. (u) If the contract refers to "the day of the date," or "the date," and expresses any date, this day, and not that of the actual making, is taken. But if there is in the contract no date, or an impossible date — as if a thing is

execution, which is "within one year from the time of executing, by the officer to the purchaser, the deed thereof," the day on which the deed is executed is to be excluded. And *Wilde*, J., in delivering the opinion of the court, said, "Before the case of *Pugh v. The Duke of Leeds*, all the cases agreed that the words, 'from the day of the date,' are words of exclusion. So plain was this meaning thought to be, that leases depending on this rule of construction were uniformly declared void, against the manifest intention of the parties. Of this doctrine, thus applied, Lord *Mansfield* very justly complains; not, however, on the ground that the general meaning of the words had been misunderstood, but because the plain intention of the parties to the contract had been disregarded. All that was decided in that case was, that 'from the day of the date' might include the day, if such was the clear intention of the contracting parties; and not that such was the usual signification of the words. I think, therefore, we are warranted by the authorities to say, that when time is to be computed from or after the day of a given date, the day is to be excluded in the computation; and that this rule of construction is never to be rejected, unless it appears that a different computation was intended. So also if we consider the question independent of the authorities, it seems to be impossible to raise a doubt. No moment of time can be said to be after any given day, until that day is expired." See also *Pellew v. Wonford*, 9 B. & C. 134, where the clause "two days after" a certain day was held to exclude that day. A sensible criterion seems to be to reduce the time to one day, and see whether you do not obtain an absurdity, unless you exclude the first day; and you must have the same rule whatever be the number of days. This was the rule adopted in *Webb v. Fairmaner*, 3 M. & W. 473, where goods

were sold on the 5th of October to be paid *for in two months*. It was held, that no suit could be sustained until after the expiration of the 5th of December following. And see, to the same effect, *Bigelow v. Willson*, *supra*; *Hardy v. Ryle*, 9 B. & C. 603. *Rex v. Adderley*, 2 Doug. 463, was decided on a particular ground, under a statute in favor of sheriffs, and cannot be considered as laying down any general rule. It is true that in *Glassington v. Rawlins*, 3 East, 407, the first day seems to have been included; but there the party lay in prison on the day he went there, and also a portion of each of the twenty-eight days necessary under the statute to amount to an act of bankruptcy; and, as the law takes no cognizance of a part of a day, the case does not upon careful examination conflict with the rule in the text, namely, to regard the first day as excluded. *Rex v. Cumberland*, 4 Nev. & M. 378, is to the same effect. See *Wilkinson v. Gaston*, 9 Q. B. 141; *Gorst v. Lowndes*, 11 Sim. 434; *Farwell v. Rogers*, 4 Cush. 460; *Judd v. Fulton*, 10 Barb. 117; *Bissell v. Bissell*, 11 id. 96; *Thomas v. Afflick*, 16 Penn. St. 14, overruling *Goswiler's Estate*, 3 Penn. 200; 4 Kent's Com. p. 95, n. (a); *Blake v. Crowninshield*, 9 N. H. 304; *Ewing v. Bailey*, 4 Scam. 420; *Presbrey v. Williams*, 15 Mass. 193; *Weeks v. Hull*, 19 Conn. 376; *Sands v. Lyon*, 18 Conn. 28; *Avery v. Stewart*, 2 Conn. 69; *Wiggin v. Peters*, 1 Met. 127; *Cornell v. Moulton*, 3 Denio, 12.

(u) *Lester v. Garland*, 15 Ves. 248, 156; *Pellew v. Wonford*, 9 B. & C. 134, 144, per Lord *Tenterden*. So the phrase "until a certain day," has been held to exclude that day. *Wicker v. Norris*, Cas. temp. Hardw. 108. But it may admit of a different interpretation according to the subject-matter and context. *Rex v. Stevens*, 5 East, 244.

Mass. 94. Under the U. S. Rev. Sts. § 5044, an attachment, made on September 9th, was held to be dissolved by an assignment in bankruptcy under a petition filed on the January 9th following. *Richards v. Clark*, 124 Mass. 491, following *Dutcher v. Wright*, 94 U. S. 553. See *Blackman v. Nearing*, 43 Conn. 56; *Bochner v. Knickerbocker Ins. Co.* 63 N. Y. 160.

required to be done within "ten days from the date," and the contract was not made until twenty days from the expressed date, then the day of the actual making will be understood to be meant by the day of the date. (v) The expression "between two days" excludes both. (w)

(v) *Styles v. Wardle*, 4 B. & C. 908. This was an action of covenant on an indenture, dated the 24th December, 1822, whereby the plaintiff, in consideration of £924, leased to the defendant a house and premises for ninety-seven years; subject to an agreement for an underlease to A for twenty-one years; and the defendant covenanted, that he would, within twenty-four calendar months then next after the date of the indenture, procure A to accept a lease of the premises for the term of twenty-one years from *Christmas-day*, 1821; and that, in case A would not accept the lease, that he, the defendant, would, within one calendar month next after the expiration of the said twenty-four calendar months, pay to the plaintiff a certain sum of money. The declaration, after setting forth the indenture as above, assigned as a breach that the defendant did not procure A to accept of said lease within said twenty-four calendar months, nor pay the said sum of money within one calendar month after the expiration of said twenty-four calendar months. The defendant pleaded, that the indenture was not in fact executed and delivered until the 8th of April, 1823; and that at the time of the commencement of the action, twenty-five calendar months had not elapsed from the time of the execution of the indenture. To this plea the plaintiff demurred, and the court sustained the demurser. *Bayley*, J., said: "The question in this case is simply as to the construction to be put upon the words of this deed. A deed has no operation until delivery, and there may be cases in which, *ut res valeat*, it is necessary to construe date delivery. When there is no date, or an impossible date, that word must mean delivery. But where there is a sensible date, that word in other parts of the deed means the day of the date, and not of the delivery. This distinction is noticed in Co. Litt. 46 b, where it is said: 'If a lease be made by indenture bearing date 26th of May, to hold, &c., for twenty-one years from the date, or from the day of the date, it shall begin on the 27th day of May. If the lease bears date the 26th of May, to have, &c., from the making hereof, or from henceforth, it shall begin on the day on which it is delivered, &c.' And afterwards it is said:

'If an indenture of lease bear date which is void or impossible, as the 30th of February, &c., if in this case the term be limited to begin from the date, it shall begin from the delivery, as if there had been no date at all.' In *Armit v. Breame*, 2 Ld. Raym. 1082, it is said: 'If the award had no date, it must be computed from the delivery, and that is one sense of *datuſ*.' The question here is, What in this covenant is the meaning of *datuſ*? I consider that a party executing a deed agreed that the date therein mentioned shall be the date for purposes of computation. It would be very dangerous to allow a different construction of the word *date*; for then, if a lease were executed on the 30th of March, to hold from the date, that being the 25th, and the tenant were to enter and hold as if from that day, yet, after the expiration of the lease, he might defeat an ejectment on the ground that the lease was executed on a day subsequent to the 25th of March, and that he did not hold from that day. All the authorities give a definite meaning to the word *date* in general, but show that it may have a different meaning when that is necessary, *ut res valeat*. It has been said that the computation could not have been intended to be made from the date, if the twenty-four months had elapsed before the execution of the deed. That may be true, for then the intention of the parties, that the computation should not be made from the date, would have been apparent. Here the meaning of the deed is plain, and according to that a breach of covenant was committed before the commencement of the action. The plea is therefore bad."

(w) Therefore, a policy of insurance on goods to be shipped between "February 1st and July 15th" does not cover goods shipped on the 15th of July. *Atkins v. Boylston Fire and Marine Ins. Co.* 5 Met. 439. In this case *Wilde*, J., said: "The construction of the policy seems to depend wholly on the true meaning of the word 'between.' This preposition, like many other words, has various meanings; and the question is, In what sense was it used in the present policy? The most common use of the word is to denote an intermediate space of time or place, and the defendant's counsel contends that it

* The rule which makes notes which become due on Sunday, without grace, payable on the Monday following, applies to all *contracts; thus, where a policy of insurance was conditioned for payment on or before Sunday at noon, and the party whose life was insured died in the afternoon of that day, and the premium was tendered on Monday, the insurers were held. (x) No one is bound to do any work in performance of his contract on Sunday, (y) unless the work by its very nature, or by express agreement, is to be done on that day, and can be then done, without a breach of the law. But if a contract is to be performed, or some act done in a certain number of days, and Sunday happens to come between the first and last day, it must be counted as one day, unless the contrary be clearly expressed. (z) If a party, bound to do a thing on a certain day, and therefore having the whole intermediate time, by some act distinctly incapacitates himself from doing that thing on that day, it seems that an action may be commenced at once without waiting for that day. As if a man promises to marry a woman on a future day, and before that time marries another, he has been held liable to an action before the day of performance arrives. (a) So if he engages to

was so used in the present policy, and that the first day of February, and the fifteenth day of July, are to be both excluded. On the other hand, the plaintiff's counsel insists that both days are to be included; at least I so understood the argument. And we think it clear that both days must be included or excluded; for there is nothing in the contract manifesting the intention of the parties to include or exclude one day rather than the other. It is undoubtedly true that the word 'between' is not always used to denote an intermediate space of time or place, as the plaintiff's counsel remarked. We speak of a battle between two armies, a combat, a controversy, or a suit at law between two or more parties; but the word thus used refers to the actions of the parties, and does not denote locality or time. But if it should be said that there was a combat between two persons between two buildings, the latter word would undoubtedly refer to the intermediate space between the buildings, while the former word would denote the action of the parties. But it was argued that the word 'between' is not always used as exclusive of the termini, when it refers to locality. Thus, we speak of a road between one town and another, although the road extends from the centre of one town

to the other; and this, in common parlance, is a description sufficiently intelligible although the road in fact penetrates each town. But if all the land between two buildings, or between two other lots of land, be granted, then certainly only the intermediate land between the two lots of land or the two buildings would pass by the grant. And we think the word 'between' has the same meaning when it refers to a period of time from one day, month, or year, to another. If this policy had insured the plaintiff's property to be shipped between February and the next July, it would clearly not cover any property shipped in either of those months. So we think the days mentioned in the policy are excluded."

(x) *Hammond v. American Mutual Life Ins. Co.* 10 Gray, 306.

(y) *Sands v. Lyon*, 18 Conn. 18; *Avery v. Stewart*, 2 Conn. 69; *Cock v. Bunn*, 6 Johns. 326, and note (a) in 2d edition; *Salter v. Burt*, 20 Wend. 205; *Barrett v. Allen*, 10 Ohio, 426; *Link v. Clemmons*, 7 Blackf. 479. But see, contra, *Kilgour v. Miles*, 6 Gill & J. 268; and see *Stead v. Dawber*, 10 A. & E. 57.

(z) *Brown v. Johnson*, 10 M. & W. 331; *King v. Dowdall*, 2 Sandf. 131.

(a) *Short v. Stone*, 8 Q. B. 358.

lease or sell property from and after a certain day, but before that time conveys it to another. (b) It might, however, seem more reasonable to permit such an action only where the capacity of the promisor could * not be restored before the day, or the promisee had received a present injury from the act of the promisor. (c)

(b) *Lovelock v. Franklyn*, 8 Q. B. 371; *Ford v. Tiley*, 6 B. & C. 325; *Bowdell v. Parsons*, 10 East, 359.

(c) See *New Eng. Mutual F. Ins. Co. v. Butler*, 34 Me. 451. But the recent case of *Hochster v. De la Tour*, 2 Ellis & B. 678, 20 Eng. L. & Eq. 157, goes further in sustaining such an action than any previous case. The action was commenced on the 22d of May, 1852. The declaration stated, that in consideration that the plaintiff would agree to enter the service of the defendant as a courier, on the 1st of June, 1852, and to serve the defendant in that capacity, and travel with him as a courier, for three months certain, from the said 1st of June, for certain monthly wages, the defendant agreed to employ the plaintiff as courier on and from the said 1st of June for three months certain, to travel with him on the continent, and to start with the plaintiff on such travels on the said day, and to pay the plaintiff during such employment the said monthly wages. Averment of an agreement to the said terms on the part of the plaintiff, and of his readiness and willingness to enter upon the said employment, and to perform the said agreement. Breach, that the defendant, before the said 1st of June, wholly refused to employ the plaintiff in the capacity and for the purpose aforesaid, on or from the said 1st day of June or any other time; and wholly discharged the plaintiff from his said agreement, and from the performance of the same, and from being ready and willing to perform the same; and the defendant wholly broke and put an end to his promise and engagement. Held, in arrest of judgment, that, after the refusal of the defendant to employ, the plaintiff was entitled to bring an action immediately, and was not bound to wait until after the day agreed upon for the commencement of performance had arrived. And Lord Campbell, in delivering the judgment of the court, said: "On this motion in arrest of judgment, the question arises whether, if there be an agreement between A and B, whereby B engages to employ A, on and from a future day, for a given period of time, to travel with him into a foreign country as a courier, and to start

with him in that capacity on that day, A being to receive a monthly salary during the continuance of such service, B may, before the day, refuse to perform the agreement, and break and renounce it, so as to entitle A, before the day, to commence an action against B to recover damages for breach of the agreement; A having been ready and willing to perform it until it was broken and renounced by B. The defendant's counsel very powerfully contended, that, if the plaintiff was not contented to dissolve the contract, and to abandon all remedy upon it, he was bound to remain ready and willing to perform it till the day when the actual employment as courier in the service of the defendant was to begin, and that there could be no breach of the agreement before that day to give a right of action. But it cannot be laid down as a universal rule, that where, by agreement, an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for doing the act has arrived. If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage. *Short v. Stone*, 8 Q. B. 358. If a man contracts to execute a lease on and from a future day for a certain term, and before that day executes a lease to another for the same term, he may be immediately sued for breaking the contract. *Ford v. Tiley*, 6 B. & C. 325. So if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them. *Bowdell v. Parsons*, 10 East, 359. One reason alleged in support of such an action is, that the defendant has, before the day, rendered it impossible for him to perform the contract at the day. But this does not necessarily follow; for, prior to the day fixed for doing the act, the first wife may have died; a surrender of the lease executed might be obtained; and the defendant might have repurchased the goods, so as to be in a situation to sell and deliver them to the plaintiff. Another reason may be, that when there is a com-

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Contracts sometimes express that they are to be performed "on notice" generally, or on some specific notice, and notice is then indispensable. (*d*) In some instances the necessity of notice

tract to do an act on a future day, there is a relation constituted between the parties in the mean time by the contract, and that they impliedly promise, that in the mean time neither will do anything to the prejudice of the other, inconsistent with that relation. As an example: a man and woman engage to marry, are affianced to one another during the period between the time of the engagement and the celebration of the marriage. In this very case of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other, and it seems to be a breach of an implied contract if either of them renounces the engagement. This reasoning seems in accordance with the unanimous decision of the Exchequer Chamber, in *Elderton v. Emmens*, 6 C. B. 160, which we have followed in subsequent cases in this court. The declaration in the present case, in alleging a breach, states a great deal more than a passing intention on the part of the defendant which he may repent of, and could only be proved by evidence that he had utterly renounced the contract, or done some act which rendered it impossible for him to perform it. If the plaintiff has no remedy for breach of the contract, unless he treats the contract as in force, and acts upon it down to the first of June, 1852, it follows that till then he must enter into no employment which will interfere with his promise "to start on such travels with the plaintiff on that day," and that he must then be properly equipped in all respects as a courier for three months' tour on the continent of Europe. But it is surely much more rational, and more for the benefit of both parties, that after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant,

after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is bereft of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the first of June, he is prejudiced by putting faith in the defendant's assertion; and it would be more consonant with principle, if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it. Suppose that the defendant, at the time of his renunciation, had embarked on a voyage to Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of Europe, in the months of June, July, and August, 1852, according to decided cases the action might have been brought before the 1st of June; but the renunciation may have been founded on other facts to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered, cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrong-doer. An argument against the action before the 1st of June is urged, from the difficulty of calculating the damages; but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case, the jury, in assessing the damages, would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial."

(*d*) *Hodsdon v. Harridge*, 2 Wms. Saund. 62 a, n. (4); *Child v. Horden*, 2 Bulstr. 144. In *Quarles v. George*, 23 Fick. 400, by a contract between the plaintiff

* 669 * springs from the nature of the contract, though nothing be said about it.¹ Generally, where anything is to be done by one party on the performance of some act by the other, this other must give notice of such act, (*e*) unless it be one

and the defendant it was agreed that the defendant should deliver to the plaintiff one thousand barrels of flour, at the rate of six dollars per barrel, at any time within six months from the date of the contract, and give him six days' notice prior to the time of such delivery, and that the plaintiff should pay that price therefor on delivery. In an action by the plaintiff against the defendant for not delivering the flour within the six months, it was held, that under the provisions of this contract it was incumbent on the defendant to do the first act by giving notice of his readiness to deliver the flour; but that, as he had a right to give notice six days before the expiration of the six months, and had he then given notice, he would have had till the last day of the six months to deliver the flour, the actual breach of the contract by non-delivery must be taken to have occurred on such last day, and the damage computed accordingly.—In declaring on a promise to pay money on demand, if a third person shall fail to do a certain act, it is not necessary to aver a notice of the failure to do that act, or a demand of the money. *Dyer v. Rich*, 1 Met. 189.

(*e*) *Vyse v. Wakefield*, 6 M. & W. 442. 8 Dowl. P. C. 377, 4 Jur. 509, affirmed on error, 7 M. & W. 126, is an excellent case on this subject. There the declaration stated, that, by indenture, the defendant covenanted that he would, at any time or

times thereafter, appear at an office or offices for the insurance of lives within London, or the bills of mortality, and answer such questions as might be asked respecting his age, &c., in order to enable the plaintiff to insure his life, and would not afterwards do or permit to be done any act whereby such insurance should be avoided or prejudiced. It then alleged, that the defendant, in part performance of his covenant, did, at the plaintiff's request, appear at the office of the Rock Life Insurance Company, and did answer certain questions asked of him; and that the plaintiff insured the defendant's life with that company, by a policy containing a proviso, that if the defendant went beyond the limits of Europe, the policy should be null and void: Breach, that the defendant went beyond the limits of Europe, namely, to the province of Canada, in North America. Held, on special demurrer, that the declaration was bad, for not averring that the defendant had notice that the policy was effected. Lord Abinger said: "I am of opinion that the defendant in this case is entitled to our judgment, on two grounds. The plaintiff having reserved to himself the liberty of effecting the insurance at any office within the bills of mortality, the number of which is limited only by the circumscription of the place and having also reserved to himself the choice of time for effecting the insurance, it appears to me that he ought to give the defendant

¹ Upon a covenant by the lessor to keep in repair the main walls, main timbers, and roofs of the demised premises, the lessor cannot be sued for non-repair, unless he has received notice of want of repair. *Makin v. Watkinson*, L. R. 6 Ex. 25. Where an insurance company allows any dividends declared to be used in reduction of annual premiums, it is the company's duty to give the insured notice of the amount of the dividends, so that he may in due time pay or tender the balance of the premium. *Phoenix Ins. Co. v. Doster*, 106 U. S. 30. And also where an insurance company determines to cancel an accepted risk, the insured is entitled to reasonable notice of such determination. *McLean v. Republic Ins. Co.* 3 Lansing, 421. If an agreement is made to pay for the construction of a bridge an amount "which should be justified by the certificate" of the engineer in charge of the work, the production of such a certificate and notice of it to the debtor are conditions precedent to a suit on the agreement. *Wangler v. Swift*, 90 N. Y. 38. As to a preliminary notice to a purchaser before taking away a sewing machine, sold with an option in the seller to so withdraw it in default of payment, see *Wheeler, &c. Co. v. Teetzlaff*, 53 Wis. 211.—But notice that the plaintiff has acted in the knowledge and on the faith of an offer of reward is not a condition precedent to maintaining an action on the reward. *Reif v. Paige*, 55 Wis. 496. Nor does a right to terminate a contract, subject to a liability for damages, entitle one party to alter its terms on giving notice to the other. *Gillett v. Bowman*, 43 Mich. 477.—Unless the contract so provides, the demand of one of the parties thereto, that the other shall perform his agreement, need not be in writing. *Colby v. Reed*, 99 U. S. 560.

that carries * notice of itself. And if the thing is to be * 670 done on the happening of an event not to be caused by

notice of his having exercised his option, and of the insurance having been effected, before an action can be maintained. But there is also another ground, which weighs strongly with me in coming to this conclusion. Even supposing the defendant were bound to go to all the insurance offices within the bills of mortality, to ascertain whether such a policy had been effected, he would still be obliged to do something more; namely, to learn what were the particular conditions on which it was effected; because the covenant here is, not that the defendant shall not do anything to evade the covenants or conditions usually prescribed by insurance offices; but that he shall not violate any of the conditions by which such insurance might be avoided or prejudiced; i. e., he is bound to observe all the stipulations contained in any policy which the plaintiff may effect. Now, some conditions, totally distinct from the conditions in general use, might be annexed by a particular insurance office; and in such case it would be most unfair to allow the plaintiff to keep the policy in his pocket, and, without notice of them, to call on the defendant to pay for a violation of the stipulations contained in it. Suppose one of the conditions imposed by the policy were, that the party whose life was insured should live on a particular diet, or at a particular place, or cease from some particular practice to which he was addicted, or that he should abandon some course of exercise which might, if persevered in, cost him his life, and the forsaking of which the insurance office might be fully justified in making a condition of insuring the life at all, it would be hard if the plaintiff could, without giving the defendant notice of the existence of such a condition, make him pay the amount of the policy on its violation. The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him. That is the common sense of the matter, and is what is laid down in all the cases on the subject; and if there are any to be found which deviate from this principle, it is quite time that they should be overruled." And Parke, B., said: "The general rule is, that a party is not entitled to

notice, unless he has stipulated for it; but there are certain cases where, from the very nature of the transaction, the law requires notice to be given, though not expressly stipulated for. There are two classes of cases on this subject, neither of which, however, altogether resembles the present. One of them is, where a party contracts to do something, but the act on which the right to demand performance is to arise is perfectly indefinite, as in the case of Haule v. Heming, Vin. Abr. 'Condition' (A. d.), pl. 15; s. c. nom. Heming's case, Cro. Jac. 432, where the defendant promised to pay the plaintiff for certain weys of barley as much as the plaintiff sold them for to any other man; there the plaintiff is bound to aver notice, because the person to whom the weys are to be sold is perfectly indefinite, and altogether at the option of the plaintiff, who may sell them to whom he pleases; and, in such cases, the right of the defendant to a notice before he can be called on to pay, is implied by law from the construction of the contract. So, where a party stipulates to account before such auditors as the obligee shall assign, the obligee is bound to give him notice when he has assigned them; for that is a fact which depends entirely on the option or choice of the plaintiff. On the other hand, no notice is requisite when a specific act is to be done by a third party named, or even by the obligee himself; as, for example, where the defendant covenants to pay money on the marriage of the obligee with B, or perhaps on the marriage of B alone (for there are some cases to that effect), or to pay such a sum to a certain person, or at such a rate as A shall pay to B. In these cases there is a particular individual specified, and no option is to be exercised; and the party who, without stipulating for notice, has entered into the obligation to do those acts, is bound to do them. But there is an intermediate class of cases between these two. Let us suppose the defendant in this case bound to perform such stipulations as shall be contained on a policy to be effected at some office in London. Now, my present impression is, that where any option at all remains to be exercised on the part of the plaintiff, notice of his having determined that option ought to be given; and if this had been a covenant by the defendant to perform the conditions to be imposed by any insurance company then existing in London, I think it would be the duty of the plaintiff to notify to the defendant

* 671 either party, he who is to *have the benefit of the thing should give notice to him who is to do it, that the event has occurred, unless from its own nature it must become known to that party when it happens; or, perhaps, unless it is as likely to be known to the party who is to do the act required by the contract, as to him for whose benefit it is to be done. The rule in respect to demand rests upon the same principle with that in respect to notice. It may be requisite, either from the stipulations of the parties, or from the peculiar nature of the contract; but where not so requisite, he who has promised to do anything, must perform his promise in the prescribed time and in the prescribed way; or, if none be prescribed, in a reasonable time and a reasonable way, without waiting to be called upon.

Notice to an agent has been fully considered in the first volume. It may be well to remark here, however, that notice, whether directly to a principal, or through an agent, may be *constructive* only; but the construction which should give effect to a notice, would be more closely restricted if an agent intervened.

We apprehend that *constructive* notice may be of two kinds. In one, some notice or knowledge of a fact is proved, which would imply to a reasonable man certain other facts, or would lead a person of ordinary caution into an inquiry which would certainly disclose those facts. (f) The other kind of *constructive* notice exists, when actual notice was attempted, or when sufficient means of

the exercise of his option, as to which he had selected. But this principle holds even more strongly in the present case; for not only do the terms of the covenant apply to all actually existing companies of the sort, but to all that might, at any future time subsequent to the date of the deed, be established within the bills of mortality. Now that is a condition which appears to me so perfectly indefinite, that notice ought to be given by the plaintiff of his having determined his choice; and I think therefore, that he was at least bound to give notice that a policy of insurance had been effected by him at such a particular office; it might then *perhaps*, be the duty of the defendant to inquire at that office into the nature and terms of the policy which had been there effected." See also Haule v. Hemyng, Vin. Abr. Condition (A. d.), pl. 15; s. c. *nom. Henning's* case, Cro. Jac. 432. So in Graddon v. Price, 2 C. & P. 610, it was held, that a performer who is called on to resume, in consequence of the illness of another, a

part in which by previous performances she has acquired celebrity, is entitled to reasonable notice previous to the time of performance, such notice to be proportioned to the reputation at stake. In Haverley v. Leighton, 1 Bulstr. 12, the defendant promised the plaintiff's intestate, that if he borrowed £100 of B, he would pay him the same sum, upon the same conditions, as they between them should agree upon, and notice of such agreement was *held* not necessary. So in Bradley v. Toder, Cro. Jac. 228, and Fletcher v. Pynsett, Cro. Jac. 102, where the promise was in consideration that the plaintiff would marry such a woman, the defendant would give him £100, notice of the marriage was *held* not necessary.

(f) Jones v. Smith, 1 Hare, 43, 1 Phillips, 253; Kennedy v. Green, 3 Mylne & K. 719, Sugden on V. & P. 1052. It is intimated in Jones v. Smith, as reported in 1 Phillips, 254, that courts of equity are now disposed to restrain rather than enlarge the law of constructive notice.

knowledge and motives to inquiry exist, and the court are satisfied that the party has abstained from inquiry, or avoided notice, with the intent of remaining in ignorance.

* 7. OF IMPOSSIBILITY OF PERFORMANCE.

* 672

It has been somewhat questioned, how far the impossibility of doing what a contract requires, is a good defence against an action for the breach of it. If the performance of a contract becomes impossible by the act of God, that is, by a cause which could not possibly be attributed to the promisor, and this impossibility was not among the probable contingencies which a prudent man should have foreseen and provided for, it should seem that this would be a sufficient defence. (*g*) But to make the act of God a defence, it must amount to an impossibility of performance by the promisor; mere hardship or difficulty will not suffice. (*h*)¹ So the non-

(*g*) *Williams v. Lloyd*, W. Jones, 179; *s. c. non*. *Williams v. Hide*, Palmer, 543. In this case the declaration stated, that the plaintiff delivered a horse to the defendant, which the defendant promised to redeliver upon request; and that, although he was requested to redeliver the horse, he refused. The defendant pleaded that the horse was taken sick and died, and that the plaintiff made the request after the horse was dead. To this plea the plaintiff demurred, and judgment was given to the defendant. See also *Lord v. Wheeler*, 1 Gray, 282; *Oakley v. Morton*, 1 Kern. 26; *Harmony v. Bingham*, 2 id. 99.

(*h*) Thus in *Bullock v. Dommitt*, 6 T. R. 660, it was held, that a lessee of a house who covenants generally to repair, is bound to rebuild it, if it be burned by an accidental fire. And Lord *Kenyon* said: "The cases cited on behalf of the plaintiff have always been considered and acted upon as law. In the year 1754, a

great fire broke out in Lincoln's Inn, and consumed many of the chambers, and among the rest those rented by Mr. Willbraham; and he, after taking the opinions of his professional friends, found it necessary to rebuild them. On a general covenant like the present, there is no doubt but that the lessee is bound to rebuild in case of an accidental fire; the common opinion of mankind confirms this, for in many cases an exception of accidents by fire is cautiously introduced into the lease to protect the lessee." So in *Brecknock Co. v. Pritchard*, 6 T. R. 750, it was held, that on a covenant to build a bridge in a substantial manner and to keep it in repair for a certain time, the party is bound to rebuild the bridge though broken down by an unusual and extraordinary flood. So in *Atkinson v. Ritchie*, 10 East, 530, the master and freighter of a vessel of 400 tons, having mutually agreed in writing, that the ship, being fitted for the voyage, should proceed to St. Petersburg,

¹ It was declared in *Cunningham v. Dunn*, 3 C. P. D. 443, following *Ford v. Cotesworth*, L. R. 4 Q. B. 127, that where neither party is ready to perform his undertaking because both are prevented by some superior power, neither party can maintain an action against the other. Where a contract was for the delivery of a portion of a particular crop of potatoes to be grown on specific fields, and the crop fails owing to a blight, without any fault on the seller's part, performance is excused. *Howell v. Coupland*, L. R. 9 Q. B. 462; affirmed in the Court of Appeal, 1 Q. B. D. 258. The performance of an agreement to play the piano at a concert was excused because of the inability of the performer to play through illness, in *Robinson v. Davison*, L. R. 6 Ex. 269; and in *Spalding v. Rosa*, 71 N. Y. 40, of an opera troupe to perform because of the sickness of Wachtel, the leading tenor and "attraction." But the closing of a school on account of small-pox is not such an act of God as will excuse a school district from liability to a teacher for his services, *Dewey v. Alpena School District*, 43 Mich. 480; nor where one contracts to furnish capital, a financial panic is no excuse for his failure to do so, *McCreery v. Green*, 38 Mich. 172.

* 673 performance * of the contract is not excused by an act of God, where it still may be substantially carried into effect, although the act of God makes a literal and precise performance of it impossible. (i)

If one for a valid consideration promises another to do that which is in fact impossible, but the promise is not obtained by actual or constructive fraud, and is not on its face obviously impossible, there seems no reason why the promisor should not be held to pay damages for the breach of the contract; not, in fact, for not doing what cannot be done, but for undertaking and promising to do it. So if it becomes impossible by contingencies which should have been foreseen and provided against in the contract, and still more if they might have been prevented, the promisor should be held answerable. So if the impossibility applies to the promisor personally, there being no natural impossibility in the thing, this will not be a sufficient excuse. (j)¹ But if one promises to do what

and there load from the freighter's factor a *complete* cargo of hemp and iron, and proceed therewith to London, and deliver the same on being paid freight, &c.; it was held, that the master, after taking in at St. Petersburg about half a cargo, having sailed away upon a general rumor of a hostile embargo being laid on British ships by the Russian government, was liable in damages to the freighter for the short delivery of the cargo, though the jury found that he acted *bona fide* and under a reasonable and well-grounded apprehension at the time, and a hostile embargo and seizure was in fact laid on six weeks afterwards. And the cases from 6 T. R., above cited, were approved. So in *Gilpins v. Consequa*, Pet. C. C. 83, it was held, that it is no excuse for the non-performance of a contract to deliver "prime," "first-chop" teas, that the season of the year when the teas were to have been delivered, was unfavorable to the best teas being in market. Again, in the leading case of *Paradine v. Jane, Aleyn*, 26, where, to an action of debt for rent, the defendant pleaded that a certain German Prince, by name Prince Rupert, an alien born, an enemy to the king and kingdom, had invaded the realm

with a hostile army, and with the same force had entered upon the defendant's possession, and him expelled and held out of possession, whereby he could not take the profits; upon demurrer the plea was held bad. And this difference was taken, "that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." See also *Huling v. Craig*, Adm. 342; *Harmony v. Bingham*, 2 Kern. 99; and *Exposito v. Bowden*, 4 Ellis & B. 963, 30 Eng. L. & Eq. 336, reversed in 7 Ellis & B. 768.

(i) *White v. Mann*, 26 Me. 361; *Chapman v. Dalton*, Plowden, 284; *Holtham v. Ryland*, 1 Eq. Cas. Abr. 18.

(j) See *ante*, vol. i., p. *459, n. (f). And see *Pothier*, *Traité des Obligations*, pt. 1, ch. 1, sec. 4, § 2; *Stray v. Russell*, 28 L. J. Q. B. 279; 29 ib. 116; *Stevens v. Webb*, 7 C. & P. 60; *Wilkinson v. Lloyd*, 7 Q. B. 27.

¹ A party who has entered into a contract to make and deliver a certain manufactured article within a specified time, having ample time for performance, cannot postpone performance to the last moment, and then excuse it upon the plea of accident; in such a case he takes the responsibility of the delay. *Booth v. Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 487. Where a company agreed to supply water for floating logs from a dam owned by it, a break in the dam does not excuse performance, since such accidents were not guarded against in the contract. *Keystone Lumber, &c. Co. v. Dole*, 43 Mich. 370.

cannot be done, and the impossibility is not only certain but perfectly obvious to the promisee, as, if the promise were to build a common dwelling-house in one day, such a contract must be void for its inherent absurdity. (*k*) And impossibility is a good defence where it arises even indirectly from the act of the promisee; as where one contracted to excavate land and replace it in a certain way, and the promisee directed him to put the earth taken out on the land of another man, who would not permit it to be taken away again, the contractor was held excused from replacing the earth, and permitted to recover for the rest of the work. (*kk*)

8. OF ILLEGALITY OF THE CONTRACT.

That the illegality of a contract is in general a perfect defence, must be too obvious to need illustration. It may, indeed, * be regarded as an impossibility by act of law; and it is * 674 put on the same footing as an impossibility by act of God; because it would be absurd for the law to punish a man for not doing, or, in other words, to require him to do, that which it forbids his doing.

Therefore, if one agrees to do a thing which it is lawful for him to do, and it becomes unlawful by an act of the legislature, the act avoids the promise; and so if one agrees not to do that which he may lawfully abstain from doing, but a subsequent act requires him to do it, this act also avoids the agreement. (*l*)

(*k*) Thus, in *Faulkner v. Lowe*, 2 Exch. 665, there was a covenant by C to pay a sum of money to A, B, and to himself C, or the survivors or survivor of them, on their joint account. C being sued upon this covenant, the court held the covenant senseless and impossible, and judgment was given for the defendant.

(*kk*) *Tome v. Doelger*, 6 Rob. 251.

(*l*) *Presb. Church v. City of N. York*, 5 Cowen, 538. In that case the corporation of the city of New York conveyed lands for the purposes of a church and cemetery, with a covenant for a quiet enjoyment, and afterwards, pursuant to a power granted by the legislature, passed a by-law prohibiting the use of these lands as a cemetery; held, that this was not a breach of the covenant which entitled to damages, but it was a repeal of the covenant. And *Savage*, C. J., thus remarked upon the authorities: "There are but few authorities on this question, and those few are at variance. The case of *Brason v. Dean*, 3 Mod. 39, decided in 1688,

was covenant upon a charter-party for the freight of a ship. The defendant pleaded that the ship was loaded with French goods, prohibited by law to be imported. And upon demurrer judgment was given for the plaintiff, for the court were all of opinion, that if the thing to be done was lawful at the time when the defendant entered into the covenant, though it was afterwards prohibited by act of parliament, yet the covenant was binding. But in the case of *Brewster v. Kitchin*, 1 Ld. Raym. 317, 321, A. D. 1698, a different and a more rational doctrine is established. It is there said: 'For the difference when an act of parliament will amount to a repeal of a covenant and when not, is this: when a man covenants not to do a thing which was lawful for him to do, and an act of parliament comes after and compels him to do it, then the act repeals the covenant; and vice versa. But when a man covenants not to do a thing which was unlawful at the time of the covenant, and afterwards an act

But if one agrees to do what is at the time unlawful, a subsequent act making the act lawful, cannot give validity to the agreement, because it was void at its beginning. A law may, however, have the effect of suspending an agreement that was originally valid, and which it makes impossible without violation of law; and yet leave the contract so far subsisting, that upon a repeal of the law the force and obligation of the contract

* 675 * remain. (m) It would seem that a prevention by the law of a foreign country is no excuse, because this does not make the act unlawful in the view of the law which determines the obligation of the contract. The subject of illegal contracts is again considered in a subsequent section of this chapter.

SECTION III.

OF DEFENCES RESTING UPON THE ACTS OR OMISSIONS OF THE PLAINTIFF.

It is a good defence to an action on a contract, that the obligation to perform the act required, was dependent upon some other thing which the other party was to do, and has failed to do. And if, before the one party has done anything, it is ascertained that the other party will not be able to do that which he has undertaken to do, this will be a sufficient reason why the first party

makes it lawful, the act does not repeal the covenant.' In 1 Salkeld, 198, where the same case is reported, the proposition is thus stated: 'Where H. covenants not to do an act or thing which was lawful to do, and an act of parliament comes after and compels him to do it, the statute repeals the covenant. So if H. covenants to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is repealed. But if a man covenants not to do a thing which then was unlawful, and an act comes and makes it lawful to do it, such act of parliament does not repeal the covenant.' And see Bennett v. Woolfolk, 15 Ga. 218. As to the dissolution of contracts by a declaration of war, see Reid v. Hopkins, 4 Ellis & B. 979, 80 Eng. L. & Eq. 406. See also same case, 5 Ellis & B. 729, 34 Eng. L. & Eq. 51, affirmed 6 Ellis & B. 968, 88 Eng. L. & Eq. 130.

(m) Thus in Baylies v. Fettysplace, 7 Mass. 325, it was held, that a law of the United States laying an embargo for an unlimited time, and afterwards repealed, did not extinguish a promise to deliver debentures, but operated as a suspension only during the continuance of the law. So in Hadley v. Clarke, 8 T. R. 259, where the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn, and on the vessel's arrival at Falmouth in the course of her voyage, an embargo was laid on her "until the further order of council;" it was held, that such embargo only suspended the execution, but did not dissolve the contract between the parties; and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages for the non-performance of their contract.

should do nothing. (n)¹ And this excuse is valid, although the omission by the other party to do the thing required of him, was produced by causes which he could neither foresee nor control. And if it is provided that the thing shall be done "unless prevented by unavoidable accident," the accident to excuse the not doing, must be not only unavoidable, * but must render * 676 the act physically impossible, and not merely unprofitable and inexpedient by reason of an increase of labor and cost. (o)

If one bound to perform a future act, before the time for doing it declares his intention not to do it, this is no breach of his contract; (p)² but if his declaration be not withdrawn when the

(n) *Caines v. Smith*, 15 M. & W. 180, where defendant had promised to marry plaintiff, but married another woman. To an action for breach of promise, a plea by defendant that he had never been requested by the plaintiff to perform his contract was held ill. *Johnston v. Caulkins*, 1 Johns. Cas. 116, where in a similar action it was held, that if the defendant has absconded, the plaintiff need not show an offer to marry him. And see other instances of the same principle in *Short v. Stone*, 8 Q. B. 358; *Lovelock v. Franklyn*, id. 371; *Ford v. Tiley*, 6 B. & C. 325; *Bowdell v. Parsons*, 10 East, 359; *Tewksbury v. O'Connell*, 21 Cal. 60.

(o) See *ante*, p. *672, n. (k).

(p) *Phillpotts v. Evans*, 5 M. & W. 477; *Ripley v. McClure*, 4 Exch. 345; *Leigh v. Paterson*, 2 J. B. Moore, 588. This principle, however, is drawn in

question by the recent case of *Hochster v. De la Tour*, 2 Ellis & B. 678, 20 Eng. L. & Eq. 157, where it was held, that if A engages to employ B in his service, the term to commence at a future day, and before that day A changes his mind and refuses to employ him, this is a breach of the contract, and B may have his action for such breach *immediately* and is not bound to wait until the day the service was to commence. A in such case has no right to a *locus penitentia*. See the case fully stated, *ante*, p. *667 n. (c). So it was held in *Cort v. Ambergate, &c. Railway Co.* 17 Q. B. 127, 8 Eng. L. & Eq. 230, that where there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for,

¹ Where a defendant has "received a substantial portion of the consideration, it is no longer competent to him to rely upon the non-performance of that which might have been originally a condition precedent." *Carter v. Scargill*, L. R. 10 Q. B. 564. One who covenants to devote himself entirely to another's business for three years, and is prevented from so doing for about two weeks during the busy season without fault on his part, commits thereby a breach of his covenant, and cannot maintain an action on the contract for not being allowed to resume his position thereafter. *Leopold v. Salkey*, 89 Ill. 412. A singer agreed with G. to sing in "both public and private, in Great Britain and Ireland," from March 30, 1875, to July 13, 1875, "and to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals." It was held, on demurrer, that his failure to attend at rehearsals during the six days did not go to the root of the matter, so as to make it a condition precedent to G.'s performance of the contract, but that the latter must seek redress in an action for damages. *Bettini v. Gye*, 1 Q. B. D. 183. But the failure of a skilled and capable singer, through serious illness of an uncertain duration, to perform on the opening and early performances of a new opera, for which she had been engaged, goes to the root of the consideration, to the extent of justifying her employers in rescinding their contract with her to so sing. *Poussard v. Spiers*, 1 Q. B. D. 410.

² In *Frost v. Knight*, L. R. 7 Ex. 111, where the defendant, who promised to marry the plaintiff so soon as his father should die, refused absolutely, during such lifetime, to marry her, it was held, that the plaintiff could sue while the father was still alive. *Cockburn*, C. J., said that "the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time,

time comes for the act to be done, it constitutes a sufficient excuse for the default of the other party. In all cases whatever, a promisor will be discharged from all liability, when the non-performance of his obligation is caused by the act, or the fault, of the other contracting party. (q)¹

The validity of many of these defences, resting upon the act or default of the other party, must depend upon the question, which is sometimes difficult, whether the contracts are in fact dependent or independent. There are cases, and especially some early ones, which seem to be severe, and more technical than rational; but of late the courts incline to decide these questions as good sense and common justice require. But there are rules by which they

gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of the contract.

(q) Thus where one was bound to deliver a deed on a day certain, and at the

day was ready with the deed, and would have tendered it but for the evasion of the other party, this was held to be equivalent to a tender. *Borden v. Borden*, 5 Mass. 67. And see Com. Dig. Condition, L. (6); *Goodwin v. Holbrook*, 4 Wend. 377; *Whitney v. Spencer*, 4 Cowen, 89; *People v. Bartlett*, 3 Hill, 570; *Grandy v. McCleese*, 2 Jones, Law, 142; *Warters v. Herring*, id. 46.

subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." See also *Roper v. Johnson*, L. R. 8 C. P. 167, to the effect that *Hochster v. De la Tour*, *supra*, has been distinctly recognized in many subsequent cases, and must now be assumed to be law. And where one in October declared his intention not to carry out an engagement to marry "in the fall," no day being fixed, *Burtis v. Thompson*, 42 N. Y. 246; where a person engaged to marry one, married another, *Sheahan v. Barry*, 27 Mich. 217, it was held in each instance that the party aggrieved might sue at once. See *Holloway v. Griffith*, 32 Ia. 409. In *Daniels v. Newton*, 114 Mass. 530, *Wells*, J., reviews elaborately all the authorities, and, disapproving of *Hochster v. De la Tour*, and *Frost v. Knight*, *supra*, arrives at the conclusion that "an action for the breach of a written agreement to purchase land, brought before the expiration of the time given for the purchase, cannot be maintained by proof of an absolute refusal on the defendant's part ever to purchase." He says, p. 539: "Until the plaintiff has either suffered loss or wrong in respect of that which has already vested in him in right, or has been deprived of or been prevented from acquiring that which he is entitled to have or demand, he has no ground on which to seek a remedy by way of reparation. Actual injury and not anticipated injury is the ground of legal recovery. The plaintiff's rights are invaded by repudiation of the contract only when it produces the effect of non-performance, or prevents him from entering upon or completing performance on his part, at a time when and in the manner in which he is entitled to perform it or to have it performed." *Parker v. Russell*, 133 Mass. 74, however, decides that, on the breach of a contract for life support, the person to be supported may treat the contract at his election as absolutely broken, and recover damages at once for its entire value. *Field*, J., distinguishes *Daniels v. Newton*, as deciding that "an absolute refusal to perform a contract before the performance is due by the terms of the contract is not a present breach of the contract for which any action can be maintained;" and as not deciding that "an absolute refusal to perform a contract after the time and under the conditions in which the plaintiff is entitled to require performance is not a breach of the contract, even although the contract is by its terms to continue in the future."

¹ If money is paid in part fulfilment of a fair contract, it cannot be recovered back when the non-fulfilment of the entire contract is owing to the fault of the one paying. *Alden v. Goddard*, 73 Me. 345. See *Haines v. Tucker*, 50 N. H. 307.

are guided in this matter, if not controlled ; and we would add to what we have already said on this subject, that the classes of engagements contained in a contract,—dependent, concurrent, and independent,—may be thus distinguished. Where the agreements go to the whole of * the consideration on both sides, the promises are dependent, and one of them is a condition precedent to the other. If the agreements go to a part only of the consideration on both sides, and a breach may be paid for in damages, the promises are so far independent. If money is to be paid on a day certain, in consideration of a thing to be performed at an earlier day, the performance of this thing is a condition precedent to the payment ; and if the money is to be paid in instalments, some before a thing is to be done, and some when it is done, the doing of the thing is not a condition precedent to the former payments, but is to the latter. And if there is a day for the payment of the money, and this comes before the day fixed for the doing of the thing, or before the time when the thing, from its nature, can be performed, then the payment is at all events obligatory, and an action may be brought for it independently of the act to be done. Concurrent promises are those where the acts to be performed are simultaneous, and either party may sue the other for a breach of the contract, on showing *either*, that he was able, ready, and willing to do his act at the proper time and in the proper way, *or*, that he was prevented from doing it, *or*, being so ready to do it, by the act or default of the other contracting party. (r)

The defendant may rely on the fact that the contract has been rescinded ; and this may have been done by mutual consent, or by the plaintiff, who had the right to do so, or by the defendant, if he had the right. And a suit for recovery of damages for breach of a contract is equivalent to a notice of rescission, and the contract can no longer be enforced unless it is renewed by mutual consent. (rr) Whichever party has the right to rescind, must do it within the time specified, if there be such a time, or otherwise within a reasonable time. (s) What is a reasonable time, is in this, as in most other cases, a question of law for the court only. (t)

(r) See this subject considered and the authorities cited, *ante*, p. * 525 *et seq.*

Holbrook *v.* Burt, 22 Pick. 546. One party may have a right to rescind a contract, which may yet be binding upon the other ; and although the contract was,

(rr) Graham *v.* Halloway, 44 Ill. 385. (s) Hodgson *v.* Davies, 2 Camp. 530; Okell *v.* Smith, 1 Starkie, 107; Froeser *v.* Hooper, 1 J. B. Moore, 108.

in a certain event, by its terms, to be "null and void." Thus, where by Stat. 17 Geo. III. c. 50, § 8, the vendor at an

(t) Kingsley *v.* Wallis, 14 Me. 57;

* 678 Generally, as a contract can be * made only by the consent of all the contracting parties, it can be rescinded only by the consent of all. (*u*) But this consent need not be expressed as an agreement. (*v*) If either party, without right, claims to rescind the contract, the other party need not object, and if he permit it to be rescinded, it will be done by mutual consent. Nor need this purpose of rescinding be expressly declared by the one party, in order to give to the other the right of consenting, and so rescinding. There may be many acts from which the opposite party has a right to infer that the party doing them would rescind; (*w*)¹ and, generally, where one fails to perform his part

auction was empowered to make it a condition of sale that the purchaser should pay the auction-duty in addition to the purchase-money, and it was declared that upon his neglect or refusal to pay the same, the bidding "should be null and void to all intents and purposes;" it was held, that the contract is not by reason of such neglect or refusal absolutely void, but voidable only, at the option of the vendor. *Maline v. Freeman*, 6 Scott, 187.

(*u*) Whether there has been a rescission of the contract is a question for the jury. See *Fitt v. Cassanet*, 4 Man. & G. 898.

(*v*) The rescission by one party may be as strongly expressed by acts as by words. Thus, in *Goodrich v. Laffin*, 1 Pick. 67, A agreed to deliver to B some step stones, which were to be paid for, one half in money and one half in goods. The stones were delivered, and B delivered some of the goods upon the special contract. B having sued A and recovered judgment for the value of the goods delivered, declaring upon the common counts only, it was held, that A might, upon the common counts only, recover the value of the stones. So in *Hill v. Green*, 4 Pick. 114, by a contract under seal the plaintiff agreed that his son, a minor, should work for the defendant nine months, and the defendant agreed to give him, therefore, certain chattels, which were delivered forthwith, but were to remain the property of the defendant until the service should be performed. The plaintiff sold the chattels to a stranger, and the boy was afterwards wrongfully turned away by the defendant before the

expiration of the term. The defendant reclaimed the chattels, and the vendee, knowing all the facts, settled the demand by paying him a sum of money. Held, that the written contract was rescinded, and that the plaintiff was entitled to recover on a *quantum meruit* for the service performed; but that neither the plaintiff nor his vendee could recover back the money paid to the defendant. In *Quincy v. Tilton*, 5 Greenl. 277, it was held, that where parties agree to rescind a sale once made and perfected without fraud, the same formalities of delivery, &c., are necessary to vest the property in the original vendor, which were necessary to pass it from him to the vendee. In *James v. Cotton*, 7 Bing. 288, the plaintiff engaged to let land to the defendant on building leases, and to lend him £6,000 to assist him in the erection of 20 houses on the land. Defendant agreed to build the houses, and convey them as security for the loan, which was to be paid at a time fixed. When six houses had been built, and part of the £6,000 had been advanced, plaintiff requested defendant not to go on with the other fourteen houses. Defendant desisted. Held, that this amounted to a rescission of the contract by mutual consent, and the plaintiff was allowed to recover the amount advanced on a count for money lent.—If by the terms of the contract it is left in the power of the plaintiff to rescind by any act of his, and he does it, or if the defendant afterwards consents to its being rescinded, the plaintiff may treat the contract as rescinded. *Towers v. Barrett*, 1 T. R. 133.

(*w*) See preceding note.

¹ In *Davis v. Hubbard*, 41 Wis. 408, which quotes the text with approval, it was decided that if one fails to perform a contract, as to dig a well, within the time agreed or a reasonable time, the other party may treat the contract as rescinded, and is not liable on a *quantum meruit*: but if within time agreed on, or a reasonable time, one is refused permission to fulfil such an agreement, he may recover on a *quantum meruit*.

of the contract, or disables himself from performing it, (x)¹ the other party may treat the * contract as rescinded. (y) * 679 But not if he has been guilty of a default in his engagement, for he cannot take advantage of his own wrong to defeat the contract. Nor if the failure of the other party be but partial, leaving a distinct part as a subsisting and executed consideration, and leaving also to the other party his action for damages for the part not performed. (z)² Generally, no contract can be rescinded by one of the parties, unless both can be restored to the condition in which they were before the contract was made. (a)³ If,

(x) Thus in *Keys v. Harwood*, 2 C. B. 905, A agreed to board B, and to receive pay in certain goods. Before the time of payment arrived, B allowed those goods to be seized and sold, on execution against him. This was held a rescission of the contract, and A was allowed to recover on a general count, and without reference to the special contract. So in *Planchè v. Colburn*, 8 Bing. 14, where A agreed to write a treatise for a periodical publication, which, before the treatise was completed, the defendant discontinued, this was considered an abandonment of the contract by the defendant, and the plaintiff was allowed to recover on a *quantum meruit*, without completing the treatise. See *Shaw v. The Turnpike Co.* 2 Penn. 454, 3 id. 445; *King v. Hutchins*, 8 Foster, 501; also *Warden of the Church of St. Louis v. Kerwan*, 9 La. An. 31. In *Dubois v. Delaware Canal Co.* 4 Wend. 285, *Marcy*, J., said: "Every breach of a special agreement by one party does not authorize the other to treat it as rescinded; but there are some breaches that do amount to an abandonment of it. There is not, perhaps, any precise rule, which, when applied to the breach of a contract, certainly settles the question whether it is thereby abandoned or not; but, if the act of one party be such as necessarily to prevent the other from

performing on his part according to the terms of his agreement, the contract may, I think, be considered as rescinded."

(y) But this is not always the case. Thus, in *Weaver v. Sessions*, 6 Taunt. 154, the plaintiff covenanted to furnish the defendant all the malt he should want for a certain specified period, which should be "good, well dried, and marketable." The defendant covenanted to buy all his malt of the plaintiff, and not to buy elsewhere, unless the plaintiff neglected or refused to deliver him good malt on request. The plaintiff having delivered bad malt, the defendant bought of others, without having first requested the plaintiff to furnish better. The court held, that the non-compliance by the plaintiff, merely in delivering bad malt for good, did not authorize a rescission of the contract, and that the defendant was liable for purchasing of others, before the plaintiff had refused or neglected on request to furnish better.

(z) In *Franklin v. Miller*, 4 A. & E. 599, *Littledale*, J., says: "It is a clearly recognized principle, that, if there is only a partial failure of performance by one party to a contract, for which there may be a compensation in damages, the contract is not put an end to." See *ante*, p. * 530, n.

(a) *Hunt v. Silk*, 5 East, 249, the

¹ Or, being insolvent, so acts as to give the other party reasonable ground for believing that he intends to put an end to the contract. *Bloomer v. Bernstein*, L. R. 9 C. P. 588; *Morgan v. Bain*, L. R. 10 C. P. 15. See *Ex parte Chalmers*, L. R. 8 Ch. 289. Where executory contracts are made on different days for the sale of goods, the price of which is to be payable on delivery, and the deliveries under the second contract are, by its terms, to commence when the full quantity required by the first contract has been shipped, the purchaser cannot, after refusing to pay for goods delivered under the first contract, unless the seller will give security for the entire fulfilment of the contracts, maintain an action for non-delivery under the second contract. *Stephenson v. Cady*, 117 Mass. 6.

² A party cannot disaffirm a contract in part on the ground of fraud and affirm it as to the residue, but must rescind *in toto*, either restoring everything obtained by it and recovering back his payments, or retaining the property and sue for damages for the fraud. *Grant v. Law*, 29 Wis. 99.

³ If no restoration to the prior condition is possible, the aggrieved party may have compensation in damages. *Wooster v. Sage*, 67 N. Y. 67; *Manahan v. Noyes*, 52 N. H.

* 680 therefore, one of the parties has * derived an advantage from a partial performance, or so disposed of property

leading case upon this point. There A agreed, in consideration of £10, to let a house to B, which A was to repair and execute a lease of *within ten days*; but B was to have immediate possession, and in consideration of the aforesaid was to execute a counterpart and pay the rent. B took possession and paid £10 immediately, but A neglected to execute the lease and make the repairs beyond the period of the ten days, notwithstanding which B still continued in possession. *Held*, that B could not, by quitting the house *for the default of A*, rescind the contract and recover back the £10 in an action for money had and received, but could only declare for a breach of the special contract; for a contract cannot be rescinded by one party for the default of the other, unless both can be put *in statu quo* as before the contract; and here B had had an intermediate possession of the premises under the agreement. And Lord *Ellenborough* said: "Where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being rescinded. If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after twelve months on the same account? This objection cannot be gotten rid of: the parties cannot be put *in statu quo*." So in *Beed v. Blandford*, 2 Younge & J. 278, where the master and part-owner of a vessel agreed to purchase the moiety of his partner, and having paid the purchase-money and received the title-deeds, which he deposited as a security with a third person, had the entire possession of the vessel given up to him, but his partner afterwards refused to execute a bill of sale, or refund the money; it was held, that an action for money had and received would not lie to recover the purchase-money, as the par-

ties could not be restored to their original situation. *Alexander*, C. B., said: "In order to sustain an action in this form, it is necessary that the parties should, by the plaintiff's recovering the verdict, be placed in the same situation in which they originally were before the contract was entered into. The plaintiff has, by his intermediate occupation, derived the profits of the vessel; if he has not, he might have done so; and it is impossible to say what the defendant might have made, had he, during the time, had any control over it. Under these circumstances, it cannot be said that the situation of the parties has not been altered; and that, by the plaintiff's recovering in this action, their original position may be restored. Besides this, the defendant's title-deeds have been deposited by the plaintiff as a security for the money advanced to him. How could the defendant, in this respect, be restored to his original situation by this action? He is at the mercy of the defendant, for his title-deeds, and cannot recover them by any process in this cause. I think the objection is unanswerable, and that the rule for a nonsuit must be made absolute." And *Vaughan*, B., said: "The decision in *Hunt v. Silk* lays down a very clear and just rule in these cases: if the circumstances be such, that, by rescinding the contract, the rights of neither party are injured, in that case, if one contracting party will not fulfil his part of the engagement, the other may rescind the contract, and maintain his action for money had and received, to recover back what he may have paid upon the faith of it." — And where one party elects to rescind a contract for fraud, he must return the consideration received before any right of action accrues; and it is not enough to notify the party defrauding, and call upon him to come and receive the goods. *Norton v. Young*, 8 Greenl. 30. But in the case of *Masson v. Bovet*, 1 Denio, 69, it was said, that though the general rule is, that the party who would

232; *Montgomery Co. v. American Emigrant Co.* 47 Ia. 91; *Armstrong, &c. Co. v. Kossura*, 66 Ind. 545. A buyer must return the thing sold, unless it is entirely worthless. *Babcock v. Case*, 61 Penn. St. 427; *Dill v. O'Ferrell*, 45 Ind. 268. See *Brewster v. Burnett*, 125 Mass. 68. One advancing money on a sale may rescind and recover the money if the seller fails to comply. *Howe Machine Co. v. Willie*, 85 Ill. 333. See *Green v. Stuart*, 7 Baxter, 418. Where a contract is entire, and the buyer is not willing to accept partial performance, he may reject and recover the price paid. *Whincup v. Hughes*, L. R. 6 C. P. 78; *Jenness v. Wendell*, 51 N. H. 63; *Smith v. Lewis*, 40 Ind. 98. But if he accepts, he must seek some other remedy. *Mansfield v. Trigg*, 113 Mass. 350; *Young, &c. Co. v. Wakefield*, 131 Mass. 91. See *Beetem v. Burkholder*, 69 Penn. St. 249.

bought that he cannot restore it, (*aa*) he cannot hold this and consider the contract as rescinded because of the non-performance of the residue; (*b*) but must do all that the contract obliges him to do, and seek his remedy in damages.¹ But where one party has gained an advantage over another by fraud, the rule that the parties cannot be restored to their original condition, will not prevent the defrauded party from rescinding the contract; at least, will not in equity. (*bb*)

If the thing to be done on the one side as the consideration of the agreement on the other side, is to be done at several times, a failure at one time will not generally authorize * 681 the other party to treat the whole contract as rescinded; although, even in such continuing cases, this partial failure may be so destructive of the contract as to give the other party the right to consider it as wholly rescinded. (*c*)²

It is a general rule, that a party having a right of rescission because of the fault or act of the other, should make known his rescission, as soon as may be after he knows his right to rescind. (*cc*)

rescind a contract on the ground of fraud, for the purpose of recovering what he has advanced upon it, must restore the other party to the condition in which he stood before the contract was made; yet, where the party who practised the fraud has entangled and complicated the subject of the contract in such a manner as to render it impossible that he should be restored to his former condition, the party injured, upon restoring, or offering to restore, what he has received, and doing whatever is in his power to undo what has been done in the execution of the contract, may rescind it and recover what he has advanced. See further upon this point, per *Tindal*, C. J., in *Fitt v. Casanet*, 4 Man. & G. 908; *Blackburn v. Smith*, 2 Exch. 783; *Junkins v. Simpson*, 14 Me. 364; *Coolidge v. Brigham*, 1 Met. 547; *Peters v. Gooch*, 4 Blackf. 515; *Turnpike Co. v. Commonwealth*, 2 Watts, 423; *Brown v. Witter*, 10 Ohio, 142; *Johnson v. Jackson*, 27 Miss. 498; *Allen v.*

Edgerton, 8 Vt. 442; *Luey v. Bundy*, 9 N. H. 296; *Stevens v. Cushing*, 1 N. H. 17; *Perley v. Balch*, 22 Pick. 288; *Downer v. Smith*, 32 Vt. 1; *Lewis v. White*, 16 Ohio, 444.

(*aa*) *McCrillis v. Carlton*, 37 Vt. 139.

(*b*) And if one party has derived all the intended benefit from a contract, the agreement to rescind the contract will not bar the plaintiff from some remedy. Thus, to an action for goods sold and delivered, it is no defence that the goods were sold in pursuance of a special contract which was afterwards rescinded and annulled by both parties. *Edwards v. Chapman*, 1 M. & W. 281, *Parke*, B., saying: "A duty arises from the contract of sale, which cannot be got rid of without an accord and satisfaction."

(*bb*) *Coffey v. Ruffin*, 4 Cold. 487.

(*c*) See *supra*, n. (2). And see *Battle v. Rochester City Bank*, 3 Comst. 88.

(*cc*) *Central Bank v. Pindar*, 46 Barb. 467.

¹ *Burge v. Cedar Rapids, &c. R. Co.* 32 Ia. 101.

² A. contracted to make successive deliveries of goods of a certain width, weight, and quality to B., and the two first deliveries were deficient in width and weight, and it appeared that A. must procure new machinery to fulfil the conditions, which would involve delay, and B. rescinded the contract. It was held, that he was justified in so doing. *King Phillip Mills v. Slater*, 12 R. I. 82, where cases of independent agreements in contracts were examined and criticised.

Replevin may be maintained for goods sold under false and fraudulent representations, the contract of sale being rescinded. (*cd*)

A defendant, who is a wrong-doer, cannot set up the right of a third person to bar the claim of the plaintiff. (*d*)

Redhibition is a term borrowed from the civil law, and sometimes used by our courts. In a case in Louisiana, it is said to be the avoidance of a sale on account of some vice or defect of the thing sold, rendering it either useless, or so far diminishing its value to the purchaser, that it must be supposed he would not have bought the thing with knowledge of the defect. (*dd*)

2. OF CONTRIBUTORY NEGLIGENCE.

We have referred in many parts of this work, to a liability for negligence, whether this be put on the ground of contract or of tort. A defence very frequently made, is that of contributory negligence. The rules of law are well settled on this subject; and the apparent uncertainty of the law in some cases, is but the difficulty of applying these rules to the particular facts, which are indefinitely diversified in the numerous cases in which the question arises. If the plaintiff's own negligence was an immediate and a principal cause of the injury, without which it probably would not have occurred, it is certain he cannot recover damages. But, although the plaintiff is proved to have been somewhat negligent, and to have contributed somewhat to the injury by his negligence, he may nevertheless recover, if he can show gross or far greater negligence on the part of the defendant, and also that this negligence was the principal and proximate cause of the injury. Language is sometimes used from which it might be inferred that if both parties are negligent, and the defendant more so than the plaintiff, the plaintiff should recover. (*de*) The rule may be incapable of exact definition. But we think it is not law, that if both parties are negligent in a nearly equal degree, but the defendant is, on the whole, the most negligent of the two, the plaintiff shall prevail. To sustain the action, a greater than a merely perceptible difference must exist between the two degrees of negligence. (*df*) Whether the defendant used reasonable care, or

(*cd*) *Manning v. Albee*, 11 Allen, 520. (*de*) *C. B. & Q. R. R. Co. v. Payne*, 49 Ill. 490.

(*d*) *Jefferies v. Great Western Rail-*
way Co. 5 *Ellis & B.* 802.

(*dd*) *Morphy v. Blanchin*, 18 *La. An.* 188; *Hard v. Seeley*, 47 *Barb.* 428.

(*df*) In a large part of the cases heretofore cited, under the subjects of a master's liability, or a carrier's liability,

was guilty of contributory negligence, is said to be a question of fact for the jury ; (*dg*) but the true rule is, that what constitutes contributory negligence is a question of law. And this being determined by the court, the jury then pass upon the question whether the facts in evidence bring the case within the legal definition of contributory negligence. As to this definition, the authorities cannot be reconciled. For example, it is very common for passengers in railroad cars to put their arms out of the windows. And it is so common for passengers who do this to be injured because of it, that it might seem an almost necessary conclusion that the act was proved to be dangerous, and that the doing of it would incur, without sufficient cause, a real peril, and would therefore be a negligence on the part of the passenger, on which the railroad company might rest their defence, unless gross negligence was shown on their part. So indeed it is held in Indiana, (*dh*) in Massachusetts, (*di*) in New York, (*dj*) and in Pennsylvania. (*dk*) But it is held in Wisconsin (*dl*) and in Illinois, (*dm*) that a passenger may thrust or rest his arm out of the window, without negligence, or at least without such negligence as constitutes a bar to his action.

SECTION IV.

ACCORD AND SATISFACTION.

Another sufficient defence is accord and satisfaction ; which is substantially another agreement between the parties in satisfaction

and in some under Insurance, this question of contributory negligence has arisen. For recent cases in which it is considered, see Memphis, &c. R. R. Co. v. Blakeney, 48 Miss. 218 ; Chicago, &c. R. R. Co. v. Pondrom, 5 Ill. 388 ; Keating v. Central R. R. Co. 8 Lansing, 469 ; Baltimore, &c. R. R. Co. v. State, 38 Md. 542 ; Van Shaick v. Hudson River R. R. Co. 48 N. Y. 527. In this case the negligence of the defendant sufficed to defeat the action. In the other cases cited in this note, it was insufficient, and also in Schneider v. The Provident Life Ins. Co. 24 Wis. 28 ; Transportation Co. v. Downer, 11 Wallace, 129 ; Keece v. Chicago & N. W. R. R. Co. 30 Ia. 78.

(*dg*) So stated in some of the cases in

preceding note, and in Pfau v. Reynolds, 53 Ill. 212 ; Chaffee v. Boston, &c. R. R. Co. 104 Mass. 106 ; Lynch v. Smith, 104 Mass. 52 ; Mahoney v. Metropolitan R. R. Co. 104 Mass. 73.

(*dh*) I. & C. R. R. v. Rutherford, 29 Ind. 82.

(*di*) Todd v. Old Colony R. R. Co. 3 Allen, 18.

(*dj*) Holbrook v. U. & S. R. R. Co. 12 N. Y. 236.

(*dk*) Pittsburg, &c. R. R. Co. v. McClurg, 56 Penn. 294.

(*dl*) Spencer v. Milwaukee, &c. R. R. Co. 17 Wis. 487.

(*dm*) Pondrom v. Ch. & A. R. R. Co. 51 Ill. 388.

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of the former one; and also an execution of the latter agreement. This is the meaning of the ancient rule, that accord without satisfaction is no bar to an action; and it used to be laid down in the earlier books with great exactness, that the execution of the accord must be complete and perfect. (e)¹ So, indeed, it must be now, except where the new promise itself is, by the accord or agreement, the satisfaction for the debt or broken contract. The party holding the claim may agree to take a new promise of the other in satisfaction of it; or he may agree to receive a new undertaking when the same shall be executed, as a satisfaction. In either case he will be held to his bargain, and only to

* 682 that. (f)² Whether the new promise * shall have by itself

(e) *Cock v. Honychurch*, T. Raym. 203, 2 Keble, 690. *Trespass for an assault*. Plea, a concord between the parties, that the defendant should pay plaintiff £3, and his attorney's bill, and that he had paid the £3, and was ready to pay the attorney's bill, but he never showed him any. This was held no defense, because the accord was not wholly executed. See also *Peytoe's case*, 9 Rep. 79 b; *Anonymous*, Cro. Eliz. 46; *Case v. Barber*, T. Raym. 450, T. Jones, 158; *Bree v. Sayler*, 2 Keble, 332; *Hall v. Seabright*, 2 Keble, 534; *Brown v. Wade*, 2 Keble, 861; *Frentress r. Markle*, 2 Ia. 553; *Coit v. Houston*, 3 Johns. Cas. 243; *Watkinson v. Inglesby*, 5 Johns. 388; *Frost v. Johnson*, 8 Ohio, 393; *Woodruff v. Dobbins*, 7 Blackf. 582; *Ballard v. Noaks*, 2 Pike, 45; *Brooklyn Bank v. De Grauw*, 23 Wend. 342; *Bryant v. Proctor*, 14 B. Mon. 457; *Bigelow v. Baldwin*, 1 Gray, 245.

(f) *Babcock v. Hawkins*, 23 Vt. 561. This was an action of book account. It appeared, that after the commencement of the suit, the parties met, and the defendant agreed to give a note for thirty dollars to the plaintiff, and pay all the plaintiff's costs in the suit, except the writ and service. The defendant executed the note, and agreed to pay the costs, as above stated; and the plaintiff then executed and delivered to him a receipt in these words: "Received of Peter Hawkins thirty dollars by note given per this date, in full to settle all book accounts up to this date;" and the suit, as well as the subject-matter of the suit, was considered as settled by the parties. The defendant never paid any portion of the costs, but paid part of the note; and for

the reason that the defendant had not paid the costs, the plaintiff refused to discontinue the suit. Upon these facts, found by an auditor, the county court rendered judgment for the defendant, which was affirmed by the Supreme Court. *Redfield*, J., in delivering the opinion of the court, said: "We think it must be regarded as fully settled, that an agreement upon sufficient consideration, fully executed, so as to have operated in the minds of the parties, as a full satisfaction and settlement of a pre-existing contract or account between the parties, is to be regarded as a valid settlement, whether the new contract be ever paid or not; and that the party is bound to sue upon the new contract, if such were the agreement of the parties. This is certainly the common understanding of the matter. It is reasonable, and we think it is in accordance with the strictest principles of technical law. 1. There is no want of consideration in any such case, where one contract is substituted for another, and especially so where the amount due upon the former contract or account is matter of dispute. The liquidating a disputed claim is always a sufficient consideration for a new promise. *Holcomb v. Stimpson*, 8 Vt. 141. 2. The accord is sufficiently executed, when all is done which the party agrees to accept in satisfaction of the pre-existing obligation. This is ordinarily a matter of intention, and should be evidenced by some express agreement to that effect, or by some unequivocal act evidencing such a purpose. This may be done by surrender of former securities, by release or receipt in full, or in any other mode. All that is

¹ See *Pettis v. Ray*, 12 R. I. 344.

² See *Simmons v. Clark*, 56 Ill. 96.

the effect of satisfying the original claim, must be determined by the construction of the new agreement. * Gen- * 683
erally, but not universally, if the new promise be founded upon a new consideration, and is clearly binding on the original promisor, this is a satisfaction of the former claim; (g) and otherwise it is no satisfaction. (h) But even a promise, which would

requisite is, that the debtor should have executed the new contract to that point whence it was to operate as satisfaction of the pre-existing liability, in the present tense. That is shown in the present case by executing a receipt in full, the same as if the old contract had been upon note, or bill, and the papers have been surrendered. 8. In every case where one security or contract is agreed to be received in lieu of another, whether the substituted contract be of the same or a higher grade, the action, in case of failure to perform, must be upon the substituted contract. And in the present case, as it is obvious to us that the plaintiffs agreed to accept the note, and the defendant's promise to pay the costs in full satisfaction, and in the place of the former liability, the defendant remained liable only upon the new contract. 4. In all cases where the party intends to retain his former remedy, he will neither surrender nor release it; and whether the party shall be permitted to sue upon his original contract is matter of intention always; unless the new contract be of a higher grade of contract, in which case it will always merge the former contract, notwithstanding the agreement of the debtor to still remain liable upon the original contract." See in Com. Dig. tit. Accord (B 4), it is said that "an accord, with mutual promises to perform, is good; though the thing be not performed at the time of the action, for the party has a remedy to compel the performance. Yet the remedy ought to be such that the party might have taken it upon the mutual promise at the time of the agreement." And in Sard v. Rhodes, 1 M. & W. 158, which was *assumpsit* by the indorsee against the acceptor of a bill of exchange for £43, the defendant pleaded that, after the bill became due, one G. P., the drawer of the bill, made his promissory note for £44, and delivered the same to the plaintiff in full satisfaction and discharge of the bill. Replication, that although he, the plaintiff, accepted the note in full satisfaction and discharge of the bill, yet that the note was not paid when due, and still remained unpaid. Held, that the replication was bad, and that the

plaintiff, having accepted the note in full satisfaction and discharge of the bill, could not sue upon the latter. Held, also, that the plea was sufficient. And see to the same effect Good v. Cheeseman, 2 B. & Ad. 328; Evans v. Powis, 1 Exch. 601. But the rule established by these cases has made no material change in the form of the plea. It is still true that an accord without satisfaction is not good. Therefore if a defendant intends to set up a new promise without performance in bar of an action, he must take care to aver distinctly that it was agreed that the new promise should be received in satisfaction. If he sets forth the agreement in such a manner that it appears upon the face of the plea that performance, and not the promise to perform, was to be received in satisfaction, and does not aver performance, the plea will of course be bad. This will explain several recent English cases which might seem at first sight to be at variance with what is stated in the text. See Reeves v. Hearne, 1 M. & W. 323; Collingbourne v. Mantell, 5 M. & W. 289; Carter v. Wormald, 1 Exch. 81; Gifford v. Whitaker, 8 Q. B. 249; Griffiths v. Owen, 18 M. & W. 58; Harris v. Reynolds, 7 Q. B. 71; Gabriel v. Dresser, 5 C. B. 622, 29 Eng. L. & Eq. 266; Bayley v. Homan, 3 Bing. N. C. 920; James v. David, 5 T. R. 141; Allies v. Probyn, 5 Tyrwh. 1079; Hall v. Smith, 15 Ia. 584.

(g) Com. Dig. Accord (b. 4); Good v. Cheeseman, 2 B. & Ad. 328, per Parke, J.; Cartwright v. Cooke, 3 B. & Ad. 701; Evans v. Powis, 1 Exch. 907; Bayley v. Homan, 3 Bing. N. C. 921; Wentworth v. Bullen, 9 B. & C. 850. In Pope v. Tunstall, 2 Pike, 209, it was held, that in debt on a bond, a plea averring that, before suit brought, the obligees in the bond had taken a third person into partnership, and that the defendant, with two securities, executed to the new partnership a bond on longer time, which was accepted and received in full satisfaction and discharge of the bond sued on, is good in bar as a plea of accord and satisfaction.

(h) Thus, a plea that the plaintiff accepted an order of the defendant on a third person for a given sum, in satisfac-

not itself be a satisfaction, may, if it be fully performed, at the right time and in the right way (and not merely tendered), become then a satisfaction. (*i*) If the new promise is executory, and is not binding, it is no satisfaction until it be executed; and although it is to be performed on a future day certain, the promisee may have his original action before the new promise becomes due. (*j*) But if it be a binding promise, for a new consideration, performable at a future day certain, then the original right of action is suspended until that day comes; if the promise is then duly performed, this right is destroyed; but, if the promise is not then duly performed, this right revives, and the promisee has his election to sue on the original cause of action, or on the new promise, unless by the terms or the legal effect of the new contract, the new promise is itself a satisfaction and an extinction of the old one. (*k*) This * may be illustrated by the case of one

who takes a negotiable promissory note, on time, for money which is due or to become due. This note is conclusive evidence of an agreement for delay or credit, and no action can be maintained on the original cause of action until the maturity of the note; (*l*) if then the note is not paid, an action may be brought upon the note, or on the original cause of action, unless the facts show that the promisee took the note in payment, or the law implies it, as in Massachusetts, Maine, and Vermont. (*m*) Thus, if A covenants to pay B for property bought, "in manner and at the times following," that is, to give some cash, and the rest in certain promissory notes, all which are given, if the notes are not paid, an action may be brought on the covenant, although it have been literally complied with. (*n*)

tion of the promises, is no bar to an action for the original cause of indebtedness; nor is a plea good as an accord and satisfaction that the plaintiff agreed to accept the note of a third person, which, on being tendered, he refused to accept. *Hawley v. Foote*, 19 Wend. 516.

(*i*) *Com. Dig. tit. Accord* (b. 4).

(*j*) *Com. Dig. tit. Accord* (b. 4).

(*k*) If such is the intent and effect of the new agreement, the remedy on the original cause is wholly gone. See *supra*, n. (*f*). And see further *Lewis v. Lyster*, 2 Cromp. M. & R. 704; *Kearslake v. Morgan*, 5 T. R. 518; *Richardson v. Rickman*, cited in *Kearslake v. Morgan*, 5 T. R. 518; *Griffiths v. Owen*, 18 M. & W. 68.

(*l*) *Kendrick v. Lomax*, 2 Cromp. &

J. 405. In this case, after a bill of exchange became due, and whilst it was in London, where it had been sent to be presented for payment, the person who had indorsed it to the plaintiff came to him with another bill for the same amount, and prevailed on him to take it for and on account of and in renewal of the first bill. Before the second bill became due, and without delivering it back, the plaintiff brought an action on the first bill against the acceptor. Held, that he was not entitled to recover. And see *Sawyer v. Wagstaff*, 5 Beauv. 415; *Simon v. Lloyd*, 2 Cromp. M. & R. 187.

(*m*) See *ante*, p. *624, nn. (*q*), (*r*).

(*n*) *Dixon v. Dixon*, 7 Ellis & B. 908. See also *Leake v. Young*, 5 Ellis & B. 955.

It seems that a suit on a written contract, as a note of hand, may be barred by a proof of the execution of a parol contract, entered into concurrently with the written contract, and agreed to be taken in satisfaction of it. (o)

An agreement to cancel and release mutual claims, or to discontinue * mutual suits, is a mutual accord and satisfaction ; and either party may rely on it as a bar against the further prosecution of the suit or claim by the other ; (p) but to make this effectual as to mutual suits, the mutual release should be under seal.

Nor is it necessary, as we have seen, that the accord and satisfaction should go so far as to extinguish the original claim. If there be a new agreement, resting on sufficient consideration, and otherwise valid, to suspend a previous claim or cause of action, until the doing of a certain thing, or the happening of a specified event, an action cannot be maintained on that claim in the meantime. But such agreement to suspend or delay will not be inferred from the mere giving of collateral security, with power to sell the same at a certain time if the debt be not previously paid. (q)

To show that the accord and satisfaction were simultaneous,

(o) Thus, where upon the indorsement of a note it was agreed by parol between the indorser and the indorsee, that if the former would execute to the latter a deed for a tract of land, the latter would strike out the indorsement and release the indorser from all liability thereon, and the indorser did afterwards execute a deed for the tract of land, which was accepted by the indorsee ; held, that proof of these facts was not evidence tending to establish a contract variant from that contained in the written indorsement, and was competent to establish an accord and satisfaction. Smitherman v. Smith, 8 Dev. & Bat. 89. So, where P. and the defendant agreed to purchase a vessel together, and the defendant having received \$190 of P., for which he gave his note on demand, purchased the vessel in his own name, and afterwards signed a writing which set forth that a portion of the vessel was to belong to P. upon his paying therefor, and acknowledged the receipt of \$190 towards such payment, which was admitted to be the same money for which the note was given, and such writing was accepted by P. ; it was held, that this was an accord and satisfaction of the note, although it was not cancelled. Peck v. Davis, 19 Pick. 490.

(p) Thus in Vedder v. Vedder, 1 Denio, 257, A and B having mutual causes of action in *tort* against each other, had an interview to adjust the demands of B : and for the satisfaction of such demands, A paid him a sum of money and took his receipt ; but B insisted, as a condition to such adjustment, that A should execute to him a receipt in "full of all demands" on his part, to which A consented, and such receipt was given, nothing being said respecting the particular demand of A. Held, notwithstanding, that it was a good accord and satisfaction of A's cause of action against B. So, in Foster v. Trull, 12 Johns. 456, it was held, that an agreement by two, having each an action for false imprisonment pending against the other, to discontinue their respective actions, and an actual discontinuance accordingly, are a good accord and satisfaction. So, an agreement to refer mutual causes of action to arbitration, and a performance of the agreement, is a good accord and satisfaction in respect of such causes of action. Williams v. The London Commercial Exchange Co. 10 Exch. 569, 29 Eng. L. & Eq. 420.

(q) Emes v. Widdowson, 4 C. & P. 161.

and consisted of the delivery of a certain thing, it must be proved, not only that the thing was delivered, but that it was received in satisfaction. (r) This delivery need not have been voluntary, or intended by way of satisfaction. But if the property of the debtor come lawfully into possession of the creditor, and they then agree

that it may be retained by him, and shall be in satisfaction
*** 686 * of the debt, this would be regarded as a good accord and satisfaction. (s)**

The accord and satisfaction must be advantageous to the creditor. (t)¹ He must receive from it a distinct benefit which

(r) *Maze v. Miller*, 1 Wash. C. C. 328; *Sinard v. Patterson*, 3 Blackf. 364; *Hall v. Flockton*, 16 Q. B. 439, 4 Eng. L. & Eq. 185; *State Bank v. Littlejohn*, 1 Dev. & Bat. 565. And it is entirely question for the jury, whether there was an acceptance. Every receipt is not an acceptance. To constitute an acceptance there must be an act of the will. *Hardman v. Bellhouse*, 9 M. & W. 600; *Brenner v. Herr*, 8 Penn. St. 106. So whether a note or bond is accepted in satisfaction of an original claim, or only as collateral security, is for the jury. *Stone v. Miller*, 18 Penn. St. 450; *Harn v. Kiehl*, 88 Penn. St. 147.

(s) Thus, in *Jones v. Sawkins*, 5 C. B. 142, in an action of debt for use and occupation of certain rooms and apartments of the plaintiff, the defendant pleaded: 1st That the plaintiff during the demise, and before the commencement of the suit, took the defendant's goods as a distress, they being of sufficient value to satisfy the rent and costs of the distress, &c.; that the plaintiff never sold the goods, but retained them until just before the commencement of the suit, when he, with the assent of the defendant received and accepted them, and still retained them in satisfaction, &c. 2. That after the accruing of the causes of action, and before the commencement of the suit, the plaintiff wrongfully seized the defendant's goods, being of value more than sufficient to satisfy the causes of action and retained them for an unreasonable time, namely, &c., and converted them; that it was, before the commencement of the suit, agreed between the plaintiff and the defendant, that, for the termination of disputes between them concerning the causes of action in the declaration, and claims made by the defendant in respect to the seizure and conversion, such demands and rights of action should be mutually relinquished; and that the

plaintiff should retain the goods as a final settlement in full satisfaction and discharge of the said causes of action; and that the plaintiff accepted and received, and still retained the said goods in such full satisfaction and discharge. 3. That the plaintiff wrongfully seized the defendant's goods to the value of all the money's in the declaration mentioned, and detained the goods for an unreasonable time, and converted them, and wrongfully disturbed the defendant in the peaceable possession of the rooms; that the plaintiff was desirous of regaining possession of the rooms; that after the accruing of the causes of action, and before the commencement of the suit, it was agreed between the plaintiff and the defendant, that, to put an end to disputes in respect of the causes of action in that plea mentioned, and other alleged causes of action on the part of the defendant, they should mutually relinquish their claims; that the plaintiff should retain the goods in full satisfaction and discharge of his claim, and that the defendant should relinquish her right to and give up possession of the rooms, and should be discharged by plaintiff from all claims; and that the defendant accordingly relinquished her claims to, and gave up possession during the tenancy, and the plaintiff resumed, and still retained possession of the rooms, and retained the goods so seized, in satisfaction and discharge of the causes of action. Held, that the pleas were good pleas of accord and satisfaction. Held, also, that the replications — which in substance alleged that the plaintiff did not seize or detain any goods of the defendant of sufficient value to satisfy the rents and costs, or of value sufficient for a full satisfaction and discharge of the causes of action — were bad, as raising an immaterial issue.

(t) Thus, it is settled that a mere re-

¹ *Works v. Hershey*, 35 La. 340.

* otherwise he would not have had. (u) Thus, to an action * 687 for wrongfully taking cattle, it is no plea that it was agreed that plaintiff might have them again; for this the law would have given him; and the return of the cattle is not a satisfaction for the injury caused by the detention of them. (v) But although it has been held, that the thing given in satisfaction must have a distinct value *at law*, and therefore the release of equities of redemption could not be a satisfaction for want of such value, (w) it cannot be doubted, that if the satisfaction be actual, and have a real value in fact, either at law or in equity, it would be held sufficient.

It is held that a creditor who agrees to receive a less sum in full satisfaction for a greater debt, and who receives this sum and gives a receipt in full, may yet sue for the balance of his debt. (ww) But if the promise to give a smaller sum is accompanied by additional security, here is a consideration which makes valid the

receipt by a creditor of part of his debt then due, is not a good defence by way of accord and satisfaction, to an action for the remainder, although the creditor agreed to receive it in full satisfaction. See *ante*, pp. * 619, * 620, and notes. And see further *Warren v. Skinner*, 20 Conn. 559, an excellent case; *Daniels v. Hatch*, 1 N. J. 391; *Adams v. Tapling*, 4 Mod. 88; *Worthington v. Wigley*, 8 Bing. N. C. 454; *Smith v. Bartholomew*, 1 Met. 276; *Mitchell v. Cragg*, 10 M. & W. 367; *Greenwood v. Lidbetter*, 12 Price, 183; *Hinckley v. Arey*, 27 Me. 382; *Hardey v. Coe*, 5 Gill, 189; *White v. Jordan*, 27 Me. 870; *Eve v. Moseley*, 2 Strobb. 203. But this rule applies only when the claim thus settled is a *liquidated* and undisputed one. *Longridge v. Dorville*, 5 B. & Ald. 117; *Wilkinson v. Byers*, 1 A. & E. 108; *Reynolds v. Pinhowe*, Cro. Eliz. 429; *Atlee v. Backhouse*, 3 M. & W. 651; *McDaniels v. Lapham*, 21 Vt. 228; *Stockton v. Frey*, 4 Gill, 406; *Palmerton v. Huxford*, 4 Denio, 166; *Tuttle v. Tuttle*, 12 Met. 551. And if the debtor give his *negotiable* note for part of an undisputed debt, and this be accepted in full satisfaction, the right to sue for the balance is gone. See *ante*, p. * 619, n. (z). Or the note of a *third person*. See *ante*, p. * 619, n. (a); *Booth v. Smith*, 3 Wend. 66. In *Bruce v. Bruce*, 4 Dana, 530, the defendant pleaded that the plaintiff had agreed to accept the promise of a third person, in full satisfaction of the note sued on. The only evidence in support of the plea was an indorsement signed by

the third party, and in these words: "I am to pay the within note;" and a credit of the same date, still legible, though lines had been drawn through it, for a sum paid by the third party. Held, that this was no evidence of an accord and satisfaction of the note which remained in the plaintiff's possession. So if the creditor derives any benefit from the part payment to which he was not entitled, and he accepts this additional benefit, together with the part payment, as a full satisfaction, this is a good discharge of his whole claim. *Douglass v. White*, 3 Barb. Ch. 621; *Hinckley v. Arey*, 27 Me. 382. As if part is paid and received in full satisfaction before the whole is due. *Brooks v. White*, 2 Met. 283; *Goodnow v. Smith*, 18 Pick. 414; *Smith v. Brown*, 3 Hawks, 580. And if the creditor receives any specific property, either from the debtor or a third person, in full satisfaction, this is a good discharge whatever be the value of the thing thus received, there being no fraud. *Reed v. Bartlett*, 19 Pick. 273; *Blinn v. Chester*, 5 Day, 300. And see *ante*, p. * 619, n. (z).

(u) See preceding note.

(v) *Keeler v. Neal*, 2 Watts, 424. A plea of accord, &c., must show that the plaintiff received something valuable. *Davis v. Noaks*, 3 J. J. Marsh. 497; *Logan v. Austin*, 1 Stew. 476.

(w) *Preston v. Christmas*, 2 Wils. 86.

(ww) *Harriman v. Harriman*, 12 Gray, 341; *Bunge v. Koop*, 5 Rob. 1. But see *Pepper v. Aiken*, 2 Bush, 251.

promise to accept this sum in full. (*wx*)¹ And so would any other consideration for the payment.

We have seen that a promise, without execution, is no satisfaction, unless it has this effect by express agreement. And on the same principle, if the promise be executed literally, or in form, but is rendered inoperative or worthless to the creditor by the debtor's act or omission, this has no effect as an accord and satisfaction. (*x*)

* 688 * If the accord and satisfaction be made by a third party, and is accepted as satisfaction, it would seem to be sufficient, if the actual debtor consent to look upon it as such. (*y*)

At least this must be the case where the debtor and the stranger are principal and agent, or the transaction is such that the debtor may make it the act of the stranger as his agent, by his subsequent adoption and ratification.

An accord and satisfaction made before breach of covenant or contract, is not a bar to an action for a subsequent breach. (*z*)

(*wx*) *Keeler v. Salisbury*, 83 N. Y. 648.

(*x*) Thus, in *Turner v. Browne*, 3 C. B. 157, in debt for money had and received, &c., the defendant pleaded, that after the accruing of the debts and causes of action, the defendant executed a deed, securing to the plaintiff a certain annuity; and that the plaintiff then accepted and received the same of and from the defendant in full satisfaction and discharge of all the said several debts and causes of action. The plaintiff replied, that no memorial of the annuity deed was enrolled pursuant to the statute; that the annuity being in arrear, the plaintiff brought an action to recover the amount of the arrears; that the defendant pleaded in bar of that action the non-enrolment of the memorial, and that thereupon the plaintiff elected and agreed that the indenture should be null and void, as pleaded by the defendant, and discontinued the action. *Held*, a good answer to the plea, inasmuch as it showed that the accord and satisfaction thereby set up, had been rendered nugatory and

unavailing by the act of the defendant himself. Upon the same principle it was held in *Hall v. Smallwood*, Peake's Add. Cas. 18, that if a bill of sale of goods is given in satisfaction of a bond debt, and it is afterwards discovered that the obligor had previously committed an act of bankruptcy, the obligee may abandon the bill of sale and sue out a commission against the obligor; and a co-obligor cannot plead the bill of sale as an accord and satisfaction, in an action against him on the bond. *Coles v. Soulsby*, 21 Cal. 47.

(*y*) *Booth v. Smith*, 8 Wend. 66; *Webster v. Wyser*, 1 Stew. 184.

(*z*) And it is immaterial whether the covenant is to pay at a time certain, or upon a contingency. *Healey v. Spence*, 8 Exch. 668, 20 Eng. L. & Eq. 476; *Mayor of Berwick v. Oswald*, 1 Ellis & B. 295, 16 Eng. L. & Eq. 236; *Snow v. Franklin*, 1 Lutw. 358; *Alden v. Blague*, Cro. Jac. 99; *Neal v. Sheffield*, id. 254; *Kaye v. Waghorne*, 1 Taunt. 428; *Smith v. Brown*, 3 Hawks, 580; *Harper v. Hampton*, 1 Harris & J. 678.

¹ In *Goddard v. O'Brien*, 9 Q. B. D. 37, it was held, that the acceptance of a check for £100, payable on demand, is a good accord and satisfaction for a debt of £125 7s 9d. See *Savage v. Everman*, 70 Penn. St. 315; *Bull v. Bull*, 43 Conn. 455.

SECTION V.

OF ARBITRAMENT AND AWARD.

Somewhat analogous to the defence of accord and satisfaction, is that of arbitrament and award. By the first the parties have agreed as to what shall be done by one to satisfy the claim of the other. By the second they have agreed to submit this question to third persons. (a)¹

This agreement may be made by the parties directly, or through their agency; and the authority to make this agreement may be express or implied. The authority of an agent to submit the claims of his principal to arbitration, has been much considered. No general authority to collect claims, or even to * compromise them, carries with it the power to submit them to arbitration, (b) unless the power arises from a general usage, or is given by a rule of court. (c) But an attorney-at-law has this power by his office, (d) limited, as some courts hold, to claims already put in suit. (e) No officer of the United States has authority, by virtue of his office, to enter into a submission on their behalf, which shall be binding on them. (f)

A submission, if it be not binding on both parties, is void; and therefore it is so, if it binds either to do that which he has no legal power to do. (ff)

The first essential of an award, without which it has no force whatever, is, that it be conformable to the terms of the submis-

(a) The submission is, in fact, a *contract*, — a contract to refer the subject in dispute to others, and to be bound by their award. And the submission itself implies an agreement to abide the result, although no such agreement be *expressed*. *Stewart v. Cass*, 16 Vt. 663; *Valentine v. Valentine*, 2 Barb. Ch. 430. And a submission is valid and binding, although there is no agreement that judgment may be entered on the award. *Howard v. Sexton*, 4 Const. 157.

(b) *Alexandria Canal Co. v. Swann*, 5 How. 83.

(c) *Buckland v. Conway*, 16 Mass. 396; *Henley v. Soper*, 8 B. & C. 16.

(d) *Filmer v. Delber*, 3 Taunt. 486; *Wilson v. Young*, 9 Barr, 101; *Holker v. Parker*, 7 Cranch, 438; *Talbot v. M'Gee*, 4 T. B. Mon. 377.

(e) *Jenkins v. Gillespie*, 10 Smedes & M. 31; *Scarborough v. Reynolds*, 12 Ala. 252.

(f) *United States v. Ames*, 1 Woodb. & M. 76.

(ff) *Yeamans v. Yeamans*, 99 Mass. 585.

¹ The reference to an arbitrator of the subject-matter in dispute in a bill in equity, his award to be the basis of a final decree, is a waiver of the objections of an adequate remedy at law. *Strong v. Willey*, 104 U. S. 512.

sion. (g) The authority given to the arbitrators should not be exceeded, and the precise question submitted to them, and neither more nor less, should be answered. Neither can the award affect strangers; and if one part of it is that a stranger shall do some act, it is not only of no force as to the stranger, but of no force as to the parties, if this unauthorized part of the award cannot be severed from the rest. (h) But if both the parties to the submission are bound to pay a certain debt to a stranger, an award that one of them should pay is valid as to them. (hh) Nor can it

require that one of the parties should make a payment or

* 690 do any similar act to a stranger. (i) * But if the stranger is mentioned in an award only as agent of one of the parties, which he actually is, or as trustee, or as in any way paying for, or receiving for one of the parties, this does not invalidate the award. (j) And in favor of awards, it has been said that this will be supposed, where the contrary is not indicated. (k)

(g) 1 Roll. Abr. tit. Arbitrament (E); Hide v. Petit, 1 Ch. Cas. 185; Solomons v. M'Kinstry, 18 Johns. 27. Neither arbitrators nor courts can substitute another agreement for the one actually made by the parties. Howard v. Edgell, 17 Vt. 9.

(h) 1 Rol. Abr. tit. Arbitrament (E). An award directing a *qui tam* action to cease, is therefore bad. Philips v. Knightley, 2 Stra. 903. So an award that a stranger to the submission should give bond as a security, for the performance of the award; or that one party's wife and son should join in a conveyance, is invalid. Com. Dig. Arbit. (E. 1); Pitt v. Wordal, Godb. 165, Kellwey, 48 a, pl. 10. And see Brazil v. Isham, 1 E. D. Smith, 437. So, that an action by one party and his *wife*, against the other party should be discontinued: Com. Dig. Arbit. (D. 4); that the *servant* of one party should pay a certain sum: Dudley v. Mallery, cited in Norwich v. Norwich, 3 Leon. 62; or an award that one party should become bound with *sureties* for the performance of any particular act: Oldfield v. Wilmers, 1 Leon. 140; Coke v. Whorwood, 2 Lev. 6; that the party and one who had become surety in the submission bond, should pay the sum awarded: Richards v. Brockenbrough, 1 Rand. 449. And an award against one company will not bind another company, consisting in part of the same persons. Kratzer v. Lyon, 5 Penn. St. 274. Strangers to the submission may in some instances be bound by silently acquiescing in an

award. Govett v. Richmond, 7 Simons, 1. And see Humphreys v. Gardner, 11 Johns. 61; Downs v. Cooper, 2 Q. B. 256. An award that one party shall cause a stranger to do a certain act, as to deliver possession of land, is void. Martin v. Williams, 18 Johns. 264. Or that one party should erect a stile and bridge on the premises of a stranger. Turner v. Swainson, 1 M. & W. 572. But an award directing one party and others to convey certain premises to the other, or that he alone should pay a certain sum in money, is not invalid as to the last part. Thornton v. Carson, 7 Cranch, 508. And the award will be binding if that which relates to a third party is separable. Sears v. Vincent, 8 Allen, 507.

(hh) Lamphire v. Cowan, 89 Vt. 420.

(i) Breton v. Prat, Cro. Eliz. 758; 1 Roll. Abr. tit. Arbitrament (B), pl. 7; Adams v. Statham, 2 Lev. 235; *In re* Laing and Todd, 18 C. B. 276, 24 Eng. L. & Eq. 849.

(j) Com. Dig. Arb. (E. 7); Dudley v. Mallery, cited in Norwich v. Norwich, 3 Leon. 62; Bird v. Bird, Salk. 74; Bedam v. Clerkson, Ld. Raym. 128; Snook v. Hellyer, 2 Chitty, 43; Gale v. Mottram, W. Kel. 127; Lynch v. Clemence, 1 Lutw. 571; Macon v. Crump, 1 Call. 500; Inh. of Boston v. Brazer, 11 Mass. 447; Beckett v. Taylor, 1 Mod. 9, 2 Keb. 546; Braday v. Clyston, Cro. Car. 541.

(k) Bird v. Bird, 1 Salk. 74. But see Wood v. Adcock, 7 Exch. 468, 9 Eng. L. & Eq. 524, that the *causus* of showing that a

If the award embrace matters not included in the submission it is fatal. (*l*)¹ Thus if a question of title be submitted, the arbitrators cannot award a purchase and sale of the property. (*ll*) But if "all issues in the case" are referred, the arbitrator need not report specifically on all, as it is enough if he hears all, and reports the sum finally due. (*lm*) If, however, the portion of the award which exceeds the submission can be separated from the rest without affecting the merits of the award, it may be rejected as surplusage, and the rest will stand; otherwise the whole is void. (*m*) If * the submission specify the particulars to * 691 which it refers, or if, after general words, it make specific exceptions, its words must be strictly followed. (*n*) But if these

payment to the third person is for the benefit of a party to the submission, lies on the party seeking to enforce the award. And see *In re Mackay*, 2 A. & E. 856; *Snook v. Hellyer*, 2 Chitty, 43.

(*l*) *Brown v. Savage*, Cas. tem. Finch, 485; *Warren v. Green*, id. 141; *Lynch v. Cleistence*, 1 Lutw. 571; *Waters v. Bridge*, Cro. Jac. 630; *Hill v. Thorn*, 2 Mod. 809; *Doxley v. Burton*, Ld. Raym. 533; *Bonner v. Liddell*, 1 Brod. & B. 80; *Culver v. Ashley*, 17 Pick. 98. In this last case all demands between the parties were submitted to arbitration, and the arbitrators were authorized, in case they should find the plaintiff indebted to the defendant, to estimate the value of certain chattels of the plaintiff, and the defendant was to take them in part payment. The arbitrators found the plaintiff indebted to a less amount than the value of the chattels; but, instead of appraising so much only of the chattels as would pay the debt, they awarded that the defendant should take them and pay the plaintiff in money the excess of their value beyond the amount of the debt. *Held*, that the arbitrators had exceeded their authority, and that the award was invalid. See also *Shearer v. Handy*, 22 Pick. 417; *In re Williams*, 4 Denio, 194; *Thrasher v. Haynes*, 2 N. H. 429; *Pratt v. Hackett*, 6 Johns. 14.

(*ll*) *Robinson v. Moore*, 17 N. H. 479. See also *Brown v. Evans*, 6 Allen, 338.

(*lm*) *Heckers v. Fowler*, 2 Wallace, 128.

(*m*) *Taylor v. Nicolson*, 1 Hen. &

Mun. 67; *Richards v. Brockenbrough*, 1 Rand. 449; *McBride v. Hagan*, 1 Wend. 826; *Clement v. Durgin*, 1 Greenl. 300; *Philbrick v. Preble*, 18 Me. 255; *Banks v. Adams*, 23 id. 259; *Lyle v. Rodgers*, 5 Wheat. 394; *Walker v. Merrill*, 18 Me. 173; *Gordon v. Tucker*, 6 Greenl. 247; *Pope v. Brett*, 2 Saund. 288, and note 1; *Addison v. Gray*, 2 Wilson, 293; *Cromwell v. Owings*, 6 Harris & J. 10; *Martin v. Williams*, 13 Johns. 264; *Cox v. Jagger*, 2 Cowen, 638; *Gomez v. Garr*, 6 Wend. 583, 9 id. 649; *Brown v. Warnock*, 5 Dana, 492. For it is well settled, that an award may be good in part, and bad in part. *Rixford v. Nye*, 20 Vt. 182; *Fox v. Smith*, 2 Wilson, 287; *Addison v. Gray*, id. 293; *Leominster v. Fitchburg R. R. Co.* 7 Allen, 38; *Griffin v. Hadley*, 8 Jones, L. 82. The objection that the award does not follow the submission is one that may be waived by the parties, and their promise to abide by it, or other acquiescence, may render it valid. *McCullough v. Myers*, Hardin, 197; *McDaniell v. Bell*, 3 Hayes, 268; *Culver v. Ashley*, 19 Pick. 300; *Frothingham v. Haley*, 3 Mass. 70; *Cairnes v. Bleecker*, 12 Johns. 300. And the party in whose favor an award is made, cannot object that a certain particular found for him was not authorized by the submission. *Galvin v. Thompson*, 18 Me. 367. *A fortiori*, third persons cannot impeach an award because it does not follow the submission, if the parties themselves do not object. *Penniman v. Patchin*, 6 Vt. 325. (*n*) *Scott v. Barnes*, 7 Penn. St. 134.

¹ When property other than that for which an award was to be made, was by mistake brought before the arbitrator, his award made in ignorance of the mistake is void. *Cox v. Fay*, 54 Vt. 446. An award of referees that the defendant, "his heirs and assigns," shall pay a certain yearly sum as damages for flowing the plaintiff's land, is void as in excess of authority, where the submission contains no reference to assigns. *Littlefield v. Smith*, 74 Ma. 387.

words are very general, they will be construed liberally, but yet without extending them beyond their fair meaning. (o) On the other hand, all questions submitted must be decided, unless the submission provides otherwise; (p) and either party may object to an award that it omits the decision of some question submitted; but the objection is invalid if it be shown that the party objecting himself withheld that question from the arbitrators. (q) Nor is it necessary that the award embrace all the topics which might be considered within the terms of a general submission. It is enough if it pass upon those questions brought before the arbitrators, and they are so far distinct and independent that the omission of others leaves no uncertainty in the award. (r)

The testimony of arbitrators is admissible, to show whether * 692 a certain claim was included in their award. (rr) * If the award does not embrace all of the matters within the sub-

(o) *Munro v. Alaire*, 2 Caines, 320. A submission of *all demands* extends to real as well as personal property. *Byers v. Van Deusen*, 5 Wend. 268. A submission of "all business of whatever kind in dispute between the parties," includes a prosecution for an assault and battery, pending. *Noble v. Peebles*, 18 S. & R. 819. A submission of "all causes of action," includes a charge of fraud in a sale of certain property. *De Long v. Stanton*, 9 Johns. 38. But a submission of "all unsettled accounts" does not authorize an award dividing all the personal property owned in common by the two parties, and that each should pay one-half the debts contracted by either, and that one should pay the other \$250. *Shearer v. Handy*, 22 Pick. 417. Under a submission of all demands, prospective damages on a bond of indemnity then outstanding, may be taken into consideration. *Cheshire Bank v. Robinson*, 2 N. H. 126. In *Thoreau v. Pallies*, 5 Allen, 854, it was held, that under a submission of an action to an arbitrator, with an agreement that he may pass upon *all questions of costs*, an award fixing the amount of costs in gross, is prima facie valid.

(p) *Browne v. Meverell*, Dyer, 216 b; *Cockson v. Ogle*, 1 Lutw. 550; *Freeman v. Baspoole*, 2 Brownl. & G. 309; *Bean v. Newbury*, 1 Lev. 130; *Winter v. Muntion*, 2 J. B. Moore, 729; *Richards v. Drinker*, 1 Halst. 307; *Jackson v. Ambler*, 14 Johns. 96; *Wright v. Wright*, 6 Cowen, 197. If, however, after the making of the submission, some portion of the claims embraced in it be with-

drawn from the consideration of the arbitrators, by an agreement of the parties, and an award be published, with their assent, embracing only the remaining claims, such an award will be valid. *Varney v. Brewster*, 14 N. H. 49. If the award does not, in terms, decide all the matters submitted, yet if the thing awarded, necessarily includes all other things and matters mentioned in the submission, this is sufficient. *Smith v. Demarest*, 3 Halst. 195; *Sohier v. Easterbrook*, 5 Allen, 311. The omission of some items must clearly appear. *M'Kinstry v. Solomons*, 2 Johns. 57, 13 id. 27; *Kleine v. Catara*, 2 Gallis. 61; *Karthaus v. Ferrer*, 1 Pet. 222. See further *Winter v. White*, 3 J. B. Moore, 674, 1 Brod. & B. 850; *Athelston v. Moon, Comyns*, 547; *Harris v. Wilson*, 1 Wend. 511; *Kilburn v. Kilburn*, 13 M. & W. 671.

(q) *Page v. Foster*, 7 N. H. 392. And see *Smith v. Johnson*, 15 East, 213; *Metcalf v. Ives*, Cas. temp. Hard. 350. Under a sealed submission, the parties cannot, at the hearing, by a *parol* agreement, withdraw one item embraced in the submission. *Howard v. Cooper*, 1 Hill, 44.

(r) *McNear v. Bailey*, 18 Me. 261; *Pinkerton v. Caslon*, 2 B. & Ald. 704; *Garland v. Noble*, 1 J. B. Moore, 187; *Biggs v. Hansel*, 16 C. B. 562. Arbitrators are presumed to have acted upon all matters submitted, until the contrary is shown. *Parsons v. Aldrich*, 6 N. H. 264; *Emery v. Hitchcock*, 12 Wend. 166. But see *King v. Bowen*, 8 M. & W. 625.

(rr) *Hale v. Huue*, 10 Gray, 99.

mission which were brought to the notice of the arbitrators, it is altogether void. (s) If no partiality or corruption be alleged, and the award is on its face unobjectionable, evidence will not be received to show that a claim was considered which afforded no legal ground for damages. (ss)

In the next place an award must be *certain*; that is, it must be so expressed that no reasonable doubt can be entertained as to the meaning of the arbitrators, the effect of the award, or the rights and duties of the parties under it. (t) For the very

(s) In *Houston v. Pollard*, 9 Met. 164, by an agreement of submission to arbitration, the arbitrators were to determine between A and B, 1st, whether A had finished a certain dwelling-house according to his contract with B; and what, if anything, remained to be done upon the house by A; and how much, if anything, remained to be paid by B to A; and what damage, if any, should be deducted and allowed to B for the failure of A to perform the agreement to build the house. 2d. To determine and decide what amount, if any, remained to be advanced by B to A; and what remained to be done, if anything, by A, upon a certain other dwelling-house, to finish it, conformably to another contract between him and B. And the parties agreed to do and perform to each other whatever might be ordered by the arbitrators to be done by them respectively. The arbitrators awarded that B should pay a certain sum to A, in fulfilment of the contract for building the first-mentioned house; and that another certain sum remained to be advanced by B to A, in fulfilment of the contract for building the other house. Held, that the arbitrators had not decided all the matters submitted to them, and that their award was therefore bad. See also *In re Rider and Fisher*, 8 Bing. N. C. 874, where, in a dispute upon a building contract, arbitrators were to award on alleged defects in the building, on claims for extra work, and deductions for omissions; and to ascertain what balance, if any, might be due to the builder. An award, ordering a gross sum to be paid to the builder, without any decision on the alleged defects, was held ill.

(ss) *Rundale v. La Fleur*, 6 Allen, 480.
 (t) *Hawkins v. Colclough*, 1 Burr. 274; *Schuyler v. Van Der Veer*, 2 Caines, 286, an excellent case on this subject. And it is not sufficient merely that the parties and the arbitrators could understand it. The award should be in terms so clear and intelligible that every one who reads

it may comprehend it. *Gratz v. Gratz*, 4 Rawle, 411. A few instances of a fatal uncertainty in awards are given below. Thus, an award directing one party to give a bond, without saying in what sum. *Samon's case*, 6 Rep. 77. And see *Bacon v. Dubarry*, 1 Ld. Raym. 246. To give "good security" for a certain sum, without saying what security. *Jackson v. De Long*, 9 Johns. 43; *Thinne v. Rigby*, Cro. Jac. 314; *Tipping v. Smith*, 2 Stra. 1024; *Duport v. Wildgoose*, 2 Bulstr. 280; *Barnet v. Gilson*, 3 S. & R. 340. But see *Peck v. Wakely*, 2 McCord, 279, where an award to give "sufficient indemnity" was held not uncertain, these words being construed to mean, the defendant's own personal obligation. So to convey the right of one party to *said farm*, where no farm had been mentioned: *Brown v. Hankerson*, 8 Cowen, 70; or that one party should pay £5, and other small things: *Rudston v. Yates*, March, 144; or as much as should be due in conscience: *Watson v. Watson, Styles*, 28; or as much as certain land should be worth: *Titus v. Perkins, Skinner*, 248; or as much as a quarter of malt should be worth: *Hurst v. Bambridge*, 1 Roll. Abr. tit. Arb. (Q.) pl. 7; that one party should give up a certain obligation, dated of a given date, but not otherwise identifying it. *Sheppard v. Stites*, 2 Halst. 90. And see *McKeen v. Allen*, 2 Harrison, 506; *Bedam v. Clarkson*, Ld. Raym. 124. Or to give up "several books." *Cockson v. Ogle*, 1 Lutw. 550. Or an award of three-fourths of the whole land purchased of C. F., to be taken off the upper part of said land. *Duncan v. Duncan*, 1 Ired. 466. *Contra*, of an award that one party should convey to the other all the lands he held by a certain deed from A. *Whitcomb v. Preston*, 13 Vt. 53. See other instances in *Clark v. Burt*, 4 Cush. 896; *Calvert v. Carter*, 6 Md. 136; *Thomas v. Molier*, 8 Ohio, 266; *Waite v. Barry*, 12 Wend. 377; *Young v. Reuben*, 1 Dall. 119; *Hazen v. Addis*, 2 Green, 338; *Hopcraft v. Hickman*, 2 Simona & S. 180; *Walsh v. Gill*.

* 693 * purpose of the submission, and the end for which the law favors arbitration, is the final settlement of all questions

mor, 3 Harris & J. 283; Lyle v. Rodgers, 5 Wheat. 394; Stonehewer v. Farrar, 9 Jur. 203; Kendal v. Symonds, Exch. 1855, 30 Eng. L. & Eq. 552; Parker v. Eggleston, 5 Blackf. 128; McDonald v. Bacon, 3 Scam. 428; Callahan v. M'Alexander, 1 Ala. 366; Williams v. Wilson, 9 Exch. 90. In Lincoln v. Whittenton Mills, 12 Met. 31, an oral agreement was made by L., a land-owner, and the owners of mills, who flowed his lands, to submit to referees the question, what damages he should receive. The referees made a written award, "that the Taunton Manufacturing Company, and the owners of mills or their assigns, shall pay to L." a certain sum annually, "so long as said company and others keep up their dam, and flow as heretofore; with the understanding and agreement, that if said company and others shall discontinue their dam, the said L., his heirs or assigns, shall be entitled to such damages as it appears his land sustains in consequence of former flowing, until they arrive at their primitive goodness." The words "accepted and agreed to" were written on the award, and signed by L., and by "C. R. by authority of the owners," and L. was paid, for several years, the amount mentioned in the award; but it did not appear by whom the payment was made. C. R. was not, at the time of his accepting the award, the agent of the Taunton Manufacturing Company, nor appointed by them for that purpose. The said company afterwards ceased to do business, and their mills passed to other owners, who continued to flow L.'s lands, but refused to pay the full amount of damages awarded by the referees, and offered him a less amount. L. refused to receive the amount so offered, and filed a complaint, in common form, under the Rev. Stat. c. 116, praying for a jury to estimate the damages caused by flowing his lands. *Held*, that the award was void, because it was neither certain nor final; that if the award had been valid, it would not have bound the respondents, on the facts of the case; and that L. was entitled to proceed on his complaint. And Wilde, J., said: "This case turns on the question whether the award of arbitrators, relied on in the defence, is valid and binding on the parties to the present suit. An award is in the nature of a judgment, and, to be valid, must be certain and decisive as to the matter submitted, so that it shall not be a cause of a new controversy. Samon's case, 5 Rep. 77; Bac. Abr. Arbitrament

and Award, E. 2. And although an award may be good in part, and in part void, yet this rule applies only to awards in which the parts of the award are distinct and independent of each other. So an award may be conditional; but if the condition leads to a new controversy, the award is void. According to these principles, we are of opinion that the award in question is void, as being vague and uncertain, and not final as to the matter submitted to the arbitrators. The award is sufficiently certain as to the actual payment to be made by the owners of the reservoir dam to the complainant; but it is expressly on the understanding and agreement, that if the Taunton Manufacturing Company and others shall discontinue said dam, the complainant, his heirs and assigns, 'shall be entitled to said damage as it appears his lands sustained in consequence of former flowing, until they shall arrive at their primitive goodness.' It is clear, we think, by the part of the award, that it is not final and certain between the parties; but that the matter submitted is left open to a future controversy on the contingency of the discontinuance of the dam." See also Fletcher v. Webster, 5 Allen, 566, where it is *held*, that an award is not valid which provides for the payment by one of the parties to the submission of a certain sum, after making deductions therefrom of sums which are not fixed by or capable of being ascertained *from the award*. In Johnson v. Lathain, 1 Prac. Rep. 348, 4 Eng. L. & Eq. 203, an arbitrator had to decide upon the depth at which the defendant was entitled to keep a weir which penned back the water of a river, so as to interfere with the plaintiff's mill higher up the stream, and to determine all manner of rights of water between the parties. The arbitrator awarded that the defendant was entitled to maintain his weir to the depth of fourteen inches, and no more; and added, that he had caused marks to be placed, which marks pointed out the depth the defendant was to keep his weir, and that a plan annexed to the award correctly defined and described the depth of the weir and the marks. *Held*, that the award sufficiently pointed out the depth of the weir, and was sufficiently precise, although it made no provision for the case of floods, or for regulating the depth of the paddle in the defendant's weir, by which the water could be let off. And see Pike v. Gage, 9 Foster, 461.

and disputes; * and this is inconsistent with uncertainty. * 694 But this certainty is not required to an unreasonable or impracticable degree; it should be a certainty to a common intent; and the nature of the subject should be considered; and if that which is left uncertain by the words of the award can be made perfectly certain by a reference to a standard which the award presents, this is sufficient. (u) An award may be in the alternative. (v) If it be that one party shall pay the other a certain sum, but no time of payment be fixed, the award is not uncertain, because the sum awarded becomes payable immediately, or within a reasonable time. (w)

In the next place, the award must be possible; (x) for an award requiring that to be done which cannot be done, is senseless and useless. But the impossibility which vitiates an award is one which belongs to the nature of the thing, and not to the accidental disability of the party at the time. (y) Thus, if he be ordered to pay money on a day that is past, this is void; (z) so, if he be required to give up a deed which he neither has nor may expect to have; (a) but if he be directed to pay * money, the * 695 award is good, although he has no money; for it creates a valid debt against him. (b)¹ Nor can a party avoid an award on

(u) That certainty to a common intent is sufficient, see *Wood v. Earle*, 5 *Rawle*, 44; *Brown v. Warnock*, 5 *Dana*, 492; *Case v. Ferris*, 2 *Hill*, 75; *Doolittle v. Malcolm*, 8 *Leigh*, 608; *Coxe v. Gent*, 1 *McMullan*, 302; 1 *Roll. Abr. tit. Arb. (H.)* pl. 14; *Cargey v. Aitcheson*, 2 *B. & C.* 170; *Doe d. Williams v. Richardson*, 8 *Taunt*, 697; *Cayne v. Watts*, 8 *D. & R.* 224; *Grier v. Grier*, 1 *Dall.* 178; *Kingston v. Kincaid*, 1 *Wash. C. C.* 448. Thus an award to pay the "taxable cost," is sufficiently certain. *Nichols v. Rensselaer Mut. Ins. Co.* 22 *Wend.* 125; *Macon v. Crump*, 1 *Call*, 575; *Brown v. Warnock*, 5 *Dana*, 492. So to pay a certain sum in 90 days, and interest. *Skeels v. Chickerling*, 7 *Met.* 316. See *Beale v. Beale*, *Cro. Car.* 388; *Furnis v. Hallom, Barnes*, 166; *Fox v. Smith*, 2 *Wilson*, 287; *Bigelow v. Maynard*, 4 *Cush.* 817; *Pearson v. Archbold*, 11 *M. & W.* 477; *Bourke v. Lloyd*, 10 *M. & W.* 550; *England v. Davidson*, 9 *Dowl. P. C.* 1052; *Martin v. Burge*, 4 *A. & E.* 978; *Purdy v. Delavan*, 1 *Caines*, 804; *Lutz v. Linthicum*, 8 *Pet.* 165; *Brick-*

house v. Hunter, 4 *Hen. & Mun.* 363; *Coxe v. Lundy*, *Coxe*, 255. As to awards of costs, see *Harden v. Harden*, 11 *Gray*, 435; *Dudley v. Thomas*, 23 *Cal.* 365.

(v) *Oldfield v. Wilmer*, 1 *Leon.* 140; *Lee v. Elkins*, 12 *Mod.* 585; *Simmonds v. Swaine*, 1 *Taunt.* 549; *Commonwealth v. Pejepscut Proprietors*, 7 *Mass.* 399; *Wharton v. King*, 2 *B. & Ad.* 528; *Thorn-ton v. Carson*, 7 *Cranch*, 586.

(w) *Freeman v. Baspoule*, 2 *Brownl.* 308; *Imlay v. Wikoff*, 1 *South.* 132; *Blood v. Shine*, 2 *Fla.* 127. An award of "taxable costs" to be paid by one party is not void for uncertainty. That is certain which can be rendered certain. *Wright v. Smith*, 19 *Vt.* 110.

(x) *Colwel v. Child*, 1 *Ch. Cas.* 87; *Kunkle v. Kunkle*, 1 *Dall.* 384.

(y) 1 *Roll. Abr. tit. Arb. (B.)* pl. 16; and see *Wharton v. King*, 2 *B. & Ad.* 528.

(z) 1 *Roll. Abr. tit. Arb. (B.)* pl. 17.

(a) *Lee v. Elkins*, 12 *Mod.* 585.

(b) *Brooke, Abr. tit. Arb.* pl. 89; 1 *Roll. Abr. tit. Arb. (F.)* pl. 2.

¹ Where a statute providing that an award for land taken for street improvements in a city should be paid from a fund to be assessed, was held unconstitutional as afford-

the ground of an impossibility created by himself, after the award, or perhaps beforehand, if for the purpose of evading an expected award. (c)

This impossibility may be actual, or it may be that created by law; for an award which requires that a party should do what the law forbids him to do, is void, either in whole, or for so much as is thus against the law, if that can be severed from the rest. (d)

An award must be *reasonable*. (e) If it be of things in themselves of no value or advantage to the parties, or out of all proportion to the justice and requirements of the case, or if it undertake to determine for the parties what they should determine for themselves, as that the parties should intermarry, it is void. It is not unreasonable, however, merely because it lays a burden on one party only, and requires nothing of the other. It used to be said, that *mutuality* was essential to an award. (f) It is now certain that this mutuality need not appear upon the face of the award;

and indeed it can hardly be supposed necessary at all. (g)

* 696 If A and B refer only a claim which A has on * B, and the award is simply that B pay A a certain sum of money, it would be good, but it would have no element of mutuality that did not belong to it necessarily. (h) An award under a submission

(c) Com. Dig. tit. Arb. (E. 12).

(d) 1 Roll. Abr. tit. Arb. (G.) pl. 1. See Alder v. Savill, 5 Taunt. 454; Maybin v. Coulon, 4 Dall. 298; Harris v. Curnew, 2 Chitty, 594; Turner v. Swainson, 1 M. & W. 572.

(e) See 1 Roll. Abr. tit. Arb. (B.) pl. 12, 13; Cooper v. ——, 8 Ch. Rep. 76, cited in 1 Vern. 157; Earl v. Stocker, 2 Vern. 251; Cavendish v. ——, 1 Ch. Cas. 279. But a strong case of unreasonableness must be made out in order to induce courts to set aside an award; since the parties made choice of their own judge. See Wood v. Griffith, 1 Swanst. 43; Brown v. Brown, 1 Vern. 157, 2 Ch. Cas. 140; Waller v. King, 9 Mod. 68; Hardy v. Innes, 6 J. B. Moore, 574. As to the consistency required in an award, see Ames v. Millward, 2 J. B. Moore, 718.

(f) 1 Roll. Abr. tit. Arbit. (K.). And see Gibson v. Powell, 5 Smedes & M. 712; McKeen v. Oliphant, 3 Harrison, 442.

(g) The doctrine of mutuality is not now applied in the strict sense in which it was formerly taken. Horrell v. M'Al-

exander, 3 Rand. 94. It is not necessary that the same acts should be done by each party. Munroe v. Alaire, 2 Caines, 320; Kunckle v. Kunckle, 1 Dall. 364. The doctrine of mutuality is fully expounded in Purdy v. Delavan, 1 Caines, 815, by Kent, J., and in Jones v. Boston Mill Corporation, 6 Pick. 148. In Onion v. Robinson, 16 Vt. 510, O. and W. having a claim against R. for money received, to their use, and R. alleging that he had paid it to O., they submitted the matter to arbitrators with authority to award costs and damages, who awarded that R. account to O. for a certain sum, in damages and costs. In a suit on the award in favor of O., it was held that there was no mutuality in the submission between O. and R., and that neither the rights nor liabilities of either were affected by the award. Held, also, that the submission and award, though legally invalid, might be given in evidence under a declaration setting forth the above facts.

(h) Weed v. Ellis, 8 Caines, 255; Gordon v. Tucker, 6 Greenl. 247; Gaylord v.

ing no certain means of payment, the award under the circumstances of the case was decided to be binding on the city, although the fund proved insufficient. Sage v. Brooklyn, 89 N. Y. 189.

by an infant or married woman, against the other party, will not be set aside on the ground that it would not have been enforced if against the infant or married woman. (hh)

Lastly, the award must be final and conclusive. (i)¹ This necessity springs also from the very purpose for which the law favors arbitration, namely, the settlement and closing of disputes. (j) But here, too, as on other points, the law is now more rational and

Gaylord, 4 Day, 422; — v. Palmer, 12 Mod. 284; Horton v. Benson, Freeman, 204; Doolittle v. Malcom, 8 Leigh, 608.

(hh) *Palmer v. Davis, 23 N. Y. 242.*

(i) See *Goode v. Waters, 20 Law J. (n. s.) Ch. 72, 1 Eng. L. & Eq. 181; Wood v. The Company of Copper Miners, 15 C. B. 484, 28 Eng. L. & Eq. 369; Mays v. Cannell, 15 C. B. 107, 28 Eng. L. & Eq. 328; Carnochan v. Christie, 11 Wheat. 446.* An award, which, after disposing of the claims of some of the parties, declared that as to the claims of certain other parties, they should be at liberty to prosecute the same, either at law or equity, in like manner as if the order of reference had never been made, is not final. *Turner v. Turner, 8 Russ. Ch. 494.* But an award directing the execution of mutual and general releases is final. *Bell v. Gipps, 2 Ld. Raym. 1141; Birks v. Trippat, 1 Saund. 82; Wharton v. King, 2 B. & Ad. 528.* So of an award that plaintiff has no good cause of action. *Dibben v. Marquis of Anglesea, 4 Tyrwh. 920; M'Dermott v. U. S. Ins. Co. 3 S. & R. 604; Craven v. Craven, 1 J. B. Moore, 408; Jackson v. Yabsley, 5 B. & Ald. 849; Angus v. Redford, 11 M. & W. 69.*

(j) An award settling the costs on both sides, without saying more, is final and conclusive. *Buckland v. Conway, 16 Mass. 396; Stickles v. Arnold, 1 Gray, 418; Tarquair v. Redinger, 4 Yeates, 282; Hartnell v. Hill, Forest, 73.* An award that defendant should pay costs, without saying to whom, is not uncertain. *Baily v. Curling, 20 Law J. (n. s.) Q. B. 235, 4 Eng. L. & Eq. 201; and see Drew v. Woolcock, Bail Court, 1864, 28 Eng. L. & Eq. 223.* In *Hancock v. Reede, 15 Jur. 1036, 6 Eng. L. & Eq. 388,* H. & M. being partners, had covered wires with gutta-percha for R., in pursuance of a contract.

They afterwards assigned the partnership business to C. H., with power to him to take proceedings in their name for the recovery of debts due to them, to enforce existing contracts, and to deal in respect thereof as they themselves might have done. C. H., after the assignment, also covered wires for R. on his own account, and brought two actions against him, one in his own name, the other in the name of H. & M. It had been agreed between C. H. and R. to refer both actions, and all matters in difference, as well between H. & M. and R. as between C. H. and R., to arbitration; whereupon an order of reference was drawn up, and an award had been made. *Held*, that the award was not bad for want of finality in awarding a discontinuance of H. & M.'s action without determining the cause of action, as it appeared that the discontinuance had been entered before or at the time of making the order of reference, and that it was left to the arbitrator to decide whether the discontinuance should remain, and it was intended that he should not proceed further in that action. And see *Nicholson v. Sykes, 9 Exch. 857, 25 Eng. L. & Eq. 490.* — Where several issues are involved in the pleadings, and the whole case is referred, the costs to abide the result, it ought to appear that each issue was disposed of. See *Pearson v. Archbold, 11 M. & W. 477; Bourke v. Lloyd, 10 M. & W. 550; Stonewhewer v. Farrer, 6 Q. B. 730; Phillips v. Higgins, 20 Law J. (n. s.) Q. B. 357, 5 Eng. L. & Eq. 295; Wilcox v. Wilcox, 4 Exch. 500; Kilburn v. Kilburn, 13 M. & W. 671.* So where a cause, and all matters in difference, are referred, the costs to abide the result, the award ought to distinguish between the matters in the cause and other matters of difference. See *Morton v. Burge, 4 A. & E. 973.*

¹ An architect occupying the position of an arbitrator in ascertaining an amount due under a building contract is not liable to an action for refusing to reconsider his certificate, or give the grounds of his opinion, no fraud or collusion being alleged. *Stevenson v. Watson, 4 C. P. D. 148.* A person called upon to act as an arbitrator is not liable to an action for want of care or skill or for negligence. *Pappa v. Rose, L. R. 7 C. P. 525; Tharsis Sulphur Co. v. Loftus, L. R. 8 C. P. 1.*

less technical than it was formerly. Thus, it was once a rule * 697 that an award of nonsuit was not good, * because not final, as the plaintiff might immediately renew his action; (k) but this would hardly be held now. An award of discontinuance of a suit has always been held sufficient. (l) It is not a valid objection to an award, that it is upon a condition, if the condition be clear and certain, consistent with the rest of the award, in itself reasonable, and such as to cause no doubt whether it were performed or not, or what were the rights or objections dependent upon it. (m)

Any delegation or reservation of their authority by the arbitrators, which would have the effect of leaving anything to the future judgment or power of the arbitrators, would vitiate the award. (n) But where arbitrators are unable to decide accurately upon some particular point, requiring some technical knowledge, they may refer the settlement of the details to some third person having such knowledge, the arbitrators, however, accurately determining the principles by which such person is to be governed. (o)

(k) *Knight v. Burton*, 1 Salk. 75; 1 Roll. Abr. tit. Arb. (I.) pl. 16; *Philips v. Knightley*, 1 Barnard. 463. But in *Miller v. Miller*, 5 Binn. 62, it was said that arbitrators had no power to award a nonsuit. Nor have they to arrest judgment, if their power be only to direct how a verdict shall be entered. *Angus v. Redford*, 11 M. & W. 69.

(l) *Blanchard v. Lilley*, 9 East, 497; *Philips v. Knightley*, 1 Barnard. 463; *Linsey v. Ashton*, Godb. 255; *Ingram v. Webb*, 1 Rolle, 362. Or that plaintiff should enter a *retraxit*. 1 Roll. Abr. tit. Arb. (F.) pl. 7, (I.) pl. 18. Or that no suit should be brought by one party against the other on a certain bond. 1 Roll. Abr. tit. Arb. (O.) pl. 7. Or that all suits then pending between the parties should cease. *Squire v. Grevell*, 6 Mod. 33, Ld. Raym. 961, 1 Salk. 74. Or that a chancery suit should be dismissed, *Knight v. Burton*, 6 Mod. 232, 1 Salk. 75. See *Purdy v. Delavan*, 1 Caines, 804, for an able statement of the law upon this point by Mr. Justice Kent.

(m) *Collet v. Podwell*, 2 Keble, 670; *Kockill v. Withersell*, 2 Keble, 838; 1 Roll. Abr. tit. Arb. (H.) pl. 8; *Furser v. Prowd*, Cro. Jac. 428. An award that one party should pay the other a particular debt, in case it was not collected from another source, is valid. *Williams v. Williams*, 11 Smedes & M. 393.

(n) *Archer v. Williamson*, 2 Harris & G. 62; *Levezey v. Gorgas*, 4 Dall. 71; *Lingood v. Eade*, 2 Atk. 501; *Emery v. Emery*, Cro. Eliz. 726; *Manser v. Heaver*, 3 B. & Ad. 296; *Tandy v. Tandy*, 9 Dowl. P. C. 1044, 5 Jur. 726. So an award that one party should put certain premises in good repair, to the satisfaction of a third party, has been held bad *in toto*. *Tomlin v. Mayor, &c. of Fordwich*, 5 A. & E. 147. So an award that A should beg B's pardon, in such form as B should appoint, is an improper delegation of authority. *Glover v. Barrie*, 1 Salk. 71, 2 Lutw. 1697.

(o) See *Emery v. Wase*, 5 Ves. 846; *Anderson v. Wallace*, 3 Clark & F. 26; *Sharp v. Nowell*, 6 C. B. 253; *Hopcraft v. Hickman*, 2 Simons & S. 180; *Scale v. Fothergill*, 8 Beav. 361; *Church v. Roper*, 1 Ch. Rep. 140; *Lingood v. Eade*, 2 Atk. 501; *Cater v. Startute, Styles*, 217; *Furniss v. Hallom, Barnes*, 166; *Winter v. Garlick*, 1 Salk. 75, 6 Mod. 195; *Worral v. Akworth*, 2 Keble, 831; *Hunter v. Benison, Hardres*, 43; *Galloway v. Webb*, 818. There is no impropriety in arbitrators employing an attorney to prepare their award. Nor is there necessarily any impropriety in employing an attorney of one of the parties for that purpose. *Behren v. Bremer*, C. B. 1854, 30 Eng. L. & Eq. 490. But see *Bayne v. Morris*, 1 Wallace, 97.

* An award may open to any or all of these objections * 698 in part, without being necessarily void in the whole. So much of it as is thus faulty, is void; but if this can be severed distinctly from the residue, leaving a substantial, definite, and unobjectionable award behind, this may be done, and the award then will take effect. (p) It is therefore void in the whole because bad in part, only where this part cannot be severed from the residue, or where, if it be severed and amended, leaving the residue in force, one of the parties will be held to an obligation imposed upon him, but deprived of the advantage or recompense which it was intended that he should have. (q)

Generally, in the construction of awards, they are favored and enforced, wherever this can properly be done. If the intention of the arbitrators can be ascertained from the award with reasonable certainty, and this intention is open to no objection, a very liberal construction will be allowed as to form, or, rather, a very liberal indulgence as to matters of form and expression. (r)

If it be necessary to make a presumption on the one side or the other, to give full force and significance to an award, the * court will incline to make that presumption which * 699 gives effect to the award, rather than one which avoids it. (s)

(p) This is a perfectly well-settled doctrine in the law of arbitration and award,—too well settled to need the citation of authorities. A few instances of the application of the principle are given by way of illustration. Thus, in an award that defendant should pay plaintiff a certain sum, *and also the costs of arbitration*, where the arbitrator had no power to award costs, that part is bad, but the rest is valid. *Candler v. Fuller*, Willes, 62; *Fox v. Smith*, 2 Wilson, 267; *Addison v. Gray*, 2 Wilson, 293; *Gordon v. Tucker*, 6 Greenl. 247. So, in an award directing a lease for life to one party, *and a remainder over in fee to a third person*, the last part was rejected, and the first supported. *Bretton v. Prat*, Cro. Eliz. 758. And so, where part of the sum awarded to one party was founded upon a claim illegal in its nature, the other portion being separable. *Aubert v. Maze*, 2 B. & P. 371. So, if an award directs one party to deliver up a deed not in his possession, or pay a sum of money, the last is good and the first bad, and the award is not invalid. *Lee v. Elkins*, 12 Mod. 685; *Simmonds v. Swaine*, 1 Taunt. 549; and see *Wharton v. King*, 2 B. & Ad. 528; *Thornton v. Carson*, 7

Cranch, 596; *Skillings v. Coolidge*, 14 Mass. 43. See also *Ebert v. Ebert*, 5 Md. Ch. 353.

(q) If the void part of the award was apparently intended by the arbitrators as the consideration, in whole or in part, of that portion which is good, or if the void part manifestly affected the judgment of the arbitrators, in respect to other matters, the whole is clearly void. See *Pope v. Brett*, 2 Saund. 292, where part was void for uncertainty; *Winch v. Sanders*, Cro. Jac. 584, where part was void because the arbitrator had reserved to himself a future authority. See further *Storke v. De Smeth*, Willes, 66; *Johnson v. Wilson*, Willes, 248; *Clement v. Durgin*, 1 Greenl. 300.

(r) *Spear v. Hooper*, 22 Pick. 144; *Rixford v. Nye*, 30 Vt. 132; *Kendrick v. Turbell*, 26 id. 416; *Ebert v. Ebert*, 5 Md. Ch. 353. It is said in *Tomlinson v. Hammond*, that a party cannot complain of an award which was designed for his benefit, though it may be wanting in definiteness or certainty. 8 Iowa, 40.

(s) *Armit v. Bream*, 2 Ld. Raym. 1076; *Booth v. Garnett*, 2 Stra. 1082; *Rose v. Spark, Aleyn*, 51.

Thus, it has been laid down, almost as a rule, and certainly as a maxim; that where the words of an award extend beyond those of the submission, it shall be understood that they are mere surplusage, because there is nothing between the parties more than was submitted; (*t*) and if the words of the award be less comprehensive than those of the submission, it shall be understood that what is omitted was not controverted, unless, in either case, the contrary is expressly shown. (*u*) And if the submission be in the most general terms, and the award equally so, covering "all demands and questions," &c., between the parties, yet either party may show that a particular demand either did not exist, or was not known to exist, when the submission was entered into, or that it was not brought before the notice of the arbitrators, or considered by them. (*v*) And equity will correct a mistake, if the facts before the court permit it. (*vv*) And generally an award will not be set aside for defects curable by amendment. (*vw*)

There are certain words and phrases often used in awards, which seem to have acquired from practice a legal signification. Thus, "costs" will mean only the legal costs of court; and even "charges and expenses" mean no more, unless more be specially indicated. (*w*) Such at least is the English authority; but it might, perhaps, be expected, that the courts of this country would execute the intention of the parties, and construe such very general words as these accordingly. So "releases" mean to

* 700 the time of the submission, and have been so * construed even when the words used were "of all claims to the time of the award;" for the arbitrators had no authority to go beyond this limit. (*x*) And if by an award money is to be paid in satis-

(*t*) *Alder v. Savill*, 5 *Taunt.* 454; *Solomons v. M'Kinstry*, 18 *Johns.* 27.

(*vv*) *Davis v. Cilley*, 44 *N. H.* 448. See *Beach v. Cooke*, 28 *N. Y.* 506.

(*u*) *Knight v. Burton*, 1 *Salk.* 75; 6 *Mod.* 231; *Middleton v. Weeks*, *Cro. Jac.* 200; *Vanvivée v. Vanvivée*, *Cro. Eliz.* 177; *Webb v. Ingram*, *Cro. Jac.* 664; *Lewis v. Burgess*, 5 *Gill.* 129; *Roberts v. Mariett*, 2 *Saund.* 188; *Cable v. Rogers*, 3 *Bulstr.* 311; *Ward v. Uncorn*, *Cro. Car.* 216; *Bussfield v. Bussfield*, *Cro. Jac.* 677.

(*vw*) *Ladd v. Lord*, 36 *Vt.* 194.

(*v*) *Ravee v. Farmer*, 4 *T. R.* 146; *Golightly v. Jellicoe*, *id.* 147, n.; *Thorpe v. Cooper*, 5 *Bing.* 129; *Seldon v. Tutop*, 6 *T. R.* 607; *Martin v. Thornton*, 4 *Esp.* 180. But see *Jonee v. Bennett*, 1 *Bro. P. C.* 411; *Shelling v. Farmer*, 1 *Stra.* 646; *Smith v. Johnson*, 16 *East.* 218; *Dunn v. Murray*, 9 *B. & C.* 780.

(*w*) *Fox v. Smith*, 2 *Wilson*, 267. And an award of costs generally, is understood to be costs to be taxed by the proper officer. See *Dudley v. Nettlefold*, 1 *Stra.* 737. An award that the costs be paid immediately by one party, means that they are payable upon notice to such party. *Hoggins v. Gordon*, 3 *Q. B.* 466; *Wright v. Smith*, 19 *Vt.* 110; *Safford v. Stevens*, 2 *Wend.* 158; *Barnes v. Parker*, 8 *Met.* 184. In *Morrison v. Buchanans*, 32 *Vt.* 289, held, that an arbitrator has no power to award costs of arbitration, except when it is expressly given him by the submission.

(*x*) *Making v. Welstrop, Freem.* 402;

faction of a debt, this implies an award of a release on the other side, and makes this a condition to the payment. (y)

There is no special form of an award necessary in this country. (z) If the submission requires that it should be sealed, it must be so. (a) And if the submission was made under a statute, or under a rule of court, the requirements of the statute or the rules should be followed. But even here mere formal inaccuracies would seldom be permitted to vitiate the award. If the submission contains other directions or conditions, as that it should be delivered to the parties in writing, or to each of the parties, such directions must be substantially followed. Thus, in the latter case, it has been held, that it is not enough that a copy be delivered to one of the parties on each side, but each individual party must have one. (b)

* If an award be relied on in defence, the execution of * 701 the submission by each party, or the agreement and promise by each, if there was no submission in writing, must of course

White v. Holford, Styles, 170; Hooper v. Pierce, 12 Mod. 116; Squire v. Grevell 6 Mod. 34; Abrahart v. Brandon, 10 Mod. 201; Herrick v. Herrick, 2 Kebble, 431; Robinet v. Cobb, 3 Lev. 188; Nicholas v. Chapman, 8 id. 314.

(y) *Mawe v. Samuel, 2 Rolle, 1; — v. Palmer, 12 Mod. 234; Brown v. Savage, Cas. temp. Finch, 184.*

(z) It may be under seal, or in writing, or oral, if there is nothing in the submission to the contrary. *Cable v. Rogers, 8 Bulstr. 311; Marsh v. Packer, 20 Vt. 198; Oates v. Bromell, Holt, 82.*

(a) *Stanton v. Henry, 11 Johns. 133; Rea v. Gibbons, 7 S. & R. 204. And see French v. New, 20 Barb. 481.*

(b) *Hungate v. Mease, Cro. Eliz. 885. Sed quare. See Pratt v. Hackett, 6 Johns. 14. So, if by the submission, the award is to be *indorsed* on the submission, an award annexed to the submission by a wafer, is not valid. Montague v. Smith, 13 Mass. 396. And in Wade v. Dowling, 4 Ellis & B. 44, 28 Eng. L. & Eq. 104, it was held, that where the submission required that the award should be made by more than one arbitrator, the award must be the joint act of the arbitrators, and executed in the presence of each other. See also Henderson v. Buckley, 14 B. Mon. 294. But this seems too much like forsaking the substance, and clinging to the shadow. Perhaps the fact proved in that case, that the arbitrators by mistake annexed the wrong paper to the submission, was the real cause of the decision.*

If the submission require the award to be attested by witnesses, such attestation is necessary, and the submission may be revoked at any time before such attestation, although the arbitrators have done all their duty. *Bloomer v. Sherman, 6 Paige, 575; see Newman v. Labeaume, 9 Mo. 30.* — If by the submission the award must be ready for delivery at a day certain, the award is complete, if it be in fact ready on that day, although not delivered, and although some accident should occur, by which it should never be delivered at all. *Brown v. Vawser, 4 East, 584; and see Henfree v. Bromley, 6 East, 309; Macarthur v. Campbell, 5 B. & Ad. 518.* In *Brooke v. Mitchell, 6 M. & W. 473*, where an order of reference required that the arbitrator should *make and publish* his award in writing, ready to be delivered to the parties, or such of them as should require the same, on or before a certain day, it was held, that the award was "published and ready to be delivered," within the meaning of the order, when it was executed by the arbitrator in the presence of and attested by witnesses, and that it could not be set aside, although the plaintiff died on the following day, and before he had notice that the award was ready. In *Sellick v. Addams, 15 Johns. 197*, it was held, that where sworn copies of an award are delivered to the parties by the arbitrators, and received without objection, this is a waiver of their right to receive the original award.

be proved, because the promise of the one party is the consideration for the promise of the others. (*c*)

An award is so far like a judgment that an attorney has been held to have a lien upon it for his fees; but it is not the same thing in all respects. (*d*)¹

It may happen, where an award is offered in defence, or as the ground of an action, that it is open to no objection whatever for anything which it contains or which it omits; and yet it may be set aside for impropriety or irregularity in the conduct of the arbitrators, or in the proceedings before them. Awards are thus set aside if "procured by corruption or undue means," as is said in the Stat. 9 and 10 Wm. III. ch. 15, which is held as only declaratory of the law as it was before. This rule rests, indeed, on the common principle that fraud vitiates and avoids every transaction. So too, it may well be set aside, if it be apparent on its face that the arbitrator has made a material mistake of fact or of law. (*e*) It must, however, be a strong case in which the court would receive evidence of a mistake, either in fact or in law, which did not appear in the award, and was not supposed to spring from, or indicate corruption, or gross ignorance or negligence. (*f*)²

(*c*) *Antram v. Chace*, 15 East, 209; *Houghton v. Houghton*, 37 Me. 72.

(*d*) *Ormerod v. Tate*, 1 East, 464; *Cowell v. Betteley*, 4 Moore & S. 285; s. c. not as well reported upon this point in 10 Bing. 432. But see *Dunn v. West*, 10 C. B. 420, 1 Eng. L. & Eq. 325; *Brearey v. Kemp*, Bail Court, 1856, 32 Eng. L. & Eq. 147. See also *Collins v. Powell*, 2 T. R. 756, that there is a difference between money awarded, and money recovered by a judgment.

(*e*) See *Aubert v. Maze*, 2 B. & P. 871; *Pringle v. McClenaghan*, 1 Dail. 487; *Nance v. Thompson*, 1 Snead, 321; *Walker v. Walker*, 1 Wins. 259.

(*f*) This subject was very fully considered in the *Boston Water Power Co. v. Gray*, 8 Met. 181. From the able opinion of *Shaw*, C. J., we quote the following: "It is clearly settled that an award is *prima facie* binding upon the parties, and the burden of proof is upon the party who would avoid it. In general, arbitra-

tors have full power to decide upon questions of law and fact, which directly or incidentally arise in considering and deciding the questions embraced in the submission. As incident to the decision of the questions of fact, they have power to decide all questions as to the admission and rejection of evidence, as well as the credit due to evidence, and the inferences of fact to be drawn from it. So, when not limited by the terms of the submission, they have authority to decide questions of law, necessary to the decision of the matters submitted; because they are judges of the parties' own choosing. Their decision upon matters of fact and law, thus acting within the scope of their authority, is conclusive, upon the same principle that a final judgment of a court of last resort is conclusive; which is, that the party against whom it is rendered can no longer be heard to question it. It is within the principle of *res judicata*; it is the *final judgment* for that case, and be-

¹ Thus an attorney may by an oral agreement obtain a lien valid in equity on damages subsequently awarded to his client by an arbitrator in an action for malicious prosecution, and such lien is valid against an attaching creditor of the client without notice of the assignment. *Williams v. Ingersoll*, 89 N. Y. 508.

² An arbitrator cannot recover for his services in making an award which by his corrupt and fraudulent practices has been rendered valueless. *Bever v. Brown*, 56 Ia. 565. See *Sanborn v. Murphy*, 50 N. H. 65.

And while an award obtained by fraud in either * party, * 702 would undoubtedly be set aside, it has been held, that a

tween those parties. It is amongst the rudiments of the law, that a party cannot, when a judgment is relied on to support or to bar an action, avoid the effect of it by proving, even if he could prove to perfect demonstration, that there was a mistake of the facts or of the law. But this general rule is to be taken with some exceptions and limitations, arising either from the submission, or from the award itself, or from matter distinct from either. If the submission be of a certain controversy, expressing that it is to be decided conformably to the principles of law, then both parties proceed upon the assumption that their case is to be decided by the true rules of law, which are presumed to be known to the arbitrators, who are then only to inquire into the facts, and apply the rules of law to them, and decide accordingly. Then, if it appears by the award, to a court of competent jurisdiction, that the arbitrators have decided contrary to law, of which the judgment of such a court, when the parties have not submitted to another tribunal, is the standard, the necessary conclusion is, that the arbitrators have mistaken the law, which they were presumed to understand; the decision is not within the scope of their authority, as determined by the submission, and is for that reason void. But when the parties have expressly, or by reasonable implication, submitted the questions of law, as well as the questions of fact, arising out of the matter of controversy, the decision of the arbitrators on both subjects is final. It is upon the principle of *res judicata*, on the ground that the matter has been adjudged by a tribunal which the parties have agreed to make final, and a tribunal of last resort for that controversy; and therefore it would be as contrary to principle, for a court of law or equity to rejudge the same question, as for an inferior court to rejudge the decision of a superior, or for one court to overrule the judgment of another, where the law has not given an appellate jurisdiction, or a revising power acting directly upon the judgment alleged to be erroneous. — It has sometimes been made a question whether the court will not set aside an award, on the ground of mistake of the law, when the arbitrator is not a professional man, and decline inquiry into such mistake, when he was understood, from his profession, to be well acquainted with the law. Some of the earlier cases may have countenanced this dis-

tinction. But the probability is, that this distinction was taken rather by way of instance to illustrate the position, that when the parties intended to submit the questions of law as well as of fact, the award should be final, but otherwise not; which we take to be the true principle. But we think the more modern cases adopt the principle, that inasmuch as a judicial decision upon a question of right, by whatever forum it is made, must almost necessarily involve an application of certain rules of law to a particular statement of facts, and as the great purpose of a submission to arbitration usually is to obtain a speedy determination of the controversy, a submission to arbitration embraces the power to decide questions of law, unless that presumption is rebutted by some exception or limitation in the submission. We are not aware that there is anything contrary to the policy of the law in permitting parties thus to substitute a domestic forum for the courts of law, for any good reason satisfactory to themselves; and having done so, there is no hardship in holding them bound by the result. *Volenti non fit injuria.* On the contrary, there are obvious cases in which it is highly beneficial. There are many cases where the parties have an election of forum; sometimes it is allowed to the plaintiff, and sometimes to the defendant. It may depend upon the amount or the nature of the controversy, or the personal relations of one or other of the parties. As familiar instances in our own practice, one may elect to proceed in the courts of the United States, or in a State court; at law or in equity; in a higher or lower court. In either case, a judgment in one is, in general, conclusive against proceeding in another. A very common instance of making a judgment conclusive by consent, is where a party agrees, in consideration of delay, or some advantage to himself, to make the judgment of the court of common pleas conclusive, where, but for such consent, he would have a right to the judgment of the higher court. But where the whole matter of law and fact is submitted, it may be open for the court to inquire into a mistake of law, arising from matter apparently on the award itself; as where the arbitrator has, in his award, raised the question of law, and made his award in the alternative, without expressing his own opinion; or, what is perhaps more common, where the arbitrator expresses his opinion, and, con-

*708 which an * award was obtained, will not be the ground of an action by the injured party. (g)

It has been permitted to the arbitrators to state a mistake of fact, which they afterwards discovered; but it would seem that the court cannot then rectify the award, or do anything but set it aside if the error be material, or, perhaps, in some cases, refer the case back again to the arbitrators. (h)

formably to that opinion, finds in favor of one of the parties; but if the law is otherwise, in the case stated, then his award is to be for the other party. In such case, there is no doubt the court will consider the award conclusive as to the fact, and decide the question of law thus presented. Another case, somewhat analogous, is where it is manifest, upon the award itself, that the arbitrator intended to decide according to law, but has mistaken the law. Then it is set aside, because it is manifest that the result does not conform to the real judgment of the arbitrator. For, then, whatever his authority was to decide the questions of law, if controverted, according to his own judgment, the case supposes that he intended to decide as a court of law would decide; and therefore, if such decision would be otherwise, it follows that he intended to decide the other way." And see *Burchell v. Marsh*, 17 How. 344. In this case, Mr. Justice Grier said: "Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end of litigation." See also *Jones v. Boston Mill Corporation*, 6 Pick. 148; *Fuller v. Fenwick*, 3 C. B. 705; *Faviell v. Eastern Counties Railway Co.* 2 Exch. 344; *Kent v. Elstob*, 3 East, 18; *Kleine v. Catara*, 2 Gallis. 61; *Greenough v. Rolfe*, 4 N. H. 357; *Johns v. Stevens*, 8 Vt. 308; *Bliss v. Robins*, 6 id. 529; *Root v. Renwick*, 15 Ill. 461; *Wohlenberg v. Lageman*, 6 Taunt 254; *Prentice v. Reed*, 1 Taunt. 162; *In re Badger*, 2 B. & Ald. 691; *Boutilier v. Thick*, 1 Dowl. & R.

366; *Richardson v. Nourse*, 3 B. & Ald. 237; *Delver v. Barnes*, 1 Taunt. 48; *Cramp v. Symons*, 1 Bing. 104; *Anonymous, 1 Chitty*, 674; *Pulliam v. Pensonneau*, 33 Ill. 376.

(g) *Blaggrave v. Bristol Waterworks Co.* 1 H. & N. 369.

(h) As to the effect of a mistake in fact, see an elaborate review of the authorities by Ch. Kent, in *Underhill v. Van Cortlandt*, 2 Johns. Ch. 339. See also *The Boston Waterpower Co. v. Gray*, 6 Met. 181, cited *supra*, where Shaw, C. J., said: "Another ground for setting aside the award is a mistake of fact, apparent upon the award itself; and this is held to invalidate the award, upon the principle stated in the preceding proposition, that the award does not conform to the judgment of the arbitrators; and the mistake, apparent in some material and important particular, shows that the result is not the true judgment of the arbitrators. The mistake, therefore, must be of such a nature, so affecting the principles upon which the award is based, that if it had been seasonably known and disclosed to the arbitrators, if the truth had been known and understood by them, they would probably have come to a different result. A familiar instance of this class of mistakes, is an obvious error in computation, by which the apparent result, in sums or times, or other things of like kind, is manifestly erroneous. In such case it is clear that the result stated is not that intended; it does not express the real judgment of the arbitrators. The class of cases in which the court will set aside an award, upon matter not arising out of the submission or award, is, where there is some corruption, partiality, or misconduct on the part of the arbitrators, or some fraud or imposition on the part of the party attempting to set up the award, by means of which the arbitrators were deceived or misled. In neither of these cases is the result the deliberate and fair judgment of the judges chosen by the parties; the former is the result of prejudice uninfluenced by law

* If the submission authorize the arbitrators to refer * 704 questions of law to the court, this may be done; otherwise, such reference would, in general, either be itself declared void, or would have the effect of avoiding the award, because it prevented it from being certain, or final and conclusive. (i) The arbitrators, by a general submission, are required to determine the law; and only a decided and important mistake could be shown and have the effect of defeating the award; it has been said, that only a mistake amounting to a perverse misconstruction

* of the law, would have this effect; certainly a very great * 705 power is given to arbitrators in this respect, and it has even been expressly declared, that they have not only all the powers of equity as well as of law, but may do what no court could do, in giving relief or doing justice. (j)¹

and fact; the latter may be a true judgment, but upon a case falsely imposed on them by the fraud of a party. Under this class of cases, where the award may be set aside, upon matter not arising out of the submission or award, another was stated at the trial; that is, where the arbitrators make a mistake in matter of fact by which they are led to a false result. This would not extend to a case where the arbitrators come to a conclusion of fact erroneously, upon evidence submitted to and considered by them, although the party impeaching the award should propose to demonstrate that the inference was wrong. This would be the result of reasoning and judgment, upon facts and circumstances known and understood; therefore a result which, upon the principles stated, must be deemed conclusive. But the mistake must be of some fact, inadvertently assumed and believed, which can now be shown not to have been so assumed; and the principal illustration was that of using a false weight or measure, believing it to be correct. Suppose, as a further illustration, that a compass had been used to ascertain the bearings of points, and it should be afterwards found, that, by accident, or the fraud of the party, a magnet had been so placed as to disturb the action of the needle, and this wholly unknown to the arbitrators; it is not a fact, or the inference of a fact, upon which any judgment or skill had been exercised, but a pure mistake, by which their judgment, as well as the needle, had been swerved

from the true direction, which it would have taken had it followed the true law understood to govern it. One test of such a mistake is, that it is of such a kind, and so obvious, that when brought to the notice of the arbitrators, it would induce them to alter the result to which they had come in the particular specified. It is not to be understood that such mistake can be proved only by the testimony or by the admission of the arbitrators. They may, from various causes, be unable to testify, or may not be able to recollect the facts and circumstances sufficiently. It is not, therefore, a matter of law, confined to a case of mistake admitted or proved by the arbitrators; but it must be of a fact upon which the judgment of the arbitrators has not passed as a part of their judicial investigation, and one of such a nature, and so proved, as to lead to a reasonable belief that they were misled and deceived by it, and that if they had known the truth, they would have come to a different result."

(i) *Sutton v. Horn*, 7 S. & R. 228

(j) The power of arbitrators to disregard strict principles of law, and to decide upon principles of equity and good conscience, was warmly claimed by *Story*, J., in *Kleine v. Catara*, 2 Gallis, 61: "Under a general submission," said he, "the arbitrators have rightfully a power to decide on the law and the fact; and an error in either respect ought not to be the subject of complaint by either party, for it is their own choice to be concluded by

¹ An award will not be sent back to the arbitrator on the ground that he has made a mistake in the legal principle on which his award is based, except where the arbitrator himself admits the mistake. *Dinn v. Blake*, L. R. 10 C. P. 388.

Other grounds of objection to an award, are irregularity of proceedings.¹ Thus, a want of notice to the parties furnishes a ground of objection to the award. (k) And for this purpose

the judgment of the arbitrators. Besides, under such a general submission, the reasonable rule seems to be, that the referees are not bound to award upon the mere dry principles of law applicable to the case before them. They may decide upon principles of equity and good conscience, and may make their award *ex aequo et bono*. We hold, in this respect, the doctrine of Lord Talbot in the South Sea Company *v.* Bumbstead, of Lord Thurlow in Knox *v.* Simonds, of the King's Bench in Ainslie *v.* Goff, and of the Common Pleas in Delver *v.* Barnes. If, therefore, under an unqualified submission, the referees, meaning to take upon themselves the whole responsibility, and not to refer it to the court, do decide differently from what the court would on a point of law, the award ought not to be set aside. If, however, the referees mean to decide according to law, and mistake, and refer it to the court to review their decision (as in all cases, where they specially state the principles on which they have acted, they are presumed to do), in such cases the court will set aside the award; for it is not the award which the referees meant to make, and they acted under a mistake. On the other hand, if knowing what the law is, they mean not to be bound by it, but to decide, what in equity and good conscience ought to be done between the parties, their award ought to be supported, although the whole proceedings should be apparent on the face of the award. And this, in our opinion, notwithstanding some contrariety, is the good sense to be extracted from the authorities. In Morgan *v.* Mather, Lord Loughborough lays it down as clear, that corruption, misbehavior, or excess of power, are the only grounds for setting aside awards; and although in the same case Mr. Commissioner Wilson says, that arbitrators cannot award contrary to law, because that is beyond their power, for the parties intend to submit to them only the legal consequences of their transactions and agreements; yet this reasoning is wholly unsatisfactory, not only from its begging the question, but from its being in direct opposition to very high authority. If, in the case before the court,

referees had made a general award, without any specification of the reasons of their decision, it would have deserved very grave consideration, whether we could, by collateral evidence, have examined into the existence of any errors of law. We are not prepared to say that such a course would be proper, unless the submission were restrained to that effect, or misbehavior were justly imputed to the referees. But here the referees have expressly laid the grounds of their decision before us, and have thereby submitted it for our consideration. This course is not much to be commended. Arbitrators may act with perfect equity between the parties, and yet may not always give good reasons for their decisions; and a disclosure of their reasons may often enable a party to take advantage of a slight mistake of law, which may have very little bearing on the merits. A special award, therefore, is very perilous; but when it is once before the court, it must stand or fall by its intrinsic correctness, tested by legal principles."

(k) Paschal *v.* Terry, Kelynge, 132; Rigden *v.* Martin, 6 Harris & J. 408; Falconer *v.* Montgomery, 4 Dall. 232; Lutz *v.* Linthicum, 8 Pet. 178; Peters *v.* Newkirk, 6 Cowen, 103; Rivers *v.* Walker, 1 Dall. 81; Webber *v.* Ives, 1 Tyler, 441; Craig *v.* Hawkins, Hardin, 46. In Crowell *v.* Davis, 12 Met. 288, C. and D. agreed to submit all disputed claims between them to the final award of B., and to abide by his decision; and that if B. should decline to act alone as referee, he might select one or two other referees to act with him; and that if he should decline altogether, the matter should be referred to such person or persons as he should select. B. declined to act, and appointed G., H., and I. as referees, on the 28d of March, of which appointment C. and D. had immediate notice, and G., as chairman of said referees, called on D., and informed him that the referees had agreed to hear the parties in the afternoon of that day. D. told G. that he could not attend to the business on that day; and G. told D. that H. and I. could not attend at any other time, and that other referees would

¹ Where one of three arbitrators had conversed with an outside party about the matter in controversy, under such circumstances as to probably influence his mind in making the award, the award was set aside, although the submission provided that an agreement of only two arbitrators should be necessary to make a binding award. Moshier *v.* Shear, 102 Ill. 169.

* it is not necessary that the submission provide for * 706 giving such notice, because a right to notice springs from the agreement to submit. (*l*) But this rule is not of universal application; for there may be cases where all the facts have been agreed upon and made known to the arbitrators, and where the case does not depend upon the evidence, and no hearing is desired, and therefore notice would be unnecessary. (*m*)

Another instance of irregularity is the omission to examine witnesses, (*n*)¹ or an examination of them when the parties were * not present, and their absence was for good * 707 cause; (*o*) but the examination of witnesses without put-

have to be appointed in their place, to which D. made no objection or reply. On the next day, G. gave notice to D. that the hearing would be on the 27th of March, at a certain place. On the said 27th of March H. and I. were not present at the appointed place, and B., at the request of C. and G., appointed K. and L. as referees in their stead. G., K., and L. thereupon proceeded to hear C., in the absence of D., and made an award in C.'s favor. *Held*, that D. was not bound by the award. And see *Peterson v. Ayre*, 17 C. B. 724, 25 Eng. L. & Eq. 325; *Oswald v. Gray*, *Bail Court*, 1855, 29 Eng. L. & Eq. 86.

(*l*) *Elmendorf v. Harris*, 23 Wend. 628; *Peters v. Newkirk*, 6 Cowen, 108.

(*m*) *Miller v. Kennedy*, 3 Rand. 2. Notice to sureties on the submission bond is not necessary. *Farmer v. Stewart*, 2 N. H. 97. In *Ranney v. Edwards*, 17 Conn. 309, A and B having unsettled accounts between them, submitted such accounts to the arbitration of C and D; and in case they should not agree, they were authorized to select a third person, who, either individually, or in conjunction with the other two, should determine the cause. C and D, after hearing the parties, and examining their books and accounts, were unable to agree upon a part of the matter in controversy; and thereupon they selected E as a third person to act with them in making the award. C and D then stated to E the claims, accounts, and evidence of the parties, relative to the matters about which they disagreed; after which C, D, and E made their award in favor of B. A and B had no notice of the appoint-

ment of E, until after the publication of the award; nor had they, or either of them, any hearing before the arbitrators, after such appointment; but C and D in omitting to give such notice, and in making their statement to E, acted under a sense of duty, and were not guilty of any fraud, concealment, or partiality. On a bill in chancery, brought by A against B, to have the award set aside, it was held, *Church*, J., dissenting, that no sufficient cause was shown for such an interference, and the bill was dismissed. And *sembles* that where the submission is to two arbitrators, with power, in case of disagreement, to select a third person to act conjointly with them, the necessity of a rehearing, in the absence of any express request by one or both of the parties, is a matter resting in the sound discretion of the arbitrators; but if such request be made, it is their duty to comply with it. See further *Rigden v. Martin*, 6 Harris & J. 406; *Emery v. Owings*, 7 Gill, 488; *Bullitt v. Musgrave*, 3 Gill, 31; *Cobb v. Wood*, 32 Me. 466; *McKinney v. Page*, id 518. And the right to notice may be waived. *Graham v. Graham*, 9 Barb, 254.

(*n*) This seems not to be necessary, in cases where the value of property merely is to be determined. *Eads v. Williams*, 4 De G., M. & G. 674, 31 Eng. L. & Eq. 203.

(*o*) So an examination of the books of one party in the absence of, and without notice to, the other party, and without proof of the correctness of the entries therein, will vitiate the award. *Emery v. Owings*, 7 Gill, 488. See also *Knowlton v. Nickles*, 29 Barb. 465.

¹ A refusal by arbitrators to hear material witnesses is sufficient misconduct for the setting aside the award, though they think they have sufficient evidence without them. *Halstead v. Seaman*, 82 N. Y. 27.

ting them under oath or affirmation will not set aside an award, if the parties were present and made no objection. (p) A concealment by either of the parties of material circumstances, would avoid an award, for this would be fraud. So if the arbitrators, in case of disagreement, were authorized to choose an umpire, but drew lots which of them should choose him. (q) But it was in one case held enough that each arbitrator named an umpire, and lots were drawn to decide which of these two should be taken, because it might be considered that both of these men were agreed upon. (r) And if an umpire be appointed by lot, or otherwise irregularly, if the parties agree to the appointment, and confirm it expressly or impliedly by attending before him, with a full knowledge of the manner of the appointment, this, it seems, covers the irregularity. (s) If a reference be to three arbitrators, the award of two, without consulting the third, although he be absent, has no force. (t)

2. OF AN AGREEMENT TO SUBMIT QUESTIONS TO ARBITRATION.

Both in this country and in England, it has long been considered, that the parties to a contract are not bound by an agreement, whether in or out of the contract, to refer questions under the same to arbitration; because they cannot oust the courts of their jurisdiction, by any agreement that these claims shall be

* 708 * submitted to arbitration. (u) Such a clause has been held to have no effect, although the matters in controversy have been referred to arbitrators and are still pending at the time of action brought. (v) So, courts of equity have refused to

(p) *Biggs v. Hansell*, 16 C. B. 562.

tolit errorum. See *Christman v. Moran*, 9 Barr, 487.

(q) *Harris v. Mitchel*, 2 Vern. 485.

(r) *Neale v. Ledger*, 16 East, 51. But see *contra*, *In re Caecil*, 9 B. & C. 624; *Tunno v. Bird*, 5 B. & Ad. 488; *James v. Attwood*, 7 Scott, 841; *Ford v. Jones*, 3 B. & Ad. 248.

(s) *Taylor v. Backhouse*, Bail Court, 2 Eng. L. & Eq. 184; *Tunno v. Bird*, 5 B. & Ad. 488. The acquiescence in such a mode of appointment, will not bind a party, however, unless made with full knowledge of all the facts. *Wells v. Cooke*, 2 B. & Ald. 218; *In re Jamieson*, 4 A. & E. 945; *In re Greenwood*, 9 A. & E. 699; *In re Hodson*, 7 Dowl. 569. The case of *Ford v. Jones*, 3 B. & Ad. 248, holding that the appointment of umpire by lot, even by consent of parties, is bad, is probably not law; *consensus*

(t) *In re Beck & Jackson*, 1 C. B. (n. s.) 696. See also *Wade v. Dowling*, 4 Ellis & B. 44.

(u) *Kill v. Hollister*, 1 Wilson, 129; *Thompson v. Charnock*, 8 T. R. 139; *Goldstone v. Osborn*, 2 Car. & P. 550; *Mitchell v. Harris*, 2 Ves. 129; *Wellington v. Mackintosh*, 2 Atk. 569; *Nichols v. Chalie*, 14 Ves. 265; *Robinson v. Georges Ins. Co.* 17 Maine, 181; *Hill v. More*, 40 Maine, 515; *Allegre v. Maryland Ins. Co.* 6 *Harris & J.* 408; *Gray v. Wilson*, 4 Watts, 39; *Contee v. Dawson*, 2 Bland, 264; *Randel v. Chesapeake & Delaware Canal Co.* 1 *Harring. Del.* 233; *Horton v. Stanley*, 1 Miles, 418; *Stone v. Dennis*, 3 *Porter*, 231; *Haggart v. Morgan*, 4 *Sandf.* 198, 1 *Seld.* 422.

(v) *Harris v. Reynolds*, 7 Q. B. 71.

enforce a bill for the specific performance of an agreement to refer to arbitration, or to compel a party to appoint an arbitrator under such an arrangement. (*w*) In one case where an action was referred to arbitration by consent, the court refused to order the arbitrators to proceed. (*x*) But, in England, the principles upon which these rules rest, have recently been much questioned; (*y*) and it * has been held, that an agreement, that * 709 the amount of damages to be recovered in an action at law

(*w*) *Wellington v. Mackintosh*, 2 Atk. 569; *Street v. Rigby*, 6 Ves. 815; *Milnes v. Gery*, 14 id. 400; *Blundell v. Brettargh*, 17 id. 282; *Gourlay v. Duke of Somerset*, 19 id. 429; *Wilks v. Duke*, 3 Meriv. 507; *Agar v. Macklewe*, 2 Simons & S. 418; *Mexborough v. Bower*, 7 Beav. 127; *Copper v. Wells*, *Saxton*, 10; *Tobey v. County of Bristol*, 8 Story, 800. In *Halfhide v. Jenning*, 2 Dickens, 702, *nom. Halfhide v. Fenning*, 2 Bro. Ch. 336, a bill was brought by one partner against another and the representative of a deceased partner, for an account and for a production and a discovery. The defendants pleaded, that there was a clause in the articles that no bill or suit should be brought respecting the partnership, until the matter should have been referred to arbitration and the arbitrator should have made his award, and the plea was sustained. This case has generally been considered to have been incorrectly decided; but it appears to us not to be opposed to the authorities above cited, and it is sustained by Lord Chancellor *Sugden*, in *Dimsdale v. Robertson*, 2 Jones & La Touche, 58. In this case, a submission had been entered into by the parties, the arbitrators were designated, and their powers and duties fully pointed out. But before they had taken any proceedings, the plaintiff filed his bill, alleging that the arbitrators could not do him justice under the powers conferred upon them. It is provided in England and Ireland by statute, that after the arbitrators are appointed in pursuance of any submission to reference, containing an agreement that such submission shall be made a rule of court, etc., that the submission cannot be revoked by either party without leave of court. The chancellor held, that the bill would not lie in this case, and the whole subject of the power of a court of equity in the premises was considered at length, and the case of *Halfhide v. Fenning* was considered as correctly decided.

(*x*) *Crawshay v. Collins*, 1 Swanst. 40.

(*y*) In *Scott v. Avery*, 5 H. L. Cas. 811, 38 Eng. L. & Eq. 1, 18, *Cresswell*, J., said: "The whole of the doctrine as to ousting the jurisdiction of the courts, appears to have been based upon the passage quoted by *Parke*, B., in 8 Exch. 494, from Co. Litt. 536: 'If a man makes a lease for life, and by deed grants, that if any waste or destruction be done, it shall be redressed by neighbors, and not by suit or plea, notwithstanding, an action of waste shall lie, for the place wasted cannot be recovered without plea.' The case is not to be found in the Year Book, 8 Edw. III, referred to, but is in *Fitz. Ab. 'Waste'*, pl. 5; and the whole of it is given in Co. Litt. 536. It seems, that this decision proceeded on the ground that the neighbors could not redress the wrong done; that it could only be done by plea; therefore, notwithstanding the deed, an action of waste would lie. There is not a word leading to the supposition, that an action would have been maintainable, if the neighbors could have given the appropriate redress; or that it might not have been granted by deed, that, if a dispute arose about waste, neighbors should say whether there had been waste or not. But in subsequent cases, it has been considered to have established, that parties cannot by agreement oust the jurisdiction of the courts of the realm." And in *Russell v. Pellegrini*, 6 Ellis & B. 1020, 38 Eng. L. & Eq. 99, Lord *Campbell*, C. J., said: "For some time the courts had a great horror of arbitrations, and doubts were entertained, whether a clause for referring matters in dispute, introduced in an agreement, was not illegal. But I cannot imagine why parties should not be allowed to settle their differences in the manner which they think most convenient. When a cause of action has arisen, the courts are not to be ousted of their jurisdiction; but parties may come to an agreement that there shall be no cause of action, until their differences have been referred to arbitration."

shall be first determined by arbitrators, is binding, and that no action will lie till such an arbitration is had. (z)¹

Even if an agreement to refer a case to arbitration is so far invalid that it cannot be pleaded in bar to a suit, an action for damages will lie for the breach. (a)

In England, it is now provided by statute, which probably arose out of the recent adjudications, that whenever there is an * 710 * agreement in any written instrument, to refer a cause to arbitration, and a suit is brought, the court may grant a rule to stay proceedings at the request of the defendants. (b)

(z) In *Scott v. Avery*, 8 Exch. 487, 20 Eng. L. & Eq. 827, the policy contained the clause: "That the sum to be paid to any suffering member for any loss or damage, shall, in the first instance, be ascertained and settled by the committee; and the suffering member, if he agrees to accept such sum in full satisfaction of his claim, shall be entitled to demand and sue for the same, as soon as the amount to be paid has been ascertained and settled, and not before, which can only be claimed according to the customary mode of payment in use by the society." The arbitration clause followed immediately after this, which provided, that in case of any difference between the committee and any member relative to the settlement of any loss or damage or any other matter relating to the insurance, arbitrators should be appointed, etc., and it was also provided, that "the obtaining the decision of such arbitrators on the matters and claims in dispute, is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit." The defendants' plea set forth, that a difference had arisen between the committee and the insured relative to the extent of the loss; that the amount had, therefore, never been ascertained; and that the defendants were, and always had been, ready and willing to have the same decided by arbitrators, but the plaintiff was not ready and willing so to do; and that the loss had not been settled or ascertained by arbitrators. On demurrer, the Court of Exchequer gave judgment for the plaintiff. But in the Exchequer Chamber the judgment was reversed, on the ground, that the provisions mentioned did not oust the courts of their jurisdiction, but merely provided that the amount should be ascertained in a certain way, before the party was at liberty to sue; and that

this was in the nature of a condition precedent. *Avery v. Scott*, 8 Exch. 497, 20 Eng. L. & Eq. 334. This decision was affirmed in the House of Lords, 5 H. L. Cas. 811, 36 Eng. L. & Eq. 1, *Martin*, B., *Alderson*, B., and *Crompton*, J., dissenting. Lord Chancellor *Cranworth* stated the law, as follows: "If I covenant with A. not to do a particular act, and it is agreed between us that any question which might arise should be decided by an arbitrator without bringing an action, then a plea to that effect would be no bar to an action; but if we agreed that J. S. was to award the amount of damages to be recoverable at law, then, if such arbitration did not take place, no action could be brought."

(a) *Livingstone v. Ralli*, 5 Ellis & B. 182, 30 Eng. L. & Eq. 279. This doctrine was doubted in *Tattersall v. Groote*, 2 B. & P. 181.

(b) 17 & 18 Vict. c. 125, § 11. This statute provides, that "Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them shall, nevertheless, commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred or any of them, it shall be lawful for the court in which such action or suit is brought, or a judge thereof, on application by the defendants or any of them after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to

¹ But see *Edwards v. Aberayron Ins. Co* 1 Q. B. D. 563.

In this country, it has been held, that if the insurance company takes possession of the vessel and proceeds to repair her, with the view thus to make good the loss, this amounts to a waiver of the submission to arbitration. (*c*)

3. OF THE REVOCATION OF A SUBMISSION TO ARBITRATORS.

It is an ancient and well-established rule, that either party may revoke his submission at any time before the award is made; and by this revocation render the submission wholly ineffectual, and of course take from the arbitrators all power of making a binding award. (*d*) And in some of our States, as in New York, this is provided by statute. The precise point of time when this power of revocation ceases, may not be distinctly determined. But the reason of the case, and some of the authorities cited in the note to the preceding remarks (note *d*), lead to the conclusion that the power exists until the award is made.

In this country, our courts have always excepted from this rule, submissions made by order or rule of court; for a kind of jurisdiction is held to attach to the arbitrators, and the submission is quite irrevocable, except for such causes as make it necessarily imperative. (*e*) The same exception is now made * in England, certainly by the statute in most cases, and perhaps by the practice of courts in all. (*f*) In many of our States, the statutes authorizing and regulating arbitration, provide for the revocation of the submission.

As an agreement to submit is a valid contract, the promise of each party being the consideration for the promise of the other, a revocation of the agreement or of the submission, is a breach of

arbitration, according to such agreement as aforesaid; and that the defendant was, at the time of the bringing of such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit on such terms as to costs and otherwise as to such court or judge may seem fit: Provided always, that any such rule or order may at any time afterwards be discharged, or varied as justice may require." See *Russell v. Pellegrini*, 6 Ellis & B. 1020, 38 Eng. L. & Eq. 99.

(*c*) *Cobb v. New England Mut. M. Ins. Co.* 6 Gray, 192, 204.

(*d*) *Vynior's case*, 8 Rep. 81; *Warburton v. Storr*, 4 B. & C. 108; *Green v. Pole*, 6 Bing. 448; *Marsh v. Packer*, 20 Vt. 198; *Allen v. Watson*, 16 Johns. 206; *Milne v. Gratrix*, 7 East, 608.

(*e*) *Freeborn v. Denman*, 3 Halst. 116; *Horn v. Roberts*, 1 Ashm. 45; *Ruston v. Dunwoody*, 1 Binn. 42; *Pollock v. Hall*, 4 Dall. 222; *Tyson v. Robinson*, 3 Ired. 333; *Suttons v. Tyrrell*, 10 Vt. 94; *Inhab. of Cumberland v. Inhab. of North Yarmouth*, 4 Greenl. 459.

(*f*) See *Milne v. Gratrix*, and *Green v. Pole*, cited in note (*d*) *supra*.

the contract, and the other party has his damages. The measure of damages would generally include all the expenses the plaintiff has incurred about the submission, and all that he has lost by the revocation, in any way. (g)

If either party exercise this power of revocation (for it can hardly be called a right), he must give notice in some way, directly or indirectly, to the other party; and until such notice, the revocation is inoperative. (h)

The revocation may be by parol, if the submission is by parol; but if the submission is by deed, the revocation must be by deed. (i) It may be implied as well as express; and would be implied by any act which made it impossible for the arbitrators to proceed. So it was held, that bringing a suit for the claim submitted, before an award was "conclusively made," operated a revocation of the submission. (j) So the marriage of a *feme sole* works a revocation of her submission; and it is held, that this is a breach of an agreement to submit, on which an action may be sustained against her and her husband. (k) And the lunacy of a party revokes his submission. (l) And the utter destruction of the subject-matter of the arbitration would be equivalent to a revocation. (m)

Whether the bankruptcy or insolvency of either, or of both *712 *parties, would necessarily operate as a revocation, is not settled on authority. We should say, however, that it had no such effect, unless the terms of the agreement to refer, or the provisions of the law required it. But the assignees acquire whatever power of revocation the bankrupt or insolvent possessed, and, generally, at least, no further power. (n)

The death of either party before the award is made, vacates the submission; (o) unless that provides in terms for the continuance and procedure of the arbitration, if such an event occurs. (p)

(g) So, if a penalty for non-performance be expressed in the articles of submission, a revocation gives an action for the penalty. See cases cited in note (d), *supra*, and *Hawley v. Hodge*, 7 Vt. 240.

(h) *Vivior v. Wilde*, 2 Brownl. 290, 8 Rep. 81.

(i) *Wilde v. Vinor*, 1 Brownl. 62; *Barker v. Lees*, 2 Kebble, 64; *Brown v. Leavitt*, 28 Me. 251; *Van Antwerp v. Stewart*, 8 Johns. 125.

(j) *Peter v. Craig*, 6 Dana, 307.

(k) *Charnley v. Winstanley*, 5 East,

266. See also *Suttons v. Tyrrell*, 10 Vt. 94; *Saccum v. Norton*, 2 Kebble, 865, 3 Kebble, 9; *Abbott v. Keith*, 11 Vt. 528.

(l) *Suttons v. Tyrrell*, 10 Vt. 94.

(m) *Id.*

(n) *Marsh v. Wood*, 9 B. & C. 659; *Taylor v. Marling*, 2 Man. & G. 55; *Snook v. Hellyer*, 2 Chitty, 43.

(o) *Toussaint v. Hartop*, 7 Taunt. 571; *Cooper v. Johnson*, 2 B. & Ald. 394 1 Chitty, 187.

(p) See cases in preceding note, and *Tyler v. Jones*, 8 B. & C. 144; *Prior v.*

Although the death of a party certainly revokes a submission out of court, it seems to be held in this country, that a submission under a rule of court is not revoked or annulled, even by the death of a party. (q) So, the death or refusal or inability of an arbitrator to act, would annul a submission out of court, unless provided for in the agreement; but not, we think, one under a rule, unless for especial reasons, satisfactory to the court which would have the appointment of a substitute. (r)

It may be well to add, that, after an award is fully made, neither of the parties without the consent of the other, nor either nor all of the arbitrators without the consent of all the parties, has any further control over it.

• SECTION VI.

* 713

OF A RELEASE.

A release is a good defence; whether it be made by the creditor himself, or result from the operation of law. (s) No special form of words is necessary, if it declare with entire distinctness the purpose of the creditor to discharge the debt and the debtor. And if it have necessarily this effect, although the purpose is not declared, it will operate as a release; as in case of a covenant never to sue, (t) or not to sue without any limitation of time; (u) whereas, if a covenant not to sue for a certain time be broken by an

Hembrow, 8 M. & W. 878; Dowse *v.* Coxe, 3 Bing. 20, 10 J. B. Moore, 272.

(q) Freeborn *v.* Denman, 3 Halst. 116; Bacon *v.* Cranson, 16 Pick. 79; Price *v.* Tyson, 7 Gill & J. 475. Some of our statutes expressly provide, that the death of a party before the award shall not annul a submission under a rule. See Turner *v.* Maddox, 3 Gill, 190.

(r) In Price *v.* Tyson, 2 Gill & J. 475, one of the arbitrators appointed under a rule of court, removed from the State; and many years having elapsed after his appointment without any award being made, the court reinstated the cause on motion. We presume that all such questions would be addressed to the discretion of the court, and be within their power.

(s) A release under seal is a good discharge of a judgment. The party is not driven to an *audita querela*. The rule that a discharge of a contract must be of as high a nature as the contract itself, does not apply to such cases. Barker *v.* St. Quintin, 12 M. & W. 441; Co. Litt. 291 *a*; Shep. Touch. (Preston's ed.) pp. *322, *323.

(t) Cuyler *v.* Cuyler, 2 Johns. 186; Deux *v.* Jefferies, Cro. Eliz. 852; 2 Wms. Saund. 47, s. n. (1); Bac. Abr. tit. Release (A), 2; Jackson *v.* Stackhouse, 1 Cowen, 122. And see White *v.* Dingley, 4 Mass. 439; Sewall *v.* Sparrow, 16 Mass. 24; Reed *v.* Shaw, 1 Blackf. 245; Garnett *v.* Macon, 6 Call, 308.

(u) Clark *v.* Russell, 3 Watts, 218; Hamaker *v.* Eberly, 2 Binn. 510.

action, the covenant is no bar, and the covenantee has no remedy but on the covenant. (v) By some courts this last rule is held not to apply to actions of assumpsit, a covenant not to sue for a time certain being there a bar during that time. (w) So, if the covenant not to sue for a time, gives a forfeiture in case of breach, it is said to be a bar. (x) And a bond or covenant to save harmless and indemnify the debtor against his debt, is a release of the debt. (y)

It was an old maxim of the common law, that an obligor cannot be released by an instrument of less force than that which bound him; if bound by a seal, he could be released only by a seal; but while this is still a technical rule, it has in practice lost much force; (yy)¹ but a release, to be pleaded as such, as in bar of an action, or to qualify a witness, should still have a seal.

* 714 * A release, strictly speaking, can operate only on a present right; because one can give only what he has, and can only promise to give what he may have in future. But where one is now possessed of a distinct right, which is to come into effect and operation hereafter, a release in words of the present, may discharge this right. (z)

(v) Thimbleby v. Barron, 3 M. & W. 210; Dow v. Tuttle, 4 Mass. 414; Chandler v. Herrick, 19 Johns. 129; Berry v. Bates, 2 Blackf. 118; Alloff v. Scrimshaw, 2 Salk. 573; Bac. Abr. tit. Release (A), 2; Hoffman v. Brown, 1 Halst. 429; Deux v. Jefferies, Cro. Eliz. 362; Perkins v. Gilman, 8 Pick. 229; Gibson v. Gibson, 15 Mass. 112; Cullam v. Valentine, 11 Pick. 159; Winans v. Huston, 6 Wend. 471. See Pearl v. Wells, 6 Wend. 291; Guard v. Whiteside, 13 Ill. 7. And where two are jointly and severally bound, a covenant not to sue one, does not amount to a release of the other. Lacy v. Kynaston, 12 Mod. 548, 551; Ward v. Johnson, 6 Munf. 6; Tuckerman v. Newhall, 17 Mass. 581; Hutton v. Eyre, 6 Taunt. 289. And see *ante*, vol. i. p. *24, note.

(w) Clopper v. Union Bank, 7 Harris & J. 92. *Sed quære*. And see Dow v. Tuttle, 4 Mass. 414, and cases *supra*.

(x) 21 H. 7, 30, pl. 10; White v. Dingley, 4 Mass. 433. And see Roll. Abr. tit. Extinguishment (L), pl. 2; Lee

v. Wood, J. Bridg. 117; Pearl v. Wells, 6 Wend. 296.

(y) Clark v. Bush, 3 Cowen, 151.

(yy) White v. Walker, 31 Ill. 422; and see preceding note (s).

(z) Pierce v. Parker, 4 Met. 80, where the authorities on this subject are critically examined by Hubbard, J., who thus remarks: "From the best examination I have been able to give to the question before us, I come to this conclusion, that, while a possibility merely is not the subject of release, yet, that, in all cases where there is an existing obligation or contract between parties, although such obligation or contract is executory and dependent also upon contingencies that may never happen; still, if the party in whose favor such obligation or contract is made, or who is liable, by force of it, to suffer damage if it is not performed by the other when the contingency happens, shall execute a release of all claims and demands, actions and causes of action, &c., correct in point of form, and

¹ First Bank v. Marshall, 73 Me. 79, held, however, that an instrument to operate as a technical release, so that its discharge of an endorser will discharge the maker, must be under seal.

The whole of a release, as of all legal instruments, must be considered; and if it be general in its terms, it may be controlled and limited in its effects by the limitation in the recital. (a) And it may expressly extend to only a part of a claim or debt, (b) or to the party released, with express reservation *of rights * 715 against other parties; in which case it will be construed only as a covenant not to sue. (c) But if a plaintiff is met by a general release under his seal to the defendant, he cannot set up an exception by parol. (d) And where the release is general it cannot be limited or qualified by extrinsic evidence, although a receipt may be. (e) And a release or receipt in full throws the

having at the time of executing the release such obligation or contract in view, as one of the subjects upon which the release shall operate, then such release shall be held as a good and valid bar to any suit which may be afterwards brought upon such obligation or contract, or for money had, received, or paid, upon the future happening of the contingency, in consequence of which the plaintiff sustains damage, and but for such release would have had a perfect right of action."

(a) In *Rich v. Lord*, 18 Pick. 825, Shaw, C. J., said: "It is now a general rule in construing releases, especially where the same instrument is to be executed by various persons, standing in various relations, and having various kinds of claims and demands against the releasee, that general words, though the most broad and comprehensive, are to be limited to particular demands, where it manifestly appears, by the consideration, by the recital, by the nature and circumstances of the several demands, to one or more of which it is proposed to apply the release, that it was so intended to be limited by the parties. And for the purpose of ascertaining that intent, every part of the instrument is to be considered. As where general words of release are immediately connected with a proviso restraining their operation. *Solly v. Forbes*, 2 Brod. & B. 88. So a release of all demands, then existing, or which should thereafter arise, was held not to extend to a particular bond, which was considered not to be within the recital and consideration of the assignment, and not within the intent of the parties. *Payler v. Hornersham*, 4 M. & S. 428. So, where it is recited that various controversies are subsisting between the parties, and actions pending, and that it had been agreed that one should pay the other

a certain sum of money, and that they should mutually release all actions, and causes of action, and thereupon such releases were executed, it was held, that though general in terms, the releases were qualified by the recital, and limited to actions pending. *Simons v. Johnson*, 8 B. & Ad. 175; *Jackson v. Stackhouse*, 1 Cowen, 126. So it has been held in Massachusetts, that where, upon the receipt of a proportionate share of a legacy given to another, the person executed a release of all demands under the will, it was held not to apply to another and distinct legacy to the person himself. *Lyman v. Clark*, 9 Mass. R. 285" And see *Learned v. Bellows*, 8 Vt. 79. See also, *ante*, pp. * 502, * 503, and notes.

(b) 2 Roll. Abr. 413, tit. Release (H), pl. 1.

(c) *Willis v. De Castro*, C. B. 1868, 21 Law Rep. 376.

(d) *Brooks v. Stuart*, 8 A. & E. 854. This was assumpsit by indorsees against the maker of a promissory note. Plea, that the promise was a joint and several one by defendant and A., to whom one of the plaintiffs executed a release under seal. Replication, that the release was executed at the request of defendant, who afterwards, and while the note was unpaid, in consideration of such release, ratified his promise, and promised to remain liable to plaintiffs for the amount of the note. Held, bad, because it set up a parol exception to a release under seal. And see *ante*, vol. i. p. * 23.

(e) *Baker v. Dewey*, 1 B. & C. 704. But an agreement under seal, which compromises a suit, does not prevent either party from setting up and proving a parol undertaking, that one of the parties should pay the costs that had accrued. Such an undertaking does not contradict or vary the written agreement, but is distinct and independent of it.

whole burden of proof on him who signed it, if he alleges that he signed it through mistake or fraud. (ee)

A release of a debt should be made by him who has a legal interest in it; and if made by one who has not such an interest, but is beneficially interested, and is not the plaintiff of record, though this may for many purposes release the debt, it has been held that it cannot defeat the action at law. (f) If the release be made by the trustee, or other party having the legal interest, it can be set aside, if to the prejudice of the party beneficially interested, and made without his assent. (g)

The release may be only by operation of law; but this also is grounded upon the presumed intent of the parties. Thus, at common law (varied by statutory provisions), a creditor who ap-

points his debtor his executor, cancels the debt; (h) unless * 716 the * debtor refuses to accept the office; this he may do, and then he does not accept the release. (i) So if the parties intermarry. (j) Or if the creditor receive from the debtor a higher security, as a bond for a simple contract debt; but the higher security may be given only as collateral to the original debt, which then remains in full force. (k) Nor will a specialty security

Morancy v. Quarles, 1 McLean, 194. That a simple receipt may be contradicted or varied by extrinsic evidence, see *ante*, p. *564, and notes.

(ee) *Curley v. Harris*, 11 Allen, 112.

(f) *Quick v. Ludborow*, 3 Bulst. 29, where A covenanted with B that C should pay B and D a certain sum per year, as an annuity. D married, and her husband released the payment. This was held no bar to the action by B to enforce the covenant. And see *Walmeley v. Cooper*, 11 A. & E. 216, where A covenanted with B not to sue him for any debt due from B to A. Held, no bar to an action against B by A and C, for a debt due them.

(g) See *ante*, vol. i. p. *22, and notes, and *ante*, p. *617, n. (v). And see further *Jones v. Herbert*, 7 Taunt. 421; *Furnival v. Weston*, 7 J. B. Moore, 356; *Arton v. Booth*, 4 id. 192; *Herbert v. Pigott*, 2 Cromp. & M. 384; *Crook v. Stephen*, 5 Bing. N. C. 688; *Eastman v. Wright*, 6 Pick. 823; *Loring v. Brackett*, 3 Pick. 408.

(h) *Cheetham v. Ward*, 1 B. & P. 630. And see 20 Edw. IV. 17, pl. 2; 21 Edw. IV. 8, pl. 4; *Woodward v. Darcy, Plowd.* 184; *Wankford v. Wankford*, 1 Salk. 290, Co. Litt. 264, b. n. (1); *Dorchester v. Webb, Sir W. Jones*, 345; *Rawlinson*

v. *Shaw*, 3 T. R. 557; *Freakley v. Fox*, 9 B. & C. 180; *Allin v. Shadburne*, 1 Dana, 68. But see *contra*, in this country, *Winship v. Bass*, 12 Mass. 199. And see *Ritchie v. Williams*, 11 Mass. 50; *Kinney v. Ensign*, 18 Pick. 232; *Stevens v. Gaylord*, 11 Mass. 267; *Ipswich Man. Co. v. Story*, 5 Met. 813; *Pusey v. Clemson*, 9 S. & R. 204.

(i) *Dorchester v. Webb, Sir W. Jones*, 345. And see cases cited in preceding note.

(j) *Cage v. Acton*, 1 Ld. Raym. 515; *Cannel v. Buckle*, 2 P. Wms. 242; *Smith v. Stafford, Noy*, 26, Hob. 216. But a bond conditioned for the payment of money after the obligor's death, made to a woman in contemplation of the obligor's marrying her, and intended for her benefit if she should survive, is not released by their marriage. And if the marriage be pleaded in bar to an action of debt on the bond against the heir of the obligor, a replication stating the purposes for which the bond was made will be good, for they are consistent with the bond and condition. *Milbourn v. Ewart*, 5 T. R. 381.

(k) *Twopenny v. Young*, 3 B. & C. 208; *Drake v. Mitchell*, 3 East, 251; *Solly v. Forbes*, 2 Brod. & B. 33.

extinguish a simple contract debt, unless it be coextensive therewith. (*l*)

For the effect of a release by or of one of joint parties, see *ante*, ch. 2, sec. 2.

SECTION VII.

OF ALTERATION.

An alteration of a contract is said to operate a discharge of it. If the alteration be by a stranger, and is material, and the original words cannot be certainly restored, it avoids the instrument, on the ground that it is no longer the instrument of the parties. (*m*)¹

(*l*) *Jones v. Johnson*, 8 Watts & S. 276. And see *Twopenny v. Young*, 3 B. & C. 208.

(*m*) Formerly a material alteration by a stranger was held to render the instrument void, notwithstanding the original words might be restored. Thus, in Pigot's case, 11 Rep. 27, it was resolved, that when any deed is altered in a point ma-

terial, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, raising, or by drawing of a pen through a line, or through the midst of any material word, that the deed thereby becomes void: as if a bond is to be made to the sheriff for appearance, &c., and in the bond the sheriff's name is omitted,

¹ A material alteration of an instrument, as of a note, avoids it, and, if negotiated, even in the hands of an innocent holder. *Suffell v. Bank of England*, 9 Q. B. D. 555; *Draper v. Wood*, 112 Mass. 315; *Citizens' Bank v. Richmond*, 121 Mass. 110; *Schnewind v. Hacket*, 34 Ind. 248; *Hewins v. Cargill*, 67 Me. 554; *Aetna Bank v. Winchester*, 43 Conn. 391; *Neff v. Horner*, 63 Penn. St. 327; but not if done by consent of parties as against such. *Booth v. Powers*, 56 N. Y. 22, 31; *Stoddard v. Penniman*, 113 Mass. 386; *Myers v. Nell*, 84 Penn. St. 369; or if done to effectuate the parties' intention. *Derby v. Thrall*, 44 Vt. 413; *Duker v. Franz*, 7 Bush, 273; *McRaven v. Crisler*, 53 Miss. 542; *Hanson v. Crawley*, 41 Ga. 303. The following alterations have been held material: The changing the numbers on bank-notes, to prevent their being traced, *Suffell v. Bank of England*, 9 Q. B. D. 555; the changing the date of a note, *Vance v. Lowther*, 1 Ex. D. 176; *Hirschman v. Budd*, L. R. 8 Ex. 171; *Miller v. Gilleland*, 1 Am. L. Reg. 673; the addition of interest or changing the rate, *McGrath v. Clark*, 56 N. Y. 34; *Holmes v. Trumper*, 22 Mich. 427; *Schnewind v. Hacket*, 34 Ind. 248; *Coburn v. Webb*, 56 Ind. 96; *Kilkelly v. Martin*, 34 Wis. 525; *Harsh v. Klepper*, 28 Ohio St. 200; *Marsh v. Griffin*, 42 Ia. 403; see, however, *Rainbolt v. Eddy*, 34 Ia. 440; *Glover v. Robbins*, 49 Ala. 219; the signing of another person as a party, *Wallace v. Jewell*, 21 Ohio St. 163; *Dickerman v. Miner*, 43 Ia. 508; the insertion of words of negotiability, *Belknap v. Bank of N. A.* 100 Mass. 376; and the cutting off of any memorandum, *Benedict v. Cowden*, 49 N. Y. 396; *Gerrish v. Glines*, 56 N. H. 9; *Wait v. Pomeroy*, 20 Mich. 425; *Cochran v. Nebeker*, 48 Ind. 459; *Palmer v. Largent*, 5 Neb. 223. One paying a note in ignorance of its having been materially altered after execution by him, may recover money so paid. *Bank of Commerce v. Mechanics' Bank Ass.* 55 N. Y. 211; *Sheridan v. Carpenter*, 61 Me. 83; *City Bank v. First Bank*, 45 Tex. 203. An immaterial alteration in a note will not affect its validity. *Manufacturers' Bank v. Follett*, 11 R. I. 92; *Burlingame v. Brewster*, 79 Ill. 515; *Palmer v. Largent*, 5 Neb. 223. If a note is innocently altered, the holder may recover on the original consideration, *Kranse v. Meyer*, 32 Ia. 565; or if an alteration be made without fraud, the note may be restored and recovery had, *Kountz v. Kennedy*, 63 Penn. St. 187; *Horst v. Wagner*, 43 Ia. 373. It has also been held, that a bona fide holder of note previously altered can recover upon it in its original form. *Myers v. Nell*, 84 Penn. St. 369, 373, contra; *Citizens' Bank v. Richmond*, 121 Mass. 110.

And a material alteration in commercial paper, destroys the non-

and after the delivery thereof his name is interlined, either by the obligee or a stranger, without his privity, the deed is void. So if one makes a bond of £10, and after the sealing of it another £10 is added, which makes it £20, the deed is void. So if a bond is raised, by which the first word cannot be seen, or if it is drawn with a pen and ink through the word, although the first word is legible, yet the deed is void, and shall never make an issue, whether it was in any of these cases altered by the obligee himself, or by a stranger without his privity. *Markham v. Gonaston*, Cro. Eliz. 620, is to the same effect. And such is still held to be the law by all the common law courts in England, as appears by the case of *Davidson v. Cooper*, 11 M. & W. 778, 18 id. 848. That was an action of assumpsit on a guarantee. The defendants pleaded that after the guarantee or agreement in writing had been made and signed, and after the defendants had promised as in the declaration mentioned, and after the guarantee had been delivered to the plaintiff, and while it was in his hands, it was, without the knowledge or consent of the defendants, altered in a material particular by some person to the defendants unknown, and its nature and effect materially changed, by such unknown person affixing a seal by or near to the signature of the defendants, so as to make it purport to be sealed by the defendants, and to be the deed of the defendants; by reason of which alteration the said guarantee became void in law. The plaintiff took issue upon this plea, and upon the trial a verdict was found for the defendants. Afterwards, upon a motion to enter judgment for the plaintiff *non obstante veredicto*, on the ground that it was not stated in the plea that the alteration was made by the plaintiff, or with his privity, Lord *Abinger*, in delivering the judgment of the Court of Exchequer, said: "There is no doubt, but that, in the case of a deed, any material alteration, whether made by the party holding it or by a stranger, renders the instrument altogether void from the time when such alteration is made. This was so resolved in *Pigot's case*; and though it was contended in argument, that the rule has been relaxed in modern times, we are not aware of any authority for such a proposition, when the altered deed is relied on as the foundation of a right sought to be enforced. The case is different, where the deed is produced merely as proof of some right or title created by, or resulting from, its having

been executed; as in the case of an ejectment to recover lands which have been conveyed by lease and release, or now by release only. There, what the plaintiff is seeking to enforce, is not, in strictness, a right under the lease and release, but a right to the possession of the land, resulting from the fact of the lease and release having been executed. The moment after their execution the deeds become valueless, so far as they relate to the passing of the estate, except as affording evidence of the fact that they were executed. If the effect of the execution of such deeds was to create a title to the land in question, that title cannot be affected by the subsequent alteration of the deeds; and the principles laid down in *Pigot's case* would not be applicable. But if the party is not proceeding by ejectment to recover the land conveyed, but is suing the grantor under his covenants for title or other covenants contained in the release, there the alteration of the deed in any material point, after its execution, whether made by the party or by a stranger, would certainly defeat the right of the party suing to recover. The principle thus recognized in *Pigot's case*, with respect to deeds, was, in the case of *Master v. Miller*, 4 T. R. 320, and 2 H. Bl. 141, established as to bills of exchange and promissory notes; and the ground on which the decision in that case was put by the court of error was, that in all such instruments a duty arises analogous to the duty arising on deeds. The instrument itself proves the duty, without any further proof to establish it, *ubi codem est ratio, eadem est lex*. The law having been long settled as to deeds, was held to be also applicable to these mercantile instruments, which, though not under seal, yet possess properties, the existence of which in the case of deeds was, it must be presumed, the foundation of the rule." And see *Burfield v. Moore*, 8 Ellis & B. 683, 25 Eng. L. & Eq. 123; *Gardner v. Walsh*, 5 Ellis & B. 82, 32 Eng. L. & Eq. 162. "But the decisions do not stop there. In *Powell v. Divett*, 15 East, 29, the Court of King's Bench extended the doctrine to the case of bought and sold notes, holding, that a vendor who, after the bought and sold notes had been exchanged, prevailed on the broker, without the consent of the vendee, to add a term to the bought note for his (the vendor's) benefit, thereby lost all title to recover against the vendee. The ground on which the court proceeded was, that the bought note, having been fraudulently altered

consenting party's liability, although the alteration was made before

by the plaintiff, could not be received in evidence for any purpose, and as no other evidence was admissible, the plaintiff had no means of asserting any claim whatever. The court considered that Master *v.* Miller expressly decided the point before them, and Mr. Justice *Le Blanc*, taking, it should seem, his view of that case, not from the judges in the Exchequer Chamber, but from the wider line of argument adopted by Lord *Kenyon* in the court below, expressly stated that Master *v.* Miller was not confined to negotiable securities. Now, the case of Powell *v.* Divett was decided more than thirty years ago, and has ever since been treated as law; and therefore, although we certainly feel that there are difficulties in the extent to which it carries the doctrine of Pigot's case, yet we do not feel it open to us, if we were inclined to do so, to act against that authority; and the only question therefore is, whether there is any real distinction in principle between this case and that of Powell *v.* Divett. The only difference is, that in Powell *v.* Divett, the alteration was made by the plaintiffs, who held the written instrument; whereas, in this case, it is not ascertained by whom the alteration was made; the jury finding that the alteration was made by some person to them unknown, whilst the document was in the hands of the plaintiff. After much reflection, we are of opinion that this does not create any real distinction between the two cases. The case of Powell *v.* Divett was decided on the ground that written instruments, constituting the evidence of contracts, are within the doctrine laid down in Master *v.* Miller, as applicable to negotiable securities; and the doctrine established in Master *v.* Miller was, that negotiable securities are to be considered no less than deeds, within the principle of the law laid down in Pigot's case. That law is, that a material alteration in a deed, whether made by a party or a stranger, is fatal to its validity; and applying that principle to the present case, it is plain that there is no real difference between this case and that of Powell *v.* Divett. . . . Considering it, therefore, impossible to distinguish this case from Powell *v.* Divett, we think that the plea affords a good defence to the action, and consequently the rule for judgment *non obstante veredicto* must be discharged." The case was afterwards carried by writ of error to the Exchequer Chamber, where the judgment of the court below was unanimously affirmed. Lord *Dennan*,

in delivering the judgment, said: "After much doubt we think the judgment right. The strictness of the rule on this subject, as laid down in Pigot's case, can only be explained on the principle, that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud, or laches on his part. To say that Pigot's case has been overruled, is a mistake; on the contrary, it has been extended; the authorities establishing, as common sense requires, that the alteration of an unsealed paper will vitiate it." And see Mollett *v.* Wackerbarth, 5 C. B. 181. There seems, however, at one time to have been an inclination on the part of the English courts to relax the rule declared in Pigot's case. Thus, in Henfree *v.* Bromley, 6 East, 309, it was held, that an award altered by the umpire after it was made up ready for delivery, and notice given to the parties, was not entirely vitiated thereby, but that the original award being still legible, was good, the same as if such alteration had been made by a mere stranger without the privity or consent of the party interested. Lord *Ellenborough*, after observing that the umpire had no authority to make the alteration, said: "Still, however, I see no objection to the award for the original sum of £57; for the alteration made by him afterwards was no more than a mere spoliation by a stranger, which would not vacate the award." And again: "I consider the alteration of the award by the umpire, after his authority was at an end, the same as if it had been made by a stranger, by a mere spoliator. And I still read it with the eyes of the law as if it were an award for £57, such as it originally was. If the alteration had been made by a person who was interested in the award, I should have felt myself pressed by the objection; but I can no more consider this as avoiding the instrument, than if it had been obliterated or cancelled by accident." The same inference may be drawn from Hutchins *v.* Scott, 2 M. & W. 809. There, by an agreement between the plaintiff and defendant, a house, No. 38, was let to the plaintiff. After the agreement was executed and delivered to the plaintiff, it was altered (it was not proved by whom) by writing 35 instead

the paper came into the payee's hands and was not known to him. (mm) If the alteration be made by a party, it is said * 717 * so far to avoid the instrument that he cannot set it up, even if the alteration be in words not material. (n) But * 718 such a rule * would now be applied, if at all, with great relaxation. If the alteration does not vary the meaning of * 719 the instrument, or does * not effect its operation, there is

of 38, on an erasure. The house occupied by the plaintiff under the agreement was in fact No. 36. *Held*, that the altered agreement might be given in evidence in an action for an excessive distress (in which the demise was admitted on the record), to show the terms of the holding. In the course of the argument, *Alderson*, B., interrupted the counsel to say: "It is difficult to understand why an alteration by a stranger should in any case avoid the deed,—why the tortious act of a third person should affect the rights of the two parties to it, unless the alteration goes the length of making it doubtful what the deed originally was, and what the parties meant." And Lord *Abinger* added: "Suppose the stranger destroyed instead of altering it?" And again Lord *Abinger*, in delivering his opinion, said: "No case has gone the length of saying that when a deed is altered, and thereby vitiated, it ceases to be evidence; it may be so with reference to the stamp laws; there is no occasion, however, in the present case, to raise the general question. The old law was, no doubt, much more strict than it has been in modern times. Originally, there could be no such thing as founding upon a deed without making profert of it; and it was but an invention of the pleaders, growing out of a decision of Lord *Mansfield's*, to allege, as an excuse for not making profert, a loss of the deed by time and accident, founded on the presumption to be derived from long possession and enjoyment. I can hardly see how such a course is consistent with the old authorities which say that any alteration, even by a stranger, shall vitiate a deed. If it be so altered as to leave no evidence of what it originally was, that may prevent any party from using it; or if it be altered in a material part by a party taking a benefit under it, that may prevent him even from showing what it originally was. Here, however, it is sufficient to decide that this agreement was evidence to prove the terms of the holding; and there was no evidence of any other holding than that of the house No. 36." So *Pigot's case* has been overruled by the

Irish courts. *Swiney v. Barry*, 1 Jones, 100, where it was *held*, that an alteration in a material part of a deed by a stranger does not avoid the deed; and the court will look at the deed as it was before it was altered; and, therefore, if upon oyer, the deed is set out as it was before it was altered, it is no variance. And in this country it is clearly settled that a material alteration by a stranger will not render an instrument void, if it can be shown by evidence what the instrument was before it was altered. *Nichols v. Johnson*, 10 Conn. 192; *Rees v. Overbaugh*, 6 Cowen, 746; *Lewis v. Payn*, 8 id. 71; *Medlin v. Platte County*, 8 Mo. 236; *Davis v. Carlisle*, 8 Ala. 707; *Warning v. Smith*, 2 Barb. Ch. 119; *Smith v. McGowan*, 3 Barb. 404; *Jackson v. Malin*, 15 Johns. 293; *City of Boston v. Benson*, 12 Cush. 61. See *Worrall v. Gheen*, 39 Penn. St. 388, for an application of this doctrine to the liability of an accommodation indorser, to the amount for which he had indorsed, notwithstanding the maker had subsequently altered the note so as to increase the amount.

(mm) *Wood v. Steele*, 6 Wallace, 80.

(n) *Pigot's case*, 11 Rep. 27; *Lewis v. Payn*, 8 Cowen, 71; *Den d. Wright v. Wright*, 2 Halst. 175. And see *Mollett v. Wackerbarth*, 5 C. B. 181; *Boalt v. Brown*, 13 Ohio St. 364. But in *Pequawket Bridge v. Mathes*, 8 N. H. 189, it was *held*, that an immaterial alteration of a bond, though made by the obligee, would not destroy the bond. And see, to the same effect, *Bowers v. Jewell*, 2 N. H. 548; *Nichols v. Johnson*, 10 Conn. 192. Where a mortgagor altered a mortgage after it was signed by his co-mortgagor, without the knowledge or consent of such co-mortgagor, by inserting the description of additional property, it was *held*, that the mortgage was valid as to both mortgagors as a conveyance of the property therein described before the alteration was made; and that the party who made the alteration was bound by it as a conveyance of all the property embraced both in the original mortgage and in the alteration. *Van Horn and Clark, Adm'r, v. Bell*, 11 Iowa, 465.

no good reason why it should make the instrument void. (o) And it seems, that an alteration * in negotiable paper, although so material as to change the date and time of payment, may not avoid it, if it be only a correction of a certain error, and be made before it is put into circulation. (p) The reason given by Lord *Kenyon* for holding that any alteration avoided an instrument, that "no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event when it is detected," (q) is neither very clear nor very strong, nor does it apply to an immaterial alteration. We may therefore say, that, in this country generally, no immaterial alteration would avoid an instrument. And that alteration which only does what the law would do,—that is, only expresses what the law implies,—is not a material alteration, and therefore would not avoid an instrument. (r) Whether there be an alteration is a

(o) Such seems to have been the opinion of the court in *Falmouth v. Roberts*, 9 M. & W. 469. And it was expressly so held in *Smith v. Crooker*, 5 Mass. 540, where the name of the obligor of a bond was inserted in the body of the instrument by the obligee, after it was signed. See also *Hunt v. Adams*, 6 Mass. 510, as to supplying words omitted by mistake, or which the law itself would supply. In *Granite Railway Co. v. Bacon*, 16 Pick. 289, a promissory note in the following words was signed by the defendant: "For value received I promise to pay to Quincy Railway Company" (who were the plaintiffs), "or order, one thousand and thirty dollars, in six months." The note was then indorsed by E. P., and delivered to the treasurer of the plaintiffs, who, without the knowledge or consent of the defendant, inserted the words, "the order of E. P." above the words, "Quincy Railway Company, or order," but without erasing the latter words. It was held, that, in the absence of fraud, this was not an alteration affecting the validity of the note. So, in *Langdon v. Paul*, 20 Vt. 217, where the plaintiff offered in evidence a sealed instrument, in which the defendant acknowledged that he had "signed" certain promissory notes, and the words "and executed" were interlined after the word "signed," it was held, that these words were immaterial, and that no explanation of the time when the interlineation was made was necessary. See also *Huntington v. Finch*, 3 Ohio St. 445, and cases cited in preceding note.

(p) *Fitch v. Jones*, 5 Ellis & B. 238.
(q) *Master v. Miller*, 4 T. R. 329.

(r) The sensible rule on this subject seems to have been arrived at in *Adams v. Frye*, 3 Met. 103, where it was held, that if, after the execution and delivery of an unattested bond, the obligee, without the knowledge and consent of the obligor, fraudulently, and with a view to some improper advantage, procures a person who was not present at the execution of the bond, to sign his name thereto as an attesting witness, the bond is thereby avoided and the obligor discharged. The act of an obligee in procuring a person who was not present at the execution of the bond, nor duly authorized to attest its execution, to sign his name thereto, as an attesting witness, is *prima facie* sufficient to authorize the jury to infer a fraudulent intent. But it is competent for the obligee to rebut such inference; and if the act be shown to have been done without any fraudulent purpose, the bond will not be avoided by such alteration. And *Devoey*, J., said: "There was, by the alteration which was made in the case at bar, a material change introduced as to the nature and kind of evidence which might be relied upon to prove the facts necessary to substantiate the plaintiff's case in a court of law. By adding to the bond the name of an attesting witness, the obligee became entitled to show the due execution of the same, by proving the handwriting of the supposed attesting witness, if the witness was out of the jurisdiction of the court. It is quite obvious, therefore, that a fraudulent party might, by means of such an alteration of a contract, furnish the legal proof of the due execution there-

question of fact for the jury ; but whether the alteration is material, is not a question * of fact for a jury, but of law for the courts; (s) and the burden of proof of the fact of alteration rests on the party alleging it. (t) So whether, and when, and by whom, and with what intent an alteration was made, are questions of fact for the jury. (tt)

If the alteration be not fraudulent, although it cancels the instrument, it will not cancel the debt of which the instrument was evidence. (tu)

If the alteration be by tearing off a seal, the instrument cannot, in strict law, be pleaded with a profert, but the facts should be specially set forth as the reason why there is no profert. (u) If a seal be added to an instrument, this has been held to be a material alteration ; (v) but we think it would generally be regarded as immaterial and inoperative. It has indeed been held, that when a seal adds no actual strength to the contract, and does not interfere with the intention of the parties, which is adequately expressed and effected by the instrument regarded as a simple contract, then the seal may be treated as mere surplusage. (w) And if an agent

of, by honest witnesses swearing truly as to the genuineness of the handwriting of the supposed attesting witness; and yet the attestation might be wholly unauthorized and fraudulent. It seems to us that we ought not to sanction a principle which would permit the holder of an obligation thus to tamper with it with entire impunity. But such would be the necessary consequence of an adjudication, that the subsequent addition of the name of an attesting witness, without the privity or consent of the obligee, is not a material alteration of the instrument, and would under no circumstances affect its validity. But we think that it would be too severe a rule, and one which might operate with great hardship upon an innocent party, to hold inflexibly that such alteration would, in all cases, discharge the obligor from the performance of his contract or obligation. If an alteration, like that which was made in the present case, can be shown to have been made honestly ; if it can be reasonably accounted for, as done under some misapprehension or mistake, or with the supposed assent of the obligor, — it should not operate to avoid the obligation. But, on the other hand, if fraudulently done, and with a view to gain any improper advantage, it is right and proper that the fraudulent party should lose wholly the right to enforce his original contract in a

court of law." See also *Thornton v. Applington*, 29 Me. 298; *Bassett v. Bassett*, 56 Me. 125; *Commonwealth v. Emigrant, &c. Bank*, 48 Mass. 12; *Pope v. Chaffee*, 14 Rich. Eq. 69; *Carr v. Welch*, 46 Ill. 88.

(s) *Hill v. Calvin*, 4 How. (Miss.) 231; *Bowers v. Jewell*, 2 N. H. 543; *Martendale v. Follet*, 1 N. H. 96, where the insertion of the word *young* in a note for "merchantable neat stock" was held material; *Wheclock v. Freeman*, 13 Pick. 166; *Brackett v. Mountfort*, 2 Fairf. 115, where a note was attested some time after it was signed, and it was held, that this rendered the note void. But whether the alteration was made with fraudulent motives, or with consent, is for the jury. *Bowers v. Jewell*, 2 N. H. 543. In *Southworth Bank v. Gross*, 35 Penn. St. 80, it was held, that the addition of a particular place of payment in the body of the note by the payee, after execution, rendered it void as to the maker, in the hands of an indorsee.

(t) *Davis v. Jenney*, 1 Met. 231.

(u) *M'Cormick v. Fitzmorris*, 39 Mo. 24; *Wood v. Steele*, 6 Wallace, 80.

(tu) *Vogle v. Ripper*, 34 Ill. 100.

(v) *Powers v. Ware*, 2 Pick. 451.

(v) *Davidson v. Cooper*, 11 M. & W. 778, 13 id. 343.

(w) *Truett v. Wainwright*, 4 Gilman, 411.

having no authority to affix the seal of his principal, puts it to an instrument which would be valid without a seal, the seal is mere surplusage. (x) Where a note was payable on demand with interest, the addition of "nine per cent." avoided the note. (xx)

In the absence of explanation, evident alteration of any instrument is generally presumed to have been made after the execution of it; and consequently it must be explained by the

* party who relies on the instrument, or seeks to take advantage from it. Such is the view taken by many authorities of great weight. But others of perhaps equal weight hold, that there is no such presumption; or, at least, that the question whether the instrument was written as it now stands before it was executed, or has since been altered, and whether if so altered it was done with or without the authority or consent of the other party, are questions which should go to a jury, to be determined according to all the evidence in the case. (y)

(x) *White v. Fox*, 29 Conn. 570.

(xx) *Lee v. Starbird*, 55 Me. 491.

(y) It seems to have been the rule of the common law, that if an obvious alteration or interlineation appeared in a *deed*, it would, nevertheless, in the absence of any opposing testimony, be presumed to have been made before the deed was finally executed, because the law will never presume fraud or forgery in any person; *omnia presumuntur rite esse acta*. Co. Litt. 225 b. n. (1); *Trowet v. Castle*, 1 Kebble, 22; *Den v. Farlee*, 1 N. J. 280, the alteration being against the party claiming under the paper; so in *Pullen v. Shaw*, 3 Dev. 238. And the same rule has been adhered to in a late English case. *Doe d. Tatham v. Catamore*, 18 Q. B. 745, 5 Eng. L. & Eq. 349. And in some cases the same principle has been followed in bills of exchange and promissory notes. As in *Gooch v. Bryant*, 13 Me. 386, which was an action on a note, the date of which obviously had been at some time materially altered, but when there was no evidence on either side. The judge before whom the case was tried ruled, that altering it after the execution would be a fraud which was not to be presumed, but must be proved, and the plaintiff had a verdict. On exceptions this ruling was sustained, *Weston*, C. J., saying: "There was no other evidence of the alteration of the note, than what arose from inspection, from which it appeared that one of the figures in the date had been altered. Of the fact there could be no doubt; but the more important inquiry was, when it

was done. If altered after the signing and delivery, it would vitiate the note; if before, it would not. As to the time, no evidence was offered by either party. The alteration was not in itself proof that it was done after the signature; it might have been made before. If the alteration was *prima facie* evidence that it was done after, it must be upon the ground that such is the presumption of law. But we do not so understand it. It would be a harsh construction; exposing the holder of a note, the date of which had been so altered as to accelerate payment, or to increase the amount of interest, to a conviction of forgery, unless he could prove that it was done before the signature. It would be to establish guilt by a rule of law, when there would be at least an equal probability of innocence. But such cannot be the law; it is a question of evidence, to be submitted to the jury, as was done in the case before us. And they were properly instructed, that it was a case not within the statute of limitations." *Beaman v. Russell*, 20 Vt. 205, adopts the same rule. That also was a case of an alteration in the date of a note, and the subject is there ably examined. *Cumberland Bank v. Hall*, 1 Halst. 215, is the same way. In *Wickes v. Caulk*, 6 Harris & J. 38, the names of the witnesses to a deed had been erased. The court refused to presume that the erasure was after execution, saying: "By the inspection of the original deed, the names of the two persons are written in the place where attesting witnesses generally write

It has been held that a material alteration of a note by the holder, will prevent a recovery not only on the note itself, but

their name, and the names are erased; but when they were erased, whether before or after the execution of the deed, does not appear; and it is incumbent on the party who wished to avoid a deed by its erasure, to prove that the alteration was made after its execution and delivery. Attesting witnesses are not necessary to the validity of a deed; and the erasure of their names, by a stranger, would not avoid it. As the court, therefore, were not bound to presume that the erasure was made by the grantee, or those claiming under him, after the execution and delivery of the deed, the lessor of the plaintiff could not call on the court to declare the deed inoperative." In *Clark v. Rogers*, 2 Greenl. 147, it is said that in such cases "fraud and forgery are not to be presumed." On the other hand, there are many able and well-considered decisions, to the effect that it is incumbent upon a party offering an instrument which has an obvious or admitted interlineation or alteration on it, which is material, to explain such alteration, and show that it was made before execution. Not the least of these cases is that of *Wilde v. Armsby*, 6 Cuss. 314. There, in an action on a written guarantee of the payments of George Winchester and Company, it appeared, on the face of the instrument, the signature to which was admitted, that the same had been altered by an interlineation of the words "and Company," written in a different handwriting from that of the rest of the instrument, and in a different ink. It was held, that the burden of proof was on the plaintiff to show, that the interlineation was made before the instrument was executed. But the court there said: "We are not prepared to decide that a material alteration, manifest on the face of the instrument, is, in all cases whatsoever, such a suspicious circumstance as throws the burden of proof on the party claiming under the instrument. The effect of such a rule of law would be, that if no evidence is given by a party claiming under such an instrument, the issue must always be found against him, this being the meaning of the 'burden of proof.'" 1 Curteis, 640. But we are of opinion, upon the authorities, English and American, and upon principle, that the burden of proof, in explanation of the instrument in suit in this case, was on the plaintiff. It was admitted by his counsel, at the argument, that the words "and Co." which were interlined in the

guarantee, were in a different handwriting from that of the rest of the instrument, and also in different ink. In such a case, the burden of explanation ought to be on the plaintiff; for such an alteration certainly throws suspicion on the instrument." Probably the weight of authority in America is, that in *negotiable* instruments, the burden of showing that an obvious and material alteration was lawfully made, is upon the party claiming under it. *Simpson v. Stackhouse*, 9 Barr, 186; *Hills v. Barnes*, 11 N. H. 395; *McMicken v. Beauchamp*, 2 La. 290; *Warring v. Layton*, 8 Harring. (Del.) 404; *Commercial Bank v. Lum*, 7 How. (Miss.) 414; *Wilson v. Henderson*, 9 Smeades & M. 375; *Humphreys v. Guillow*, 18 N. H. 386; *Walters v. Short*, 5 Gilman, 252; *Tillou v. Clinton Mut. F. Ins. Co.* 7 Barb. 584. And in England the current of authority is unbroken, that in negotiable instruments a different rule prevails from that applicable to deeds. Any alteration in the former must be explained. Lord *Campbell*, C. J., in *Doe d. Tatham v. Cataomore*, *supra*; *Johnson v. Marlborough*, 2 Stark. 313; *Bishop v. Chambre*, 3 C. & P. 55; *Taylor v. Moseley*, 6 C. & P. 273; *Sibley v. Fisher*, 7 A. & E. 444; *Knight v. Clements*, 8 A. & E. 215; *Clifford v. Parker*, 2 Man. & G. 909; *Henman v. Dickinson*, 5 Bing. 188; *Cariss v. Tattersall*, 2 Man. & G. 890; *Whitfield v. Collingwood*, 1 Car. & K. 325. Some American authorities deny any distinction between deeds and other writings, and hold the burden to be always on the party claiming under an instrument to explain any alteration in it. See *Ely v. Ely*, 6 Gray, 439; *Morris v. Vanderen*, 1 Dall. 67; *Prevost v. Gratz*, Pet. C. C. 369; *Jackson d. Gibbs v. Osborne*, 2 Wend. 565; *Acker v. Ledyard*, 8 Barb. 514; *Jackson v. Jacoby*, 9 Cowen, 125. In England there may be found many decisions to the effect that alterations apparent in a will, will be presumed to have been made *after* the original execution. But it has been said that this rule is founded upon the construction of the Statute of Wills, 1 Vict. c. 2, § 6. See *Doe d. Shallcross v. Palmer*, 16 Q. B. 947, 6 Eng. L. & Eq. 155; *Cooper v. Bockett*, 4 Moore, P. C. 419. See remarks of Dr. Lushington on this statute, in *Burgoyne v. Showler*, 1 Rob. Ecc. 6. In *Rankin v. Blackwell*, 2 Johns. Cas. 198, the maker of a note relied upon an alteration in the date and amount as a defence. His proof was (*inter alia*) the alterations ap-

upon the consideration for which it was given. (*yy*) But such alteration by a payee, without fraud and only to correct a mistake, will not avoid the note in the hands of an indorsee. (*yw*) Still, any material alteration of commercial paper, unaccounted for by the holder, is, in general, fatal to it. (*yz*) If a husband duly executes a mortgage, and the signature of the wife, releasing dower and homestead, is fraudulently added, this alteration does not defeat the mortgage. (*yz*)¹

* If there are blanks left in a deed, affecting its meaning * 728 and operation in a material way, and they are filled up after execution, * there should be a re-execution, and a new ac- * 724 knowledgment. (*z*)² But no alteration in a deed defeats

parent on the note itself, from which the jury might decide whether the note had been altered or not; but the judge overruled the evidence offered, and charged the jury that the mere appearance of alterations on the face of the note, unaided by any proof as to the character of the persons through whose hands it had passed, was not sufficient to support the defence set up. The jury, accordingly, found a verdict for the plaintiff, for the full amount on the face of the note, with interest. The verdict was set aside because other competent evidence was not admitted; but the court observed: "The alterations on the face of the note, unsupported by other proof, would not be competent evidence; but if any previous testimony had been offered, to show that the note was given for a less sum, or to render it probable that a fraud had been committed, the alteration on the face of the note would have been a strong corroborating circumstance, if not decisive, of the truth of the fact. On the first ground, we think that there ought to be a new trial, with costs, to abide the event

of the suit." In *Bailey v. Taylor*, 11 Conn. 581, the whole reasoning of the court is against the principle that a party claiming under an instrument which has been obviously altered, must necessarily, and in all cases, explain such alteration before he can recover upon the paper. And see *Matthews v. Cosalter*, 9 Mo. 705; *North River Meadow Co. v. Shrewsbury Church*, 2 N. J. 424; *Cole v. Hills*, 44 N. H. 227.

(*yy*) *Bigelow v. Stilphen*, 35 Vt. 521.

(*yw*) *Ames v. Colburn*, 11 Gray, 390.

(*yz*) *Miller v. Reed*, 3 Grant, 51.

(*z*) *Kendall v. Kendall*, 12 Allen, 92.

(*z*) *Hibblewhite v. McMorine*, 6 M. & W. 200. But see, upon this point, *Smith v. Crooker*, 6 Mass. 538; *Wiley v. Moor*, 17 S. & R. 438; *Duncan v. Hodges*, 4 McCord, 239; *Stone v. Wilson*, id. 203; *Fulton's case*, 7 Cowen, 484; *Bank v. Curry*, 2 Dana, 142; *Jordan v. Neilson*, 2 Wash. (Va.) 164; *Boardman v. Gore*, 1 Stew. 517; *Bank v. McChord*, 4 Dana, 191; *Getty v. Shearer*, 28 Penn. St. 12. See *Drury v. Foster*, 2 Wallace, 24.

¹ See *Cutler v. Rose*, 35 Ia. 456.

² Where a party to a negotiable instrument intrusts it to another for use as such, with blanks not filled, it carries on its face an implied authority to complete it by filling them, but not to vary or alter its material terms by erasing what is written or printed as a part thereof, nor to pervert its scope or meaning by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument. *Angle v. North Western Ins. Co.* 92 U. S. 330. But this rule only applies where the maker has, by his own act, or the act of another, authorized, confided in or invested with apparent authority by him, put the instrument in circulation as negotiable paper. *Ledwich v. McKim*, 53 N. Y. 307. See *Coburn v. Webb*, 56 Ind. 96. If blank spaces in check be carelessly left and filled to a larger amount, the maker is liable rather than the banker. *Halifax Union v. Wheelwright*, L. R. 10 Ex. 183. A person negligently delivering to another a blank note, having the name of the payee and the words "or order" therein, intending that it shall be used for a specified purpose, will be liable thereon if the blanks are wrongfully filled, and the note then transferred to a bona fide holder for value without notice of the fraud. *Abbott v. Rose*, 62 Maine, 194. But the alteration of a promis-

an estate or interest granted by it, if the estate or interest have vested; for, in that case, "the moment after its execution the deed becomes valueless, so far as it relates to the passing of the estate, except as affording evidence that it was executed." (a) And no alteration of an executed deed can revest the title in the grantor. (aa) But if the party in possession of the land under the deed, is suing the grantor on any of his covenants contained in the deed, an alteration of the deed, subsequent to the execution, would have the same effect as if made in any other instrument. (b)

(a) Per Lord Abinger, in *Davidson v. Cooper*, 11 M. & W. 800. So in *Chessman v. Whittemore*, 28 Pick. 281, it was held, that where the title to real estate under a deed has once vested in the grantee, by transmutation of possession, it will not be divested or invalidated by a subsequent material alteration of the deed. And *Morton*, J., said: "There is a manifest distinction between executory contracts and conveyances of property. When deeds of conveyance of real, or bills of sale of personal, property are completed, and possession delivered under them, so far as the change of ownership depends on them they are executed, and the property passes and vests in the grantee. The instruments may become invalid, so that no action can be maintained upon the covenants contained in them, and yet the titles which have been acquired under them remain unaffected. When a person has become the legal owner of real estate, he cannot transfer it or part with his title, except in some of the forms prescribed by law. The

grantee may destroy his deed, but not his estate. He may deprive himself of his remedies upon the covenants, but not of his right to hold the property. This distinction has existed from the earliest times." And see *Barrett v. Thorndike*, 1 Greenl. 78; *Withers v. Atkinson*, 1 Watts, 236; *Smith v. McGowan*, 3 Barb. 404; *Bolton v. The Bishop of Carlisle*, 2 H. Bl. 259. But in *Bliss v. McIntyre*, 18 Vt. 466, it was held, that if a lessee fraudulently alter his lease in a material part, subsequent to its execution, he thereby destroys all his future right under the lease, either to retain the possession of the premises, or to preclude the lessor from re-entering upon them. See *Lord Ward v. Lumley*, 5 H. & N. 87, 656.

(aa) *Alexander v. Hickox*, 34 Miss. 496.

(b) *Davidson v. Cooper*, 11 M. & W. 800; *Withers v. Atkinson*, 1 Watts, 236; *Chessman v. Whittemore*, 28 Pick. 281; *Waring v. Smyth*, 2 Barb. Ch. 119.

sory note by one of the makers, by increasing the amount for which it was made, by the insertion of words and figures in blank spaces left in the printed form on which it was written, avoids the note as to such makers as do not consent thereto, even in the hands of a *bona fide* holder for a valuable consideration. *Greenfield Savings Bank v. Stowell*, 123 Mass. 196; *Cape Ann Bank v. Burns*, 129 Mass. 596; *Holmes v. Trumper*, 22 Mich. 427; *Knoxville Bank v. Clark*, 51 Ia. 264. See *contra*, *Garrard v. Haddan*, 67 Penn. St. 82; *Zimmerman v. Rote*, 75 Penn. St. 188; *Brown v. Reed*, 79 Penn. St. 370; *Cornell v. Nebeker*, 58 Ind. 425. See *McSparran v. Neeley*, 91 Penn. St. 17. That the erasure of a condition in a note written in pencil will not affect its validity, see *Harvey v. Smith*, 55 Ill. 224.

* SECTION VIII.

* 725

ON THE PENDENCY OF ANOTHER SUIT.

Any one who has a claim against another is at liberty to prosecute his claim at law; and the whole system of legal procedure exists for the purpose of making effectual his endeavors to recover the debt, if it be just and legal. But no man can do more than is necessary for this purpose, or use the machinery of the law merely to vex and distress another. Hence, as the law presumes that any one question may be tried and determined by means of one action, no claimant may bring more than one at the same time. Therefore, it is a good cause of abatement of an action, that another is then pending for the same cause, and between the same parties. (c) But the prior action must be between the same parties and seek the same remedy or relief; (d) and the plaintiff must sue in the same capacity. (e) And it has been held, that the parties must not only be the same, but must stand in the same relation to each other in both suits. Thus, it has been held, that a prior suit by A against B cannot be pleaded in abatement of a subsequent suit by B against A, arising from the same cause. (f) In England the prior suit must be in a court not inferior to that in which the second is, in order to be a defence. (g) If the prior action be pending in

(c) *Tracy v. Reed*, 4 Blackf. 56; *McKinsey v. Anderson*, 4 Dana, 82; *James v. Dowell*, 7 Smedes & M. 833.

(d) Therefore, in a suit against A, pendency of another suit of the same cause against B, is not a good plea in abatement. *Casey v. Harrison*, 2 Dev. 244; *Henry v. Goldney*, 15 M. & W. 404; overruling whatever is contrary in *Boyce v. Douglas*, 1 Camp. 60. And see *Logs of Mahogany*, 2 Sumner, 589; *Treasurers v. Bates*, 2 Bailey, 302; *Davis v. Hunt*, id. 412; *Thomas v. Freelon*, 17 Vt. 138; *State v. Kreider*, 21 La. An. 482.

(e) *Cornelius v. Vanarsdallen*, 3 Penn. St. 434.

(f) See *Wadleigh v. Veazie*, 3 Sumner, 165; *Colt v. Partridge*, 7 Met. 570; *Haskins v. Lombard*, 16 Me. 140. Whether in an action against two, a prior action against one of them is a good cause of abatement, may not perhaps be fully settled. We are inclined to believe it is. See *Earl of Bedford v. Bishop of Exeter*, Hob. 187; *Rawlinson v. Oriet*, 1

Show. 75, Carth. 96. And *e converso*, *Graves v. Dale*, 1 T. B. Mon. 190; *Atkinson v. The State Bank*, 5 Blackf. 84. Though there was a misjoinder of defendants in the first suit. *Id.*

(g) *Laughton v. Taylor*, 6 M. & W. 695; *Brinsby v. Gold*, 12 Mod. 204; *Sparry's case*, 5 Rep. 61 a; *Seers v. Turner*, 2 Ld. Raym. 1102. We are not aware of any such distinction in this country; and, if the court where the cause is first brought has jurisdiction to try the case and render a valid judgment therein, we think the pendency of that suit is good cause of abatement to a second suit in another and higher court. See *Boswell v. Tunnell*, 10 Ala. 958; *Johnston v. Bower*, 4 Hen. & Mun. 487; *Thomas v. Freelon*, 17 Vt. 138; *Slyhoof v. Flitcraft*, 1 Ashm. 171; *Ship Robert Fulton*, 1 Paine, 620. But see further *Smith v. The Atlantic M. F. Ins. Co.* 2 Foster, 21, cited *infra*, n. (h); and *Bowne v. Joy*, 9 Johns. 221.

* 726 another State it * will not have this effect, (*i*) except in the case of a foreign attachment or trustee process. (*i*)

(*i*) The current of authorities is to the effect that the pendency of an action in a *foreign* tribunal, although of competent jurisdiction, is not good cause of abatement. Story, *Conf. of Laws* (Bennett's ed.), § 610 *a*, and cases cited. See also *Ostell v. Lepage*, 5 De G. & S. 96, 10 Eng. L. & Eq. 250; *McJilton v. Love*, 18 Ill. 486; *Bowne v. Joy*, 9 Johns. 221; *Walsh v. Durkin*, 12 Johns. 99; *Russel v. Field*, *Stuart's Lower Canada R.* 558; *Bayley v. Edwards*, 3 Swanst. 708; *Salmon v. Wooton*, 9 Dana, 422; *Chatzel v. Bolton*, 8 McCord, 33; *Lyman v. Brown*, 2 Curtis, C. C. 559. And see *ante*, p. * 607, n. (*v*). But see *contra*, *Ex parte Balch*, 8 McLean, 221. And see *Hart v. Granger*, 1 Conn. 154. If a plea of such foreign suit ever is good in abatement, it must clearly show the jurisdiction of such foreign court over the subject-matter, and the persons of the parties. *Newell v. Newton*, 10 Pick. 470; *Trenton Bank v. Wallace*, 4 Halst. 83. And see *Smith v. The Atlantic M. F. Ins. Co.* 2 Foster, 21. In this last case the question arose whether the Circuit Court of the United States for the district of New Hampshire was a foreign court *quod* the State courts of New Hampshire; and it was held that it was not; and therefore that the pendency of another action for the same cause in the former court, if that court had jurisdiction, is a good plea in abatement of an action in the latter courts. *Perley*, J., said: "The ground is taken for the plaintiff, that, as to the courts and government of New Hampshire, the Circuit Court of the United States for this district, is to be regarded as a court of foreign jurisdiction; and for that reason an action pending in the Circuit Court of this district cannot be pleaded in abatement of a subsequent suit brought for the same cause in a court of this State. The judiciary of the United States is a branch of the general government of this country, established by the Constitution. The Circuit Court of the United States, within its territorial limit, and as to causes within its jurisdiction, cannot be regarded as a foreign court. Its powers are not derived from any foreign government. Its judgments operate directly to bind persons and property within this State; its process, meane and final, is effectual to enforce its own orders and judgments.

The Circuit Court of another district has no authority within this State, and may be considered territorially and for some purposes as a foreign jurisdiction. The Circuit Court, and the courts of this State, derive their powers from different sources; and for most, if not for all purposes, are independent of each other. But in certain cases they exercise concurrent jurisdiction. The case supposed by the plea in this action is one of them. The plaintiff had his election to pursue his remedy in the courts of this State, or resort to the concurrent jurisdiction of the Circuit Court. The general rule of law forbids that a defendant should be harassed by two suits for the same cause at the same time. In some cases, where the first suit, from defect of jurisdiction in the court, cannot give adequate remedy, a second action is allowed. This case falls clearly within the reason of the general rule, which prohibits the second suit. No ground has been suggested, and none occurs to us, for supposing that two suits, one in a State court, and the other in a Circuit Court for the same State, are less vexatious and oppressive to the defendants, than two suits in the same court. On the other hand, the plaintiff fails to bring himself within the reason of the excepted cases, where a second action is allowed; because the court in which the first was pending, cannot give complete remedy for want of jurisdiction over the person or property of the defendants. Where the prior suit is in an inferior court of special and limited jurisdiction, incapable of affording the plaintiff the remedy which he needs, the prior will not abate the second, though both courts exercise their jurisdiction in the same country. *Sparry's case*, 5 Rep. 62 *a*. But the fact that the court in which the prior action is pending is a subordinate jurisdiction, would seem to be no objection to the plea, provided the first action can give adequate and complete remedy. It has been decided in numerous cases, that an action pending in a court whose jurisdiction is *territorially* foreign, cannot be pleaded in abatement. The reason of this rule would seem to be, not that the authority of the foreign court is questionable within the limits of its jurisdiction, but because the foreign court cannot enforce its orders and judgment beyond its own territory; and, on this account, the

(*i*) See *ante*, p. * 607, n. (*s*).

The rights of parties litigant are not, in general, affected by any transfer of the subject-matter of the suit during the pendency thereof. (ii)

* It has been sometimes held, that where the defendant * 727 pleads that he has been summoned as the trustee or garnishee of the plaintiff, either by a court under the same jurisdiction, or by a foreign tribunal, and that the trustee or garnishee process is still pending, this may be pleaded in abatement. But generally, and as we think with better reason, it is held, that is only a ground for the continuance of the action; because it is not certain that the trustee or garnishee will be held on the foreign process. (j) A reasonable rule seems to be that laid down in Massachusetts, namely: if the pleadings in the case against the trustee or garnishee are in such a condition that the garnishee can plead the garnishment in bar to the action, he shall be held; otherwise not. (k)

And there is an exception to that part of the rule which requires the parties to be the same, in the case of a *qui tam* action, which may be brought by any informer. There the principle * upon which the rule is founded, namely, that the de- * 728 fendant shall not be twice vexed, requires the second suit to abate, although the first were prosecuted by a different person. (l)

remedy of the plaintiff by his prior suit may be incomplete. The defendant may have property which ought to be applied to the payment of the same demand in both jurisdictions; or his property may be in one jurisdiction, and his person in another; and suits for these and other reasons may be necessary in both territorial jurisdictions. It has accordingly been held, that a suit pending in the Circuit Court for another district cannot be pleaded in abatement of a suit in a State court. *Walsh v. Durkin*, 12 Johns. 90. But in this case the plaintiff's remedy was as complete and effectual in the Circuit Court, as he could have in the courts of this State. The meane process of that court gives security on the person and property of the defendant, at least as effectual as can be had by ours; the trial, if held, would be by jurors of this State; the judgment for the plaintiff would be final and conclusive, and could be executed by the process of that court throughout the State. The plaintiff, therefore, had no more necessity or excuse for his second suit, than he would

have had if both had been in the same court. And it has accordingly been held, that the judgment of the Circuit Court for the same State, is not to be considered in the State courts as a foreign judgment. *Barney v. Patterson*, 6 Harris & J. 203. We are of opinion that the pendency of another action for the same cause, between the same parties, in the Circuit Court of the United States, is sufficient, if well pleaded, to abate a suit in the courts of this State, where the Circuit Court had jurisdiction of the prior cause." But see *Wadleigh v. Veazie*, 3 Sunn. 165; *White v. Whitman*, 1 Curtis, C. C. 494.

(ii) *Leitch v. Wells*, 48 Barb. 637.

(j) *Winthrop v. Carleton*, 8 Mass. 456; *Hicks v. Gleason*, 20 Vt. 139; *Crawford v. Chute*, 7 Ala. 157; *Crawford v. Slade*, 9 Ala. 887. And see *Brown v. Dudley*, 33 N. H. 511.

(k) *Thornike v. De Wolf*, 6 Pick. 120. See *Drake on Attachments*, ch. 32.

(l) See *Commonwealth v. Churchill*, 5 Mass. 174; *Commonwealth v. Cheney*, 6 Mass. 847; *Henshaw v. Hunting*, 1 Gray,

The plea must show jurisdiction of the former suit, if pending in a court not under the same sovereignty. (*m*)

SECTION IX.

OF FORMER JUDGMENT.

The whole purpose of the law being to settle questions and terminate disputes, it will not permit a question which has been settled to be tried again. (*n*) But it must be the meaning of this rule — for this meaning is required by obvious justice — that only a question which has been settled after a full and regular trial, and which has been the object of direct investigation, and to which

parties have had their attention drawn in such wise as to * 729 warrant the supposition that a new trial would * but repeat a former process, — only a question tried in this way is excluded from further trial. For it would be unjust and dangerous to permit a party to bring up an important question incidentally, and then bind conclusively the other party by the result, although he might well have neglected this question, for this time, in his wish to confine all his attention and all his efforts to what he had a right to deem the true question. The rule therefore may be ex-

203; *Thayer v. Mowry*, 36 Me. 287; *Chamberlain v. Carlisle*, 8 Foster, 540. The true spirit of the rule also requires the former suit to have been valid and effectual; otherwise, the second suit will not be considered vexatious. *Downer v. Garland*, 21 Vt. 362; *Hill v. Dunlap*, 15 id. 645; *Quinebaug Bank v. Tarbox*, 20 Conn. 510; *Durand v. Carrington*, 1 Root, 356. The prior suit must also have been actually entered in court; for it must be proved by the record to be for the same cause, and pending when the second was commenced. *Parker v. Concord*, 2 N. H. 36; *Commonwealth v. Churchill*, 5 Mass. 174; *Trenton Bank v. Wallace*, 4 Halst. 83; *Smith v. Atlantic M. F. Ins. Co.* 2 Foster, 21. The pendency of a prior suit in which the defendant is summoned, as trustee of the plaintiff, is no cause for abatement of the suit subsequently commenced by the plaintiff (the principal defendant in the first action) for the cause of action sought to be reached by the trustee process. *Wadleigh v. Pillsbury*,

14 N. H. 873. And see *Morton v. Webb*, 7 Vt. 128. Neither is a suit at law a defense to a suit in equity. *Peak v. Bull*, 8 B. Mon. 428. Nor vice versa. *Colt v. Partridge*, 7 Met. 570; *Haskins v. Lombard*, 16 Me. 140; *Blanchard v. Stone*, 16 Vt. 234; *Ralph v. Brown*, 3 Watts & S. 395.

(*m*) *White v. Whitman*, 1 Curtis, C. C. 494.

(*n*) But the party insisting upon a former recovery as a bar to an action, must show that the record of the former suit includes the matter alleged to have been determined. *Campbell v. Butts*, 3 Comst. 178. Consequently, where the declaration in the first suit states a particular matter as the ground of action, and issue is taken by the defendant, parol proof is inadmissible to show that a different subject was litigated upon the trial. Id. And see *Boston & Worcester R. R. Corp. v. Dana*, 1 Gray, 83; *Davis v. Tallcot*, 2 Kern. 184; *Green v. Clarke*, id 343.

pressed thus, — that a judgment on the same matter in issue by a court having jurisdiction of the matter, (nn) and making a judicial examination into the merits of the question, (no) is a conclusive bar. (o) But when we * come to the meaning of * 730

(nn) See *Goodrich v. City, &c.*, 5 Wallace, 568.

(no) Hence a decree obtained by an arrangement between the parties has not the force of a *res judicata*. *Jenkins v. Robertson*, Law Rep. 1 H. of L. Sc. 117.

(o) The Duchess of Kingston's case, 20 Howell's State Trials, 538, is the leading case on this point. Lord Chief Justice *De Grey* there said: "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First, that the judgment of a court of concurrent jurisdiction, *directly upon the point*, is, as a plea, a bar, or, as evidence, conclusive between the same parties, upon the same matter, *directly in question* in another court. Secondly, that the judgment of a court of exclusive jurisdiction *directly upon the point*, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." This rule was expressly adopted by *Story*, J., in *Harvey v. Richards*, 2 Gallis, 229; and by *Gibson*, C. J., in *Hibshman v. Dulleban*, 4 Watts, 191. See also *Wright v. Deklyne*, Pet. C. C. 202; *Gardner v. Buckbee*, 3 Cowen, 120. In this last case, B. sued G. upon a promissory note in the Marine Court of the city of New York, and G. pleaded the general issue, with notice that the note was given upon the fraudulent sale of a vessel by B. to G., which was the question upon the trial; and the verdict was for the defendants; and afterwards B. sued G. in the Court of Common Pleas for the city and county of New York, upon another note given upon the same purchase. Held, that upon the trial of the second cause, the record and proceedings in the first were conclusive evidence of the fraud, and were a conclusive bar to the second action; that the proper course was to give the record of the Marine Court in evidence, and then show by parol evidence (e. g., by the justice who tried the first cause), that the same question had

been tried before him. So where B. brought trespass *quare clausum frexit* in May, 1816, laying the trespass with a *continuando* between the 1st November, 1814, and the 24th November, 1816, and recovered; and then brought trespass against the same defendant for a subsequent injury to the premises in question in the former suit, — it was held, that the record in the former suit, followed by parol evidence that the premises in question were the same in both, was conclusive evidence of the plaintiff's title in the second action; that it operated against the defendant by way of estoppel, whether it was pleaded or given in evidence in the second suit. *Burt v. Sternburgh*, 4 Cowen, 559. See also *Outram v. Morewood*, 3 East, 346; *George v. Gillespie*, 1 Greene, Ia. 421. It is not necessary that the plaintiff's claim in both suits be *identical*. If both arise out of the *same transaction*, and the defence is equally applicable to both, the first judgment will be conclusive. *Bouchaud v. Dias*, 3 Denio, 238. In this case H. C. was indebted to the United States for duties, arising upon a single importation, and gave two bonds with the same sureties, payable at different times, for distinct parts of the same debt. One of the sureties having paid both bonds, brought an action in the Superior Court of the city of New York against his co-surety for contribution on account of the money paid upon one of the bonds; and the defendant pleaded a discharge of himself from the whole debt by the secretary of the treasury, pursuant to the act of Congress; to which the plaintiff demurred, and judgment was given against him. Held, that such judgment was a conclusive bar to a subsequent action in the Supreme Court between the same parties, in which the plaintiff sought to recover contribution on account of the money paid on the other bond. So where A took from B a bill of sale of certain personal property, and C afterwards levied upon the property by virtue of attachments in favor of B's creditors, and A subsequently took and converted to his own use a part of the property, for which C sued him, and recovered judgment in a justice's court, on the ground that the bill of sale was fraudulent and void as to the creditors, — it was held, that the judgment was conclusive upon the question of fraud, in an action of replevin afterwards brought

the phrase, "the same matter in issue," and the application of the rule, we find an irreconcilable conflict between the authorities. (*p*) Much of the difficulty springs, no doubt, from the relaxation of the rules and practice of pleading; but there are questions on this subject in their own nature difficult, and which can only be determined by further adjudication. It may be difficult to draw the line, but it is necessary that it should be drawn somewhere. (*q*)¹ That extrinsic evidence is now received to show that the issue on trial is or is not the same as that involved in a former trial, and that this evidence may be controverted

by A against C in the Supreme Court, to recover the *residue of the property*. Doty *v.* Brown, 4 Comst. 71.

(*p*) This question was examined by Parker, C. J., with his accustomed ability, in King *v.* Chase, 15 N. H. 9. It was there held, that by "the matter in issue" is to be understood that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings; that the facts offered in evidence to establish the matter which is in issue are not themselves in issue within the meaning of the rule, although they may be controverted on trial. Thus, where an action of trover is brought, and a deed is offered in evidence to establish the title of the plaintiff, and impeached by the other party as fraudulent, if the jury, in considering the case, are of the opinion that the deed is fraudulent, and they find that the property in question is not the property of the plaintiff, and return a verdict that the defendant is not guilty, the verdict and judgment will not conclude the plaintiff, in another suit, for the recovery of other property included in the same conveyance. Nor can the verdict be used in evidence to impeach the deed in such subsequent suit.

(*q*) It is not essential that the second suit should be in the same *form* as the first, in order that a judgment therein should be a bar. If the *cause of action* is the same in both, the former judgment is conclusive. Thus, a judgment in trover is a bar to a second action of assumpsit for the value of the same goods. Agnew *v.* McElroy, 10 Smedes & M. 552; Young *v.* Black, 7 Cranch, 565; Livermore *v.* Hirschell, 8 Pick. 38. See Loomis *v.* Green, 7 Greenl. 386. Where the cause of action is the same, a former judgment in a suit between the same parties, though

an inadequate one, is a bar to a second recovery. Pinney *v.* Barnes, 17 Conn. 420. In that case an action was brought, in the name of the judge of probate, against a removed executor, on his probate bond, in which action sundry breaches were assigned, and among them, that the defendant had neglected and refused, upon demand made therefor, to pay over to his successor the moneys in his hands belonging to the estate; and thereupon judgment was rendered against the defendant for a certain sum and costs. On a *scire facias* afterwards brought on this judgment, it appeared that the testator had given by his will certain legacies, payable to the legatees respectively when they should become eighteen years of age; that neither at the time of the defendant's removal from office, nor at the trial of, and judgment in, the original action, had these legatees arrived at that age; that the defendant had then in his hands moneys belonging to the estate, derived from a sale of lands under a decree of probate, sufficient to pay such legacies, which he still retained; that on the trial of such action, no claim was made or evidence offered in relation to the non-payment of such legacies, nor were they considered by the court or included in the judgment, the action having been instituted and prosecuted solely for the benefit of those entitled to the *residuum* of the estate after the payment of such legacies. Held, Williams, C. J., and Waite, J., dissenting, that the former judgment must be considered as covering the whole ground, and constituting a bar to any claim for the legacies in the *scire facias*, the cause of action in both suits being essentially the same. See Garwood *v.* Garwood, 29 Cal. 514.

¹ The dismissal of a suit because the wrong form of action has been used does not bar a suit in another form of action. Kittredge *v.* Holt, 58 N. H. 191.

by similar evidence, is certain. (*qq*) But let us suppose * that in an action for assault and battery, in which only * 731 the general issue is pleaded, the defendant relies upon the "molliter manus imposuit," asserting the alleged assault to have taken place on his own land; the plaintiff denies that the land belonged to the defendant, and this is the main or only question actually controverted. Could a judgment in this case be interposed as a bar to a writ of entry for the same land, between the same parties? It is clear that it could not, if the rule once in force, and now not entirely obsolete, be applied,—namely, that only matters directly involved in the issues made upon the pleadings, are considered as *res judicatae*. (*qr*) But if to trespass *quare clausum*, soil and freehold are pleaded by the defendant, can a judgment in this action be pleaded in bar to a writ of entry? It is more difficult to answer this question, because it differs from the former in the new element, that the title to the very land is put in issue of record, and by the pleadings. And very high authorities answer this question differently. (*r*) The Supreme

(*qq*) *Packett Co. v. Sickles*, 5 Wallace, 580; *Wilcox v. Lee*, 1 Rob. 355.

(*qr*) *Duncan v. Holcomb*, 26 Ind. 378; *Johnson v. Morse*, 11 Allen, 540.

(*r*) Thus, in *Arnold v. Arnold*, 17 Pick. 4, which was a writ of right, the tenant pleaded a judgment in favor of his grantor, rendered in an action of trespass *quare clausum* upon an issue joined upon a plea of *liberum tenementum*, and the plea was held to be no bar. And from the opinion delivered, it seems that the judgment upon this plea would have been the same, if it had been interposed as a bar to a writ of entry. And in *Mallett v. Foxcroft*, 1 Story, 474, it was held to be no bar to a writ of right, that there had been a judgment on a petition for partition between the same parties in favor of the tenant, upon an issue joined therein on the sole seisin of the defendant. But in *Dame v. Wingate*, 12 N. H. 291, it was directly decided, that a judgment rendered in an action of trespass *quare clausum* upon an issue joined on a plea of *liberum tenementum*, is a bar to a writ of entry for the same premises. And *Gilchrist*, J., said: "It is a principle well established in the law, that a former judgment, upon a point directly in issue upon the face of the pleadings, is admissible in evidence against the parties and their privies, in a subsequent suit, where the same point comes in question. Nor is it material that the former suit was trespass,

and the latter a writ of entry, if the same point were decided in the former suit. It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery, of itself, in an action of trespass, is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which, having once distinctly been put in issue by them, or by those to whom they are privy, in estate or law, has been on such issue joined, solemnly found against them. It was so held in *Parker v. Leggett*, 18 Rich. L. 170. *Ellenborough*, C. J., *Outram v. Morewood*, 3 East, 355. The recovery concludes nothing upon the ultimate right of possession, much less of property in the land, unless a question of that kind be raised by a plea and a traverse thereon. Id. 357. And a recovery in any one suit, upon issue joined on matter of title, is equally conclusive upon the subject-matter of such title; and a finding upon title in trespass not only operates as a bar to the future recovery of damages founded on the same inquiry, but also operates by way of estoppel to any action for an injury to the same supposed right of possession. Id. 354. The issue upon a plea of *liberum tenementum* raises a question of title. *Forsaith v. Clogston*, 3 N. H. 403." See also Ben-

Court of the United States (one justice dissenting) has held that whatever is fairly within the scope of the pleadings in a suit is concluded by the judgment. (*rr*) Again, if in trover, the * 732 question turns upon the * validity of an instrument under which title to the chattels is claimed, and this is found to be fraudulent and void, is the judgment in this case conclusive as to all questions of property or title between the same parties, under that instrument, and in relation to all the property which the instrument purports to transfer? Here, too, the authorities are directly antagonistic. (*s*)

So far as we can venture to state rules which may determine these difficult questions, we should say, that "the matter in issue" is either that which the record and the pleadings show clearly to be so; or else a question which extrinsic evidence shows to have been actually tried, and shows also to have been absolutely essential to the case, in so much that the answer to it decided the case, and if it had not been contested the case could not have been tried. (*ss*) We should say, that the judgment in the supposed case of trover should not be conclusive upon the questions which might be raised in other cases as to the validity of the instrument, and the title it gave; and we should incline also to the opinion that the judgment in the supposed case of trespass *quare clausum* should be no bar to a writ of entry. (*st*) It cannot, however, be denied, that the present tendency of the law is to permit parol evidence to show the actual grounds on which the judgment rested, when the record needs not and does not exhibit those grounds. (*su*) And also, not to permit the former judgment to be a bar, although the record presents the claim, if no testimony

nett v. Holmes, 1 Dev. & Bat. 436. In some States, a judgment in an action of trespass upon the issue of *liberum tenementum*, has been held admissible in a subsequent action of ejectment between the same parties. See *Hoey v. Furman*, 1 Penn. St. 295; *Kerr v. Chess*, 7 Watts, 371; *Foster v. M'Divit*, 8 id. 341, 349; *Meredith v. Gilpin*, 6 Price, 146. As to the effect of a judgment in ejectment, as regulated by the Revised Statutes of New York, see *Beebee v. Elliott*, 4 Barb. 467.

(*rr*) *Aurora City v. West*, 7 Wallace, 82. See also *Durant v. Essex Co.* 7 Wallace, 107; *Beloit v. Morgan*, 7 Wallace, 619; *Derby v. Jacques*, 1 Clifford, 425; *Jackson v. Lodge*, 86 Cal. 28.

(*s*) See *King v. Chase*, 15 N. H. 9, cited *supra*, n. (p), and *Doty v. Brown*, 4 Comst. 71, cited *supra*, n. (o).

(*ss*) Where a seller of property took sundry notes in payment, and put one in suit, and afterwards another, it was held, that the defendant could not set up against the action the same defences he had set up in the former. *Freeman v. Bass*, 34 Ga. 355.

(*st*) *Newsome v. Graham*, 10 B. & C. 234; *Barber v. Brown*, 26 L. J. C. 41; *Clarance v. Marshall*, 2 C. & M. 495.

(*su*) *Sturtevant v. Randall*, 53 Me. 149.

was offered in relation to it, and the question was not submitted to court or jury. (sv)

It is said that the former judgment must have been between the same parties; and for this rule there seems to be good reason as well as authority. (t) It has also been held, as was * said, that the same parties must stand in the same position, as plaintiff and defendant. It is obvious that in most cases this must be necessary to constitute the question the same; and it is only then that the rule can apply. (u) It may be stated, as a general rule, that a former judgment is conclusive only against parties and privies. (uu)

A party cannot avoid the effect of a former judgment, by changing the *forum* from the equity side of the court to the law side. (uv)

It may be added, that no prior judgment is a bar to a subsequent action, if it be shown that the judgment was obtained by a mistake on the part of the plaintiff, which prevented him from trying the question; as an error in respect to the character of the action, or a fault in the pleading. (v) And it has been held, that a foreign judgment does not merge the original cause of action, and cannot be pleaded in bar of an action founded thereon. (w)

(sv) *Burwell v. Knight*, 51 Barb. 360.

(t) This is not always true; for where a cause of action is such that more than one may sue, a judgment in an action brought by one is a bar to an action by the other. Thus, if a consignor sue a carrier for goods, and the latter has a verdict and judgment on a plea of not guilty, the consignee cannot maintain another action for the same goods. *Green v. Clark*, 5 Denio, 497. So, where a plaintiff may bring his action against either of two persons, as for instance against the sheriff or his deputy, for the acts of the deputy, a judgment in favor of either would be a bar to a second action for the same cause against the other. See *King v. Chase*, 15 N. H. 9. And in *Parkhurst v. Sumner*, 23 Vt. 588, it was held, that all matters which might have been urged by the party before the adjudication are concluded by the judgment as to the principal parties, and all privies in interest, or estate; and among privies are those who are holden as bail for the party. See *Davis v. Davis*, 30 Ga. 296.

(u) See *ante*, pp. * 724, * 725, and n. (f).

(uu) *Miller v. Johnson*, 27 Md. 6.

(w) *Baldwin v. McCrae*, 88 Ga. 650.

(v) *Agnew v. McElroy*, 10 Smedes & M. 552; *Johnson v. White*, 13 Smedes & M. 584. The former decision must have been on the merits, or the judgment must be such that it *might have been*. *Dixon v. Sinclair*, 4 Vt. 354; *N. E. Bank v. Lewis*, 8 Pick. 118; *Lane v. Harrison*, 6 Munf. 573; *M'Donald v. Rainor*, 8 Johns. 442; *Lampen v. Kedgewin*, 1 Mod. 207; *Knox v. Waldoborough*, 5 Greenl. 186; *Bridge v. Sumner*, 1 Pick. 371; *Mosby v. Wall*, 23 Miss. 81. And where judgment was rendered in replevin against a plaintiff, by nonsuiting him in a case in which he had replevied a vessel alleged to be his by virtue of a bottomry bond, seized by an attaching officer, it was held, that that judgment to be good in bar of an action of trover for the vessel must be pleaded and averred, and proved to have been upon the merits, and to have been rendered in a suit between privies in interest. *Greeley v. Smith*, 3 Woodb. & M. 286.

(x) *Lyman v. Brown*, 2 Curtis, C. C. 559. Where there was a confession of judgment by members of a firm in the absence of one of the partners, and without his consent, and the judgment

And that if there be now a defence to a claim which could not have been made in the former suit, the judgment is not a bar. (*ww*)

A foreign judgment will be deemed valid and effectual here, only when the jurisdiction over the case was complete, the merits of the case investigated, and process duly served on the defendant, or a full equivalent of personal service. (*wx*)

SECTION X.

OF SET-OFF.

Where two parties owe each other debts, connected in their origin or by a subsequent agreement, the balance only is the debt, and he to whom it is due should sue only for that; and if he sue for more, the opposite debt may be offered in evidence reducing the claim of the plaintiff to the balance. But where the opposite

*debts or accounts are not so connected, each constitutes a distinct debt, for which suit may be brought. Such * debts or accounts may, in many cases, be balanced by setting off one against the other, at law or in equity. The law of set-off is very much regulated by statute in this country; and we do not propose to dwell upon the special provisions of any of the State statutes. But these generally contain many principles in common, and although, strictly speaking, set-off may not be a part of the common law, (x) yet some rules and principles have been*

was subsequently vacated, as to the partner who had not consented, and as to the whole firm at the instance of the judgment creditors, it was held, that the debt for which judgment had been confessed was revived, notwithstanding a receipt in full had been given therefor. Clark v. Bowen, 22 How. 270.

(*ww*) Smith v. McCluskey, 45 Barb. 610.

(*wx*) Bischoff v. Wetherell, 9 Wall. 812; De Cosse Brissac v. Rathbone, 30 L. J. Exch. 238; Robertson v. Struth, 5 Q. B. 941; Vanquelin v. Boward, 33 L. J. C. 78; Buchanan v. Rucker, 9 East, 192; Simpson v. Fogo, 29 L. J. C. 657; Scott v. Pilkington, 31 L. J. Q. B. 81.

(*x*) The defence of set-off, strictly so called, is purely the creature of statute.

Stat. 2 Geo. II. c. 22, § 18, made perpetual by 8 Geo. II. c. 24, § 4, and which, with some modifications, has been generally adopted in the United States (see Meriwether v. Bird, 9 Ga. 584), provides, "that where there are mutual debts between the plaintiff and defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other; and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be

established by usage and adjudication. And it may be said that courts of equity will generally extend the doctrine of set-off beyond the law, where peculiar equities exist between the parties, calling for this relief. (xx)¹

The law of set-off is quite similar to the *compensation* of the civil law; (y) not, as we think, because it is borrowed from it, but because both rest on similar principles of common sense and common justice. And although in the details they differ much, the civil law doctrines can be applied to the law of set-off, not only for general, but sometimes for particular illustration.

Set-off has been well defined, as a mode of defence by which the defendant acknowledges the justice of the plaintiff's demand, but sets up a demand of his own against the plaintiff, to counterbalance it in whole or in part. (z)

A demand founded on a judgment may be set off, or upon a contract, if it could be sued in *indebitatus assumpsit*, debt, or covenant. (a) But if it arise *ex delicto*, and can be sued only * in trespass, replevin, or case, it is not in general capable * 735 of set-off; (b) nor is it if recoverable only by bill in equity. (c) And it is held that in an action for compensation for work done under contract, damages for imperfect execution of the work cannot be set off. (cc)

Courts usually permit judgments to be set off against each other, on motion, when such set-off is equitable, even if the parties are not the same, (d) whether the statute expressly allow this or not;

given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue." The object of these statutes was to prevent cross-actions between the same parties. Isberg v. Bowden, 8 Exch. 852, 22 Eng. L. & Eq. 551; Wallis v. Bastard, 4 De G., M. & G. 251, 31 Eng. L. & Eq. 175. Courts of equity have power at common law, independent of any statute, to order a set-off of debts in certain cases. See 2 Story's Eq. Jur. ch. 88.

(xx) Lee v. Lee, 31 Ga. 26.

(y) Domat, pt. 1, b. 4, tit. 2, § 1; 1 Ersk. Ins. b. 3, tit. 4, § 5; Pothier, *Traité des Obligations*, pt. 3, ch. 4. It has frequently been said in America, that as

the doctrine of set-off was borrowed from the civil law, it should be interpreted by the same principles of construction. See Meriwether v. Bird, 9 Ga. 594; per Kent, J., in Carpenter v. Buttermfield, 3 Johns. Cas. 155.

(z) Barbour on Set-off, p. 17.

(a) Hutchinson v. Sturges, Willes, 261; Howlet v. Strickland, Cowp. 56; Dowsland v. Thompson, 2 W. Bl. 910.

(b) Huddersfield Canal Co. v. Buckley, 7 T. R. 45; Sapsford v. Fletcher, 4 T. R. 512; Bull. N. P. 181; Freeman v. Hyett, 1 W. Bl. 394; Dean v. Allen, 8 Johns. 390; Gibbes v. Mitchell, 2 Bay, 351.

(c) Gilchrist v. Leonard, 2 Bailey, 135; Sherman v. Ballou, 8 Cowen, 304.

(cc) Cardell v. Bridge, 12 Gray, 60.

(d) Barker v. Brasham, 3 Wilson, 896;

¹ Thus the liability of the defendant for rents of premises owned by the plaintiff, but withheld until the determination of the defendant's right of dower in other premises, can, in equity, be set off against her claim for dower out of the plaintiff's premises. Doane v. Walker, 101 Ill. 628.

but it is a matter within their discretion, (e) and is determined by the justice of the case. Therefore it will not be permitted against a *bond fide* assignee for value. (f) Nor if the defendant is in execution on the judgment, (g) for that is, in general, a satisfaction of it. Or if, having been imprisoned, he has been discharged by his creditor, even if it was not the intention of the creditor to discharge the debt. (h) But if he escapes, or is released from imprisonment under an insolvent act, which does not discharge the debt, the judgment may be set off. (i) And, in the exercise of their discretion, courts usually permit the judgments recovered in other courts to be set off. (j) And not only the original judgment creditor may so *use it, but an absolute assignee for value may make this use of the judgment. (k) Nor is it material on what ground of action the judgment was founded. And if the judgment which it is desired to set off can be enforced by him who would so use it, against the party who has the judgment to be satisfied by the set-off, this is sufficient; and therefore it is not necessary that the judgments be in the same rights, or that the parties on the record be the same. (l) So costs may be set off, either against costs alone, or against debt and costs. (m) After

Dennie *v.* Elliott, 2 H. Bl. 587; Schermerhorn *v.* Schermerhorn, 3 Caines, 190; Brewerton *v.* Harris, 1 Johns. 145; Turner *v.* Satterlee, 7 Cowen, 481; Story *v.* Patten, 3 Wend. 381; Graves *v.* Woodbury, 4 Hill, 559; Goodenow *v.* Buttrick, 7 Mass. 140; Makepeace *v.* Coates, 8 Mass. 451; Barrett *v.* Barrett, 8 Pick. 342; Gould *v.* Parlin, 7 Greenl. 82; Wright *v.* Cobleigh, 3 Foster, 32. In this last case it was held: 1. That courts of law have power to set off mutual judgments. 2. The set-off is made between the real and equitable owners of the judgment, and not between the nominal parties. 3. If the defendant, against whom a judgment is recovered, is the assignee and equitable owner of an ascertained part of a judgment recovered against the plaintiff, in the name of another person, that part may be set off against the plaintiff's judgment. 4. The application to set off judgments must be had in the court where the judgment was recovered against the party who makes the application. 5. To authorize a set-off of judgments it is not necessary that either of the suits shall be pending.

(e) Burns *v.* Thornburgh, 3 Watts, 78; Tolbert *v.* Harrison, 1 Bailey, 599; Coxe *v.* State Bank, 3 Halst. 172; Scott *v.* Rivers, 1 Stew. & P. 24; Davidson *v.*

Geoghan, 3 Bibb, 233; Smith *v.* Lowden, 1 Sandf. 696.

(f) Makepeace *v.* Coates, 8 Mass. 451; Holmes *v.* Robinson, 4 Ohio, 90.

(g) Burnaby's case, Stra. 658; Foster *v.* Jackson, Hob. 52; Horn *v.* Horn, Amb. 79; Cooper *v.* Bigalow, 1 Cowen, 58; Taylor *v.* Waters, 5 M. & S. 108; Jaques *v.* Withy, 1 T. R. 557. But see Peacock *v.* Jeffrey, 1 Taunt. 426; Simpson *v.* Hanley, 1 M. & S. 696; Kennedy *v.* Duncklee, 1 Gray, 66.

(h) Poucher *v.* Holley, 3 Wend. 184; Yates *v.* Van Rensselaer, 5 Johns. 864.

(i) Cooper *v.* Bigalow, 1 Cowen, 206.

(j) Ewen *v.* Terry, 8 Cowen, 126; Schermerhorn *v.* Schermerhorn, 3 Caines, 190; Duncan *v.* Bloomstock, 2 McCord, 318; Noble *v.* Howard, 2 Hayw. 14; Best *v.* Lawson, 1 Miles, 11; Barker *v.* Braham, 2 W. Bl. 866, 3 Wilson, 896; Hall *v.* Ody, 2 B. & P. 28; Simpson *v.* Hart, 1 Johns. Ch. 91, 14 Johns. 68; Bristowe *v.* Needham, 7 Man. & G. 648; Brewerton *v.* Harris, 1 Johns. 144.

(k) Mason *v.* Knowlson, 1 Hill, 218.

(l) Hutchins *v.* Riddle, 12 N. H. 464; Shapley *v.* Bellows, 4 N. H. 351; Goodenow *v.* Buttrick, 7 Mass. 140; Dennie *v.* Elliott, 2 H. Bl. 587.

(m) Nunez *v.* Modigliani, 1 H. Bl. 217. The old practice was otherwise.

some fluctuations, it seems to be settled as the better opinion, that this set-off will be made without regard to the attorney's lien, on the ground that this extends only to the net amount due after the equities between the parties are adjusted. (n)

Judgments will be set off on motion because the question on which they depend has been tried and settled, and the claim established, or admitted. (o) But other claims than those resting on judgments must be pleaded, or filed in such manner as the statutes or rules of court direct, with sufficient notice for the plaintiff to deny and contest them if he chooses to do so. * 737 For not even the amount of a note will be set off, unless the plaintiff had the opportunity to contest it, nor even the amount of a verdict recovered, for it may be that this will be set aside. (p)

The amount due on the condition of a bond may generally be pleaded in set-off, but not the penalty; for this may be reduced both at law and in equity. (q)¹ But if the full amount of a bond

See *Butler v. Inneys*, 2 Stra. 891. But the rule stated in the text is now firmly established. *James v. Raggett*, 2 B. & Ald. 776; *Thrustout v. Crafter*, 2 W. Bl. 826; *Howell v. Harding*, 8 East, 302; *Lang v. Webber*, 1 Price, 375; *Hurd v. Fogg*, 2 Foster, 98. But if this set-off of costs is sought by motion to the court, it will be granted or not, according to the justice of the case. *Gihon v. Fryatt*, 2 Sandf. 638. In *McWilliams v. Hopkins*, 1 Whart. 275, it was held, that judgment for costs obtained against an administrator plaintiff in the District Court for the City and County of Philadelphia, and assigned by the defendant there to A, cannot be set off against a judgment for damages, obtained by such administrator against A in the Supreme Court.

(n) *Roberts v. Mackoul*, cited in *Thrustout v. Crafter*, 2 W. Bl. 826; *Schoole v. Noble*, 1 H. Bl. 23; *Nunez v. Modigliani*, 1 H. Bl. 217; *Vaughan v. Davies*, 2 H. Bl. 440; *Dennie v. Elliott*, 2 H. Bl. 587; *Hall v. Ody*, 2 B. & P. 28; *Emdin v. Darley*, 4 B. & P. 22; *Lane v. Pearce*, 12 Price, 742, 752; *Taylor v. Popham*, 16 Ves. 72; *Ex parte Rhodes*, id. 539; *Mohawk Bank v. Burrows*, 6 Johns. Ch. 317; *The People v. New York Common Pleas*, 13 Wend. 649; *Spence v. White*, 1 Johns. Cas. 102; *Porter v. Lane*,

8 Johns. 357; *Martin v. Hawks*, 15 Johns. 405. But see *Mitchell v. Oldfield*, 4 T. R. 128; *Randle v. Fuller*, 6 T. R. 456; *Glaister v. Hewer*, 8 T. R. 69; *Read v. Dupper*, 6 T. R. 361; *Middleton v. Hill*, 1 M. & S. 240; *Harrison v. Bainbridge*, 2 B. & C. 800; *Shapley v. Bellows*, 4 N. H. 363; *Dunklee v. Locke*, 13 Mass. 525; *Barrett v. Barrett*, 8 Pick. 342; *Ainslie v. Boynton*, 2 Barb. 258; *Rider v. Ocean Ins. Co.* 20 Pick. 250. And see note to *Schermerhorn v. Schermerhorn*, 3 Caines, 190.

(o) And it is only such a judgment that can be set off on motion. The judgment must be conclusive upon the party, rendered in a court which had jurisdiction, and the decision must have been final, and not appealed from. See *Harris v. Palmer*, 5 Barb. 105; *The People v. Judges*, 6 Cowen, 598. And see *Willard v. Fox*, 18 Johns. 497; *Weathered v. Mays*, 1 Texas, 472.

(p) *Bagg v. Jefferson*, C. P. 10 Wend. 615; *Cobb v. Haydock*, 4 Day, 472.

(q) *Burgess v. Tucker*, 5 Johns. 105; *Nedriffe v. Hogan*, 2 Burr. 1024. Damages arising from the breach of covenant in a deed of real estate, may be set off in cases where the amount of such damages may be ascertained by a mere computation. *Drew v. Towle*, 7 Foster, 412.

¹ A demand against the obligee of a bond obtained by the obligor after notice of an assignment by the obligee, is not a matter of set-off against the assignee. *George v. Tate*, 102 U. S. 564.

is agreed upon as liquidated damages, it may be set off. (r) Unliquidated damages cannot be set off. (rr)

A debt cannot be set off to an action unless it was due when the action was brought. (rs) Thus, it is held that a demand barred by the statute of limitations and revived by a new promise, cannot be set off to an action brought while the bar existed. (rt) And it is held that there can be no set-off against a set-off. (ru)

One important and very general principle in the law of set-off is, that the demand must be due to the party, or the claim must be possessed by him, in his own right. (s)¹ But this may be, either as original creditor or payee, or as owner by assignment. It seems indeed to be settled, that debts held in the right of another can be set off neither at law nor in equity. But a question sometimes exists as to the application of this rule. Whether a party holds a claim or debt for this purpose in his own right may perhaps be determined by two tests: he so holds it, if, first, he can sue for it in his own name, without setting forth as the foundation of his right some representative or vicarious character; and, secondly, if, having sued for and recovered the debt, he would have a right to use it at his own pleasure, and for his own benefit, or has a valid lien on it for his own security. The rights to the two demands, one of which is to be balanced against the other by set-off, must be similar rights. Thus, if an executor sues as executor, the defendant may set off a debt due from the testator; (t) if he sues for a cause of action accruing after the testator's death, and does not describe himself as executor, the defendant cannot

* 738 set off a debt due to him from * the testator; (u) he cannot

(r) *Fletcher v. Dyche*, 2 T. R. 32; *Duckworth v. Alison*, 1 M. & W. 412.

(rr) *Grimes v. Reese*, 30 Ga. 330; *Corey v. Janes*, 15 Gray, 543. But it is said that unliquidated damages growing out of the contract sued on, may be set off, in *De Forest v. Oder*, 42 Ill. 600.

(rs) *Henry v. Butler*, 32 Conn. 140.

(rt) *Lee v. Lee*, 81 Ga. 28.

(ru) *Russell v. Miller*, 64 Penn. St. 154.

(s) This is too universally settled to need the citation of adjudged cases.

(t) But if the defendant has purchased a debt against an intestate, *since his death*, it has been held, that he cannot set it off against an action by the administrator to recover a debt due the intestate. *Root v. Taylor*, 20 Johns. 137; *Whitehead v. Cade*, 1 How. (Miss.) 96.

(u) *Kilvington v. Stevenson, Willes*, 264, note; *Tegetmeyer v. Lumley*, id.; *Schofield v. Corbett*, 6 Nev. & Man. 527; *Houston v. Robertson*, 4 Camp. 342; *Watts v. Rees*, 9 Exch. 696, 26 Eng. L. & Eq. 565; *Mercein v. Smith*, 2 Hill,

¹ In an action by the payee of a joint and several note against one, who, to the knowledge of the payee, joined in it as a surety only, it is competent to the surety, by way of equitable defence, to plead a special plea of a set-off due from the payee to the principal, arising out of the same transaction out of which the liability of the surety arose. *Becherweise v. Lewis*, L. R. 7 C. P. 372. A claim of the maker against the payee of a note at maturity can be set off in an action by one to whom the note was indorsed after maturity. *Robinson v. Perry*, 73 Me. 168.

himself set off a debt due to him personally against a claim on the estate of the testator made against him as executor; (*v*) nor if he be sued for his own debt can he set off a debt due him as executor. (*w*) So a debt due to a man in right of his wife cannot be set off in an action against him on his own bond. (*x*) Nor can a debt contracted by the wife, before marriage, be set off in an action brought by the husband alone; (*y*)¹ unless he has by his promise to pay it made it his own debt. So in a suit either at law or in equity against partners, the demand of one of the defendants against the plaintiff cannot be set off. (*z*) And, in general, joint

210; *Fry v. Evans*, 8 Wend. 530; *Dale v. Cook*, 4 Johns. Ch. 18; *Colby v. Colby*, 2 N. H. 419; *Wolfersberger v. Bucher*, 10 S. & R. 10; *Brown v. Garland*, 1 Wash. Va. 221; *Rapier v. Holland, Minor*, 176; *Burton v. Chinn, Hardin*, 252; *Mellen v. Boarnan*, 13 Smedes & M. 100; *Shaw v. Gookin*, 7 N. II. 16. And see *Stuart v. Commonwealth*, 8 Watts, 74. In an action by an executor, a legacy bequeathed the defendant cannot be set off, although the executor has funds to pay the legacy. *Robinson v. Robinson*, 4 Harring. (Del.) 418; *Sorrelle v. Sorrelle*, 5 Ala. 245. But if the executor is sued for a debt due from his testator in his lifetime, he may set off a debt which has accrued due from the plaintiff to him as executor since the death of the testator. *Mardall v. Thel-luson*, 18 Q. B. 857, 14 Eng. L. & Eq. 74. So where an executor is sued for a debt created by himself as executor, he may set off a debt due from the plaintiff to the testator in his lifetime. *Blakesley v. Smallwood*, 8 Q. B. 538.

(*v*) Nor *vice versa*. *Grew v. Burditt*, 9 Pick. 265; *Snow v. Conant*, 8 Vt. 308; *Cummings v. Williams*, 5 J. J. Marsh. 384; *Banton v. Hoomes*, 1 A. K. Marsh. 19; *Harbin v. Levi*, 6 Ala. 899. In an action against an executor to recover a legacy given to the plaintiff's wife, the executor may set off a bond given by the plaintiff himself to the testator in his lifetime. *Lowman's Appeal*, 3 Watts & S. 349.

(*w*) *Thomas v. Hopper*, 5 Ala. 442.

(*x*) *Paynter v. Walker*, Bull. N. P. 179. In an action by husband and wife, for a legacy left to the wife "for her own use," the executor cannot set off a

debt due from the husband to the testator in his lifetime. *Jamison v. Brady*, 6 S. & R. 466. Otherwise, if the legacy is given to the wife not to her separate use. *Lowman's Appeal*, 3 Watts & S. 349. Neither can the husband's debt be set off against the wife's distributive share of her father's estate, when the parties have been divorced; and although such divorce was after the intestate's death. *Fink v. Hake*, 6 Watts, 131. In a suit by husband and wife for rent of the wife's premises, the defendant may set off a demand against the husband alone. *Ferguson v. Lothrop*, 15 Wend. 625. But see *Naglee v. Ingersoll*, 7 Penn. St. 185, where it was held, that a debt due by a husband, or one which he had agreed to pay, could not be set off against a claim for rent due to his wife's separate estate, although she had authorized him to receive the rents without accounting.

(*y*) *Burrough v. Moss*, 10 B. & C. 558; *Wood v. Ackers*, 2 Esp. 594.

(*z*) The decisions are uniform that a joint debt cannot be set off against a separate debt, nor *vice versa*. *Woods v. Carlisle*, 6 N. H. 27; *Walker v. Leighton*, 11 Mass. 140; *Howe v. Sheppard*, 2 Sumner, 409; *M'Dowell v. Tyson*, 14 S. & R. 300; *Bibb v. Saunders*, 2 Bibb, 86; *Armitstead v. Butler*, 1 Hen. & Muf. 176; *Palmer v. Green*, 6 Conn. 14; *Emerson v. Baylies*, 19 Pick. 69; *Warren v. Wells*, 1 Met. 80. And see *Grant v. Royal Exch. Ass. Co.* 5 M. & S. 439. If there is an express agreement with a person dealing with a firm, that the debts severally due from the members of the firm to that person shall be set off against any demands which the firm may have jointly

¹ The defendant held as collateral security a policy on the life of the plaintiff's husband, for the surrender of which the plaintiff agreed to pay him her husband's indebtedness. Held, that such indebtedness could be set off against a note for money lent to the defendant; the plaintiff's allowance from her husband's estate being derived solely from this policy. *Borchsenius v. Canutson*, 100 Ill. 82.

and separate debts, or debts arising from and resting upon different rights, cannot be set off one against the other. (22)

* 739 * It sometimes happens that a demand may be set off, due from the person actually and beneficially interested in the suit, although it is brought for his benefit by one who has the legal interest, and is therefore plaintiff of record, but has no other interest. (a)

If there is more than one defendant, neither one can set off a demand due to himself alone, but all may set off demands due to all jointly. Nor can a single defendant set off a debt due to him from a part only of two or more plaintiffs. (b)

No demand can be pleaded in set-off, unless it be reasonably certain. But this is meant to exclude only those cases in which a jury must determine the amount of damages by their own estimate or opinion, and not those in which they can ascertain the amount by mere calculation, if they find the claim valid. In general, demands may be set off, which are for liquidated damages; meaning thereby when their amount is specific, or is directly and distinctly ascertainable by calculation; and also all those which usually may be sued for and recovered under the common counts. (c)¹

on him, such agreement is binding, and the set off may be allowed. *Kinner v. Hossack*, 2 Taunt. 170; *Hood v. Riley*, 8 Green, 127. See *Lovel v. Whitridge*, 1 McCord, 7; *Evernghim v. Ensworth*, 7 Wend. 326. So, if the surviving partner sue for a debt due the firm, the defendant may set off a debt due from such a partner alone. *Holbrook v. Lackey*, 13 Met. 182. But see *Meader v. Scott*, 4 Vt. 26; *Lewis v. Culbertson*, 11 S. & R. 48.

(22) *Brewer v. Norcross*, 2 Green, 219.

(a) See *Campbell v. Hamilton*, 4 Wash. C. C. 92. But see *infra*, nn. (p), (q).

(b) *Ross v. Knight*, 4 N. H. 236; *Henderson v. Lewis*, 9 S. & R. 879; *Banks v. Pike*, 15 Me. 208; *Fuller v. Wright*, 18 Pick. 403; *Watson v. Hensel*, 7 Watts, 344; *Archer v. Dunn*, 2 Watts & S. 327; *Trammell v. Harrell*, 4 Pike, 602; *Jones v. Gilreath*, 6 Ired. 388; *Vose v. Philbrook*, 3 Story, 385. The statutes in

some States are different. But in an action against principal and surety, for the default of the principal, a debt from the plaintiff to the principal alone has in some cases been allowed to be set off. *Brundridge v. Whitecomb*, 1 D. Chip. 180; *Crist v. Brindle*, 2 Rawle, 121. See *Lynch v. Bragg*, 18 Ala. 778; *Mahurin v. Pearson*, 8 N. H. 589; *Prince v. Fuller*, 34 Maine, 122. And such was the civil law. 2 Story's Eq Jur. § 1442. But see *Warren v. Wells*, 1 Met. 80; *Walker v. Leighton*, 11 Mass. 140. So, where a tax collector gives a joint and several bond to a town, with sureties, and then sues the town in his own name, on an order of the town to him, the town may set off money which the plaintiff has received and not paid over in breach of his bond. *Donelson v. Colerain*, 4 Met. 430.

(c) This rule arises from the words of

¹ Under a clause in a policy of insurance that the "loss shall be paid," "the amount of the premium note" "being first deducted," the insured, when sued upon the note, can set off a loss under the policy. *Columbian Ins. Co. v. Bean*, 113 Mass. 541. See *Osgood v. De Groot*, 36 N. Y. 348. But a claim for services for so much as they were reasonably worth cannot be set off. *Bell v. Ward*, 10 R. I. 503. In Massachusetts, by statute, a demand for money paid cannot be set off, unless it is for a sum that is liquidated, or one that may be ascertained by calculation. *Taft v. Larkin*, 123 Mass. 598.

* It may, perhaps, be doubtful, when compensation for * 740 part performance of a contract may be set off against an action for breach of the contract, and when it should rather be given in evidence by way of reduction, or when it can only be used as the ground of a cross-action. (*d*) This must depend upon the circumstances of the case, and upon the provisions of the statute in the State where the action is tried.

Set-off should, however, be discriminated from *reduction* and *recoulement*; to both of which it bears much analogy, and with either of which it may be so mingled by the facts of a case as to make it difficult to say in which of these forms the opposing demand should be brought against the plaintiff's action. In general, a defendant may deduct from the plaintiff's claim all just demands or claims

the statute before cited, that a set-off is allowed in cases of mutual debts, i. e., claims in the nature of a debt; and the same rule is applied to both parties. For if the suit is brought, not for a debt, but for unliquidated damages, no defence of set-off can be allowed. *Hardcastle v. Netherwood*, 5 B. & Ald. 93, which was an action for not indemnifying the plaintiff for paying the defendant's own proper debt; *Hutchinson v. Reid*, 3 Camp. 329, for not accepting a bill of exchange; *Birch v. Depeyster*, 4 Camp. 886, against an agent for not accounting; *Gillingham v. Waskett*, 13 Price, 484, for not replacing stock according to agreement; *Warn v. Bickford*, 7 Price, 550, for breach of a covenant for quiet enjoyment; *Attwool v. Attwool*, 1 Ellis & B. 21, 18 Eng. L. & Eq. 386, for breach of a bond to indemnify generally; *Castelli v. Boddington*, 1 Ellis & B. 68; 16 Eng. L. & Eq. 127, an action on a policy of insurance for an average loss. And see *Cope v. Joseph*, 9 Price, 155; *Gordon v. Bowne*, 2 Johns. 150; *Osborn v. Etheridge*, 13 Wend. 339, a suit by a tenant against his landlord, to recover costs of the defence of summary proceedings, instituted by the latter; *Cooper v. Robinson*, 2 Chitty, 161, for not indemnifying plaintiff from certain taxes; *Wilmot v. Hurd*, 11 Wend. 584, for breach of warranty in the sale of goods; *Dowd v. Faust*, 4 Dev. 92, covenant for uncertain damages. And see further, *Petree v. The Tennessee Manufacturing Co.* 1 Snead, 886; *Edington v. Pickle*, id. 122. More frequent illustrations exist of claims which cannot be used by a defendant by way of set-off, because they are not debts within the statutory meaning of that

word. Thus, it seems that unliquidated losses on a policy of insurance cannot be made the subject of set-off. *Thomson v. Redman*, 11 M. & W. 487; *Grant v. Royal Exch. Ass. Co.* 5 M. & S. 439. And see *Cumming v. Forester*, 1 id. 494. Nor can a claim for tortiously taking the defendant's property be set off. *Hopkins v. Meguire*, 85 Me. 78. Neither is a breach of a covenant for the non-delivery of goods according to contract a subject of set-off. *Howlet v. Strickland*, Cowp. 58; *Wright v. Smyth*, 4 Watts & S. 527. Nor a breach of the guaranty when the damages are uncertain. *Moreley v. Inglis*, 4 Bing. N.C. 58; *Crawford v. Stirling*, 4 Esp. 207. *Contra*, if the damages are certain. *Collins v. Wallis*, 15 J. B. Moore, 248. So, to an action by a bank, the defendant cannot set off his stock in the bank. *Harper v. Calhoun*, 7 How. Miss. 208; *Whittington v. Farmers Bank*, 5 Harris & J. 480. Nor can he set off the bills of such bank. *Hallowell Bank v. Howard*, 13 Mass. 235. A note payable in work cannot be set off against a demand payable in cash. *Brather v. McEvoy*, 7 Mo. 508. In Massachusetts taxes are not the subject of set-off. *Peirce v. Boston*, 8 Met. 620.

(d) As to the right of the defendant to reduce the plaintiff's demand in the cases mentioned, *ante*, p. * 523, n. (i), see the following cases: *Basten v. Butter*, 7 East, 579; *Farnsworth v. Garrard*, 1 Camp. 88; *Denew v. Daverell*, 3 id. 451; *Mandel v. Steel*, 8 M. & W. 868; *Heck v. Shener*, 4 S. & R. 249; *Still v. Halt*, 20 Wend. 51; *Hunt v. The Otis Company*, 4 Met. 484; *McAllister v. Reab*, 4 Wend. 483, 8 id. 109; *Britton v. Turner*, 6 N. H. 481.

owned by him, or payments made by him, in the very same transaction, or even in other but *closely connected transactions. They must, however, be so connected as fairly to authorize the defendant to say that he does not owe the plaintiff, on that cause of action, so much as he seeks, and not that he ought not to pay the plaintiff so much, because on another cause of action the plaintiff owes him. If he can so present and use his claims, he diminishes the plaintiff's claim by way of reduction. (e) Recoupment we consider to belong rather to cases where the same contract lays mutual duties and obligations on the two parties, and one seeking remedy for the breach of duty by the second, the second meets the demand by a claim for a breach of duty against the first.¹ But the word is of recent introduction, and is not used with uniformity or precision. (f) The essential difference between recoupment or reduction on the one hand, and set-off on the other, is that in set-off the ground taken by the defendant is that he may owe the plaintiff what he claims; but a part or the whole of this debt is paid in reason and justice by a distinct and unconnected debt which the plaintiff owes him.

(e) The difference between allowing a certain defence by way of set-off, and by way of reduction of damages, although not broad, is yet clear and well-defined. A few instances will illustrate the application of the principle. Thus, in assumpit for dyeing goods, the defendant may, at common law, show that there is a custom of the trade by which damages done the goods in dyeing shall be deducted from the price of dyeing. Bamford v. Harris, 1 Stark. 343. So a master may show, in an action by a servant for his wages, that the plaintiff agreed to deduct therefrom the value of goods lost by his negligence. Le Loir v. Bristow, 4 Camp. 134. And see Dobson v. Lockhart, 5 T. R. 133; Kinnerley v. Hossack, 2 Taunt. 170; Cleworth v. Pickford, 7 M. & W. 312. So, in an action for work and labor and materials, the defendant may show, without pleading any set-off, that he supplied part of the materials himself. Newton v. Forster, 12 M. & W. 772; Turner v. Diaper, 2 Man. & G. 241. And see Dale v. Sollet, 4 Burr. 2133,

and Lufburrow v. Henderson, 30 Ga. 482; Eddy v. Clement, 38 Vt. 486; Cage v. Phillips, 38 Ala. 637; Phelps v. Paris, 39 Vt. 511; Bates v. Cartwright, 38 Ill. 581; Miller v. Gaither, 3 Bush, 152; King v. Bradley, 44 Ill. 342.

(f) The doctrine of recoupment, or couper, as it was formerly termed, is not a new one in the common law, although it was formerly used in a different sense from that alluded to in the text. It was formerly used to signify, as it is now in many courts and decisions, a right of deduction from the amount of the plaintiff's claim, either from part payment, or defective performance of contract on the part of the plaintiff, or from any analogous fact. The same idea was expressed by default, discount, deduction, reduction, and in actions of tort, by mitigation. But we have given the definition of the text as the true and proper one, since the word recuperer in the original signifies to cut again, and therefore would favor the definition above, and Barbour on Set-off is in favor of the same use of the term.

¹ Thus, in an action upon a promissory note given in payment for land conveyed with covenant against incumbrance, the defendant can recoup what he has been obliged to pay to free the land from incumbrance. Davis v. Bean, 114 Mass. 358. In Waterman v. Clark, 76 Ill. 438, it is laid down that in recoupment a claim originating in contract may be set up against one founded on tort, and vice versa; but the defendant cannot, as in set-off, recover any excess in his favor.

In some of our States a *counter-claim* may be pleaded in defence or diminution of the plaintiff's claim. This is much the same as set-off; but it may be considered as a more extensive right, or, at least, as free from some of the formal or technical objections which may be made to set-off. (*ff*)¹ In Louisiana, the word *reconvention* is used. This also is similar to set-off, but the right is construed somewhat more liberally. (*fg*) The word "counter-claim" seems to comprehend "recoupment" and "set-off." Its essential requisite is, that the defendant should be able to maintain an action thereon against the plaintiff. (*fh*)

It should be remarked, that a set-off is a defence which the defendant may use or not at his pleasure. If he forbears doing so, this in no way impairs his right to establish his claim by a separate action. (*g*) It is, however, better that it should be settled * by set-off, when that can properly be done, because * 742 it saves both expense and time to do this. And courts have censured parties for not pleading a demand by way of set-off, when there was nothing to show that it might not have been made perfectly available to the defendant in that way. For set-off is in the nature of a cross-action, and is substituted for that, for the very purpose of preventing unnecessary litigation. Therefore, also, only those demands can be set off for which an action might be brought by the defendant, and sustained. If it be barred by the statute of limitations, or otherwise defeasible, it cannot be set off. (*h*)

(*ff*) *McDougall v. Maguire*, 35 Cal. 274; *Hook v. White*, 36 Cal. 299; *Dougherty v. Stamps*, 48 Mo. 243; *Kisler v. Tinder*, 29 Ind. 270; *Rickard v. Kohl*, 22 Wis. 506; *Ball v. Consolidated, &c. Co.* 3 Vroom, 102; *Boyd v. Day*, 3 Bush, 617; *Noonan v. Ilsley*, 22 Wis. 27; *Anthony v. Stinson*, 4 Kansas, 211.

(*fg*) *Lallande v. Ball*, 20 La. An. 193.
(*fh*) *Clinton v. Eddy*, 1 Lans. 61; 54 Barb. 54; 37 Howard, Pr. 28.

(*g*) *Laing v. Chatham*, 1 Camp. 252; *Minor v. Walter*, 17 Mass. 287; *De Sylva v. Henry*, 3 Port. 132; *Baskerville v. Brown*, 2 Burr. 1229; *Himes v. Barnitz*, 8 Watts, 89; *Garrow v. Carpenter*, 1 Port. 360. The civil law was different. 2 Story's Eq. Jur. § 1440. In some States a defendant cannot set off a claim, on which a suit is then pending in his

favor. *Lock v. Miller*, 3 Stew. & P. 13. In others the contrary has been held. *Stroh v. Uhrich*, 1 Watts & S. 57. Neither can the plaintiff file a counter set-off to the defendant's set-off. *Hudnall v. Scott*, 2 Ala. 567; *Ulrich v. Berger*, 4 Watts & S. 19.

(*h*) *Chapple v. Durston*, 1 Cromp. & J. 1; *Gilchrist v. Williams*, 3 A. K. Marsh. 235; *Williams v. Gilchrist*, 3 Bibb, 49; *Turnbull v. Strohecker*, 4 McCord, 210; *Jacks v. Moore*, 1 Yeates, 891; *Chicago, &c. Dock Co. v. Dunlap*, 82 Ill. 207. And a debt discharged by bankruptcy or insolvency cannot be the subject of a set-off. *Francis v. Dodsworth*, 4 C. B. 202. Neither can a claim which the court would not have jurisdiction to try, if an action had been brought upon it, be allowed in set-off. *Picquet v. Cor-*

¹ The defendant in an action to recover an alleged balance for labor and materials, may show, as a counter-claim, an over-payment by mistake, without proving a previous demand for repayment, if the mistake is not mutual. *Sharkey v. Mansfield*, 90 N. Y. 227.

A debt is not properly a subject of set-off, unless it existed when the plaintiff brought his action, and at that time belonged to the defendant; but it may have become the defendant's after the cause of action accrued to the plaintiff. And it must be due to the defendant when pleaded, and this should be alleged. (i)¹

* 743 * An agreement to pay a debt in cash, or in any specific way, or even an express negative of set-off, does not, in general, deprive the defendant of paying it by setting off a debt due to himself. (j)

One who buys goods of a factor, as such, and is sued for the price by the real owner, cannot set off a debt due from the factor; (k) but he may, if the factor sell the goods as his own, with a right to do so, and the buyer does not know that they are not his own. (l)² But he cannot set off a debt due to him from the prin-

mick, Dudley, 20. Nor a debt, the collection of which has been enjoined in Chancery. Key v. Wilson, 3 Humph. 406. Nor a note which the defendant holds, but which he cannot sue in his own name, as a note not negotiable. Bell v. Horton, 1 Ala. 413; Carew v. Northrup, 5 Ala. 387. Nor a bond which has been cancelled, but by mistake. Williams v. Crary, 5 Cowen, 308. The maker of a note payable to A. B. or bearer, cannot set off against one who sues as bearer, any claim against A. B. or other person except the plaintiff. Parker v. Kendall, 8 Vt. 540.

(i) Hardy v. Corlis, 1 Foster, 356; Dendy v. Powell, 3 M. & W. 442; Evans v. Prosser, 3 T. R. 186; Eland v. Karr, 1 East, 375; Richardson v. James, 2 Exch. 471; Rogerson v. Ladbrooke, 1 Bing. 98; Carpenter v. Butterfield, 8 Johns. Cas. 145; Jeff. Co. Bank v. Chapman, 19 Johns. 822; Braithwaite v. Coleman, 14 Nev. & M. 654; Stewart v. U. S. Ins. Co. 9 Watts, 126; Morrison v. Moreland, 15

S. & R. 61; Huling v. Hugg, 1 Watts & S. 418; Edwards v. Temple, 2 Harring. (Del.) 322; Carprew v. Canavan, 4 How. (Miss.) 370. And if the defendant claims to set off the plaintiff's note, which has been indorsed to him, he must show that it came to him before the plaintiff's suit was commenced. Jeff. Co. Bank v. Chapman, 19 Johns. 322; Kelly v. Garrett, 1 Gilman, 649. Money paid by the defendant as surety for the plaintiff, *after action brought*, but on an obligation entered into before, cannot be set off. Cox v. Cooper, 3 Ala. 256. See *ante*, p. * 737.

(j) Lechmere v. Hawkins, 2 Esp. 628; M'Gillivray v. Simson, 2 C. & P. 820, 9 D. & R. 36; Loudon v. Tiffany, 5 Watts & S. 367; Baker v. Brown, 10 Mo. 396.

(k) Browne v. Robinson, 2 Caines' Cas. 341; Gordon v. Church, 2 Caines, 299; Fish v. Kempton, 7 C. B. 687; Jarvis v. Chapple, 2 Chitty, 387.

(l) Carr v. Hinckliff, 4 B. & C. 547; Stracey v. Deey, 7 T. R. 361, note; Pur-

¹ A debt is not the subject of a set-off that was contracted by the plaintiff during infancy, and not ratified by him in writing after full age, and hence not actionable. Rawley v. Rawley, 1 Q. B. D. 460.

² And although the agent agreed with the principal not to sell in his own name. *Ex parte* Dixon, 4 Ch. D. 133. So where the principal consented to a sale in the agent's name. Borries v. Imperial Ottoman Bank, L. R. 9 C. P. 38. But not if the action is for unliquidated damages for not accepting goods "to arrive." Turner v. Thomas, L. R. 6 C. P. 610. It is not necessary for the buyer to aver that he had "no means of knowing" that the goods did not belong to the agent. Borries v. Imperial Ottoman Bank, L. R. 9 C. P. 38. But a buyer acting under a misapprehension, not brought about by the principal, that the agent owned the goods, cannot set off a claim against the agent. Brown v. Morris, 83 N. C. 251. If an agent is known to act as such and as principal and the buyer neglects, in the particular transaction, to find out in what character he made the sale, the buyer will have no right of set-off, where he purchased merely to avail himself of such right as against a solvent principal. Miller v. Lea, 35 Md. 396. See Stewart v. Woodward, 50 Vt. 78.

cipal, if the factor has a lien on the goods, even if the principal be mentioned at the sale. (m) And if, before they are delivered, or any payment made, the buyer is notified that they belong to a third person, he cannot set off against an action by that person, a debt due to him from the factor. (n) A broker, being one to whom goods are not intrusted, and who usually and properly sells in the name of his principal, and who is understood to be only an agent, whether he sells in his own name or not, stands only on the footing of an agent. (o) And if an action be brought by an agent in his own name, for a debt due to his principal, the defendant may set off a debt due from such principal. (p) In general,

chell v. Salter, 1 Q. B. 197. And see *George v. Clagett*, 7 T. R. 359; *Rabone v. Williams*, id. 880, note; *Pigeon v. Osborn*, 12 A. & E. 715; *Parker v. Donaldson*, 2 Watts & S. 9; *Gardner v. Allen*, 6 Ala. 187; *Sims v. Bond*, 5 B. & Ad. 380; *Waring v. Favenck*, 1 Camp. 85; *Westwood v. Bell*, Holt, N. P. 124.

(m) *Hudson v. Granger*, 5 B. & Ald. 27; *Drinkwater v. Goodwin*, Cowp. 261. But if the factor has parted with the goods and lost his lien, the purchaser may set off his debt against the principal. *Coppin v. Craig*, 7 Taunt. 248; *Coppin v. Walker*, id. 287.

(n) 1 *Harrison & Edwards*, N. P. 856; *Barbour on Set-off*, 136; *Rabone v. Williams*, 8 T. R. 880, n.

(o) *Wilson v. Codman*, 3 Cranch, 198; *Atkinson v. Teasdale*, 1 Bay, 299; *Godfrey v. Forrest*, id. 300.

(p) *Royce v. Barnes*, 11 Met. 276. This doctrine, however, is repudiated by the late English case of *Isberg v. Bowden*, 8 Exch. 852, 22 Eng. L. & Eq. 551. That was an action for freight due under a charter-party. Plea, that the plaintiff entered into the charter-party as master of the ship, and for, and on behalf of, and as agent for M. the owner; that the plaintiff never had any beneficial interest in the charter, or any lien on the freight, and that he brought the action solely as agent and trustee for M., and that M. was indebted to the defendant in a certain amount, which the defendant offered to set off. Held, on demurrer, that the statute of set-off did not apply. Martin, B., in delivering the judgment of the court, said: "It was contended, on behalf of the plaintiff, in support of the demurrer, that the plea was bad at common law, and could only be supported by virtue of the statute of set-off; and that inasmuch as the plaintiff in the action was not the debtor to the defendant, the case was not

within the statute. It was admitted, on the other hand, that the plea was bad at common law; but contended that the statute had received a construction, in several cases which were cited, and to which we shall presently refer, and that upon such construction the plea could be maintained. The statute enacts, 'that where there are mutual debts between the plaintiff and the defendant, one debt may be set against the other.' This is the whole enactment as applicable to the present case, and upon its true construction the question depends. If the words of the statute had been, that where there were 'mutual debts the one might be set against the other,' the argument for the defendant would have had more weight; but these are not the only words, for the debts are to be mutual debts between the plaintiff and the defendant, and there is no debt here due from the plaintiff at all; and except the words 'between the plaintiff and the defendant' can be excluded, the plea cannot be maintained. In support of his view, the defendant's counsel cited the case of *Coppin v. Craig*, where a plea, in substance the same as the present, was pleaded. The plea was not demurred to, and its validity or non-validity in point of law seems never to have been considered at all, and the matter decided by the court was quite collateral to the present question; so also a case of *Jarvis v. Chapple*, where a similar plea was pleaded, was also relied on. This was an action by an auctioneer, for goods sold and delivered, and the defendant pleaded that the plaintiff sold as agent for one Tappinger, who was indebted to the defendant, which debt was pleaded as a set-off. The plaintiff replied, that the goods were not the goods of Tappinger, and were not sold by the plaintiff as his agent, upon which issue was joined. The plaintiff was nonsuited at the trial,

- * 744 if an agent be permitted by his * principal to act as if he were the principal and not an agent, one dealing with him,
- * 745 and supposing him to be a principal, * acquires the same rights, and among these the right of set-off, which he would have if the agent were a principal; nor can he be subsequently deprived of these rights by the coming in of a third party who was a stranger to him in the original transaction.

When an action is brought by or against a trustee, in that capacity, money due to or from the *cestui que trust*, may be set off; for it will be considered that the party in interest, and not merely the party of record, is the one by whom or against whom the set-off should be made. (q)

and the application to the court was to set aside this nonsuit. It is at once, therefore, obvious, that the present question could not, by possibility, have arisen under such circumstances. The case of Carr v. Hinchliff, and several other cases decided on the same principle, were also cited. It is quite true that there are expressions in the judgment of the learned judges in that case which seem to support the argument for the defendant; but the real ground upon which that and the other cases decided on the same point proceeded is, that where a principal permits an agent to sell as apparent principal, and afterwards intervenes, the buyer is entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the real contracting party, and is entitled to the same defence, whether it be by common law or by statute, payment or set-off, as he was entitled to at that time against the agent, the apparent principal. The cases of Carr v. Hinchliff, George v. Clagett, 7 T. R. 859, and Rabone v. Williams, id. 380, n., are all explained on that principle in Tucker v. Tucker. By this case, and that of Wake v. Tinkler, and Lane v. Chandler, referred to in 7 East, 154, the cases of Bottomley v. Brooke, and Rudge v. Birch, must be considered as entirely overruled; and the case of Tucker v. Tucker goes far to show, that the statute of set-off is confined to the legal debts between the parties, the sole object of the statute being to prevent cross-actions between the same parties. The case of Stackwood v. Dunn was cited on behalf of the defendant. It is enough to say, that this case goes much beyond that. In that case it seems to have been ruled, that the demurror having confessed the truth of the pleas, the set-off was to be allowed between the

parties. The cases cited in Story on Agency, p. 361, § 409, as the authority for what is there said, are those already adverted to from 7 Taunton, 287 and 243, and shown not to support the general proposition. In this case the plaintiff was the party whom the defendant agreed to pay; and we think that, looking at the plain words of the statute, we best give effect to the true rule now adopted by all the courts at Westminster for its construction, by holding, that inasmuch as the debts are not mutual debts between the plaintiff and the defendant, the one cannot be set off against the other. This is acting upon the rule as to giving effect to all the words of the statute; a rule universally applicable to all writings, and which we think ought not to be departed from except upon very clear and strong grounds, which do not, in our opinion, exist in this case."

(q) Campbell v. Hamilton, 4 Wash. C. C. 92; Sheldon v. Kendall, 7 Cush. 217. See Barrett v. Barrett, 8 Pick. 342. But see Wheeler v. Raymond, 5 Cowen, 231, 9 Cowen, 296; Beale v. Coon, 2 Watts, 183; Porter v. Morris, 2 Harring. (Del.) 509; President, &c. v. Ogle, Wright, 281; Tucker v. Tucker, 4 B. & Ad. 745. In this case S. gave a bond, conditioned for the payment of money. The obligee made C. his executrix and residuary legatee, and died. C. proved the will, assented to the bequest, and died, not having fully administered, leaving E. executrix of the executrix C., in trust for her (E.'s) own benefit. A sum due on the bond in the first testator's time remained unpaid. C., during her lifetime, in consideration of a marriage about to take place between her and the father of S., gave a bond to a trustee, conditioned for a payment of a sum of money to the use of S., if C. should marry and survive her intended husband.

Set-off, it has been said, is in the nature of a cross-action, which may be for a larger amount than was due on the original action. If, therefore, the defendant files and sustains his set-off, and the result is not only that he owes the plaintiff nothing, but that the plaintiff owes him a balance when the mutual and opposing claims are adjusted, the defendant may have judgment and execution against the plaintiff, in that action, for the balance or surplus due to him. (r)

Of the notice of set-off, which must depend much on the several statutes and the rules of court, it is only necessary to *say, that it must be very precise and certain. For set-off *746 is in effect, as has been often said, in the nature of a cross-action, of which the notice takes the place and performs the office of the declaration, and it should be in fact and substance, if not in form, as full and as clear and definite as a declaration, in order that the plaintiff may have the same opportunity of knowing precisely what claim is made against him, that he would have if it were made by an original action. (s)

A defendant has a right to withdraw his account in set-off, although this may expose the plaintiff's claim to the statute of limitations, by the absence of all other evidence of any mutual and open accounts. (t)

A tort cannot be pleaded as set-off in an action for a tort. (tt)

She did marry and survive him, and the money not having been paid in her lifetime, the trustee's executor sued E., the executrix of C., upon the bond. *Held*, that in this action the claim of E. upon S.'s bond could not be set off. See *Isberg v. Bowden*, *ante*, and the remarks of *Martin*, B. In *Hurlbert v. Pacific Ins. Co.* 2 Sumner, 471, where the subject was fully discussed, it was decided, that where an insurance was effected by an agent, for the benefit of whom it concerned, and the agent brought an action in his own name, the insurance company could not set off a debt due them from the agent in his own right. *Williams v. Ocean Ins. Co.* 2 Met. 303, is to the same effect.

(r) In England this cannot be done,

but the defendant must bring his action for the surplus. *Hennell v. Fairlamb*, 3 Esp. 104. But in America such a course is common. *Good v. Good*, 9 Watts, 567; *Cowser v. Wade*, 2 Brev. 291. And the plaintiff cannot file any counter set-off: *Hall v. Cook*, 1 Ala. 629; nor discontinue his action: *Riley v. Carter*, 8 Humph. 230. A defendant cannot file the same account in set-off to two separate actions by the same plaintiff. *Chase v. Strain*, 15 N. H. 635.

(s) See *Barbour on Set-off. Babington on Set-off* (6 Law Lib.).

(t) *Theobald v. Colby*, 35 Me. 179; *Muirhead v. Kirkpatrick*, 5 Watts & S. 506; *Cary v. Bancroft*, 14 Pick. 318.

(tt) *Hart v. Davis*, 21 Texas, 411.

SECTION XI.

OF ILLEGAL CONTRACTS.

We have already spoken of illegal contracts, in connection with other subjects, and especially of an illegal consideration, in our first volume, and in a preceding section of this chapter. We would add here, that as all contracts which provide that anything shall be done which is distinctly prohibited by law, or morality, or public policy, are void; (*u*)¹ so he who advances money in consideration of a promise or undertaking to do such a thing, may, at any time before it is done, rescind the contract, and prevent the thing from being done, and recover back his money. (*v*)² But it would seem obvious that if he delays

(*u*) This principle is embodied in the maxim, *ex turpi causa, non oriatur actio*. No principle is better settled in the law, as the following among many other authorities show: Shiffner *v.* Gordon, 12 East, 304; Belding *v.* Pitkin, 2 Caines, 149; Springfield Bank *v.* Merrick, 14 Mass. 322; Russell *v.* De Grand, 15 Mass. 39; Wheeler *v.* Russell, 17 Mass. 281; Allen *v.* Rescous, 2 Lev. 174; Fletcher *v.* Har-

cot, Hutton, 56; Holman *v.* Johnson, Cowp. 343; Gaslight Co. *v.* Turner, 7 Scott, 779; Wetherell *v.* Jones, 3 B. & Ad. 221; Fivaz *v.* Nicholls, 2 C. B. 601; Simpson *v.* Bloss, 7 Taunt. 246.

(*v*) Thus, in White *v.* The Franklin Bank, 22 Pick. 181, where, upon the deposit of money in a bank, the depositor received a book containing the cashier's certificate thereof, in which it was stated

¹ See Begbie *v.* Phosphate Sewage Co. L. R. 10 Q. B. 491; 1 Q. B. D. 679; Bredin's Appeal, 92 Penn. St. 241. The following contracts have been held illegal and unenforceable: An agreement to pay money to a person in the employ of another, to induce him to act contrary to his employer's interests, although the employer is not actually injured, Harrington *v.* Victoria Graving Dock Co. 3 Q. B. D. 549; a contract to insure a woman against the risk of her dying under or in consequence of an illegal operation for abortion, Hatch *v.* Mutual Life Ins. Co. 120 Mass. 550; an agreement not to bid or to influence any one else to bid for the service or labor of the inmates of a house of correction, even if the party letting the services sustains no injury by reason of the making of the agreement, Gibbs *v.* Smith, 115 Mass. 592; and an agreement by A. to give B., who was the lowest bidder at the public letting of the construction of a public road, a portion of certain public lands, to be received for the performance thereof, as the price of his being substituted for B. in such performance, is void as against public policy, Hannah *v.* Fife, 27 Mich. 172. O'Hara *v.* Carpenter, 23 Mich. 410, decided that a contract "to procure for" the plaintiff, who was liable to be drafted into military service, if drafted within a certain time, "a substitute, or otherwise clear him from said draft, and thus save him harmless from any cost or expense in consequence of the same," and a note given in consideration of such contract, are against public policy and void.

² Thus, one who conveys his property to another for the purpose of defrauding his creditors, may, before the purpose is carried out, repudiate the transaction and recover the property from the latter or his assignee, who took it with notice of the fraud. Taylor *v.* Bowers, 1 Q. B. D. 291. See Symes *v.* Hughes, L. R. 9 Eq. 475. A payment of "margins" cannot be recovered back in case of a decrease in the price of goods, where the vendor and purchaser contemplated a merely gambling contract; nor can they be recovered to the extent of any loss, where both intended an actual sale; but if the purchaser alone acted in good faith, while the vendor received margins without obtaining goods for delivery, the purchaser can repudiate the contract and recover back the money advanced. Gregory *v.* Wendell, 39 Mich. 337. See Taylor *v.* Bowers, 1 Q. B. D. 291.

* rescinding until his rescission is inoperative, and the thing will still be done, although the contract, at the time of the rescission, was in form executory, it should come under the same rule as an executed contract for unlawful purposes; and here the law, in general, refuses to interfere, but leaves both parties as they were; (*w*)¹ unless the case shows that there is a substantial difference between them; the one doing and the other suffering the wrong. And in this case the sufferer may have a remedy, but not the wrong-doer. (*x*)

The more important classes of contracts in which the question of illegality has arisen, are contracts in restraint of marriage, contracts in restraint of trade, contracts which violate the revenue laws of foreign countries, contracts which tend to corrupt legislation, wagering contracts, contracts in violation of the Sunday law, and champerty and maintenance. Contracts in restraint of marriage we have already noticed. (*y*) The others we shall consider in this place.

1. OF CONTRACTS IN RESTRAINT OF TRADE.

It is not only a defence to a contract that it requires of the defendant, or that the defendant by it promised to do an act which the law forbade his doing, but it may also be a defence,

* that by the contract the defendant undertook to do what the plaintiff was forbidden by law to ask of him. Generally, these two cases would be the same; for it is not often that

that the money was to remain in deposit for a certain time, it was held, that such agreement was illegal and void, under the Revised Statutes, c. 36, § 57, as being a contract by the bank for the payment of money at a future day certain; and that no action could be maintained by the depositor against the bank upon such express contract; but that he might recover back the money in an action commenced before the expiration of the time for which it was to remain in deposit, the parties not being in *pari delicto*, and the action being in disaffirmance of the illegal contract; and that such action might be maintained without a previous demand. And the following cases were relied upon as showing that money advanced upon an illegal contract may be recovered back: *Bartlett v. Vinor, Carth.* 252; *De Begnis v. Armistead*, 10 Bing. 110; *Langton v. Hughes*, 1 M. & S. 596; *Gallini v. Laborie*, 5 T. R. 242; *Spring-*

field Bank v. Merrick, 14 Mass. 322; *Wheeler v. Russell*, 17 Mass. 258; *La-causade v. White*, 7 T. R. 535; *Cotton v. Thurland*, 5 id. 405; *Smith v. Bickmore*, 4 Taunt. 474; *Scott v. Nesbit*, 2 Cox, 183; *Parker v. Rochester*, 4 Johns. Ch. 390; *Wheaton v. Hibbard*, 20 Johns. 290; *Fitzroy v. Gwillim*, 1 T. R. 153; *Robinson v. Bland*, 2 Burr. 1077; *Tenant v. Elliott*, 1 B. & P. 3; *Utica Ins. Co. v. Scott*, 19 Johns. 1; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 662; *Utica Ins. Co. v. Kip*, 8 Cowen. 20; *Utica Ins. Co. v. Cadwell*, 8 Wend. 290.

(*w*) *Foote v. Emerson*, 10 Vt. 338; *Dixon v. Olmstead*, 9 Vt. 310; *Pepper v. Haight*, 20 Barb. 429; *Lubbock v. Potts*, 7 East, 449; *Howson v. Hancock*, 8 T. R. 575.

(*x*) See *White v. The Franklin Bank*, 22 Pick. 181; *Peck v. Burr*, 10 N. Y. (6 Seld.) 294.

(*y*) See *ante*, pp. *73, *74.

¹ *Hooker v. De Palos*, 28 Ohio St. 251.

it is unlawful to ask what it would be lawful to do. But the distinction exists, and may be well illustrated by certain contracts which are called "contracts in restraint of trade," and which the policy of the law is said to make illegal and void. If, therefore, an action be brought on such a contract to recover damages for carrying on the trade which it is agreed shall be abandoned, the defence of illegality may be made. And yet it is certain that every one is at full liberty to abandon or to vary his trade or occupation at his own pleasure. By these contracts, which the law makes void, such a promise is made; that is, one who exercises a certain trade, business, or occupation, promises to abandon the same, and thereafter exercise it no more.

The history of the law upon this subject is somewhat peculiar. So long ago as in times of the Year-Books the courts frowned with great severity upon every contract of this kind. But after a while this excessive aversion became much mitigated. Many exceptions and qualifications were allowed. These were gradually enlarged, until it became the settled rule that while a contract not to carry on one's trade anywhere was null and void, a contract not to carry it on in a particular place, or within certain limits, was good and enforceable at law.

If the series of cases in relation to this subject are critically examined, (z)¹ and considered in connection with the contem-

(z) The principal cases on this subject are here stated in chronological order. The first reported case to be found is in Year-Book, 2 Hen. V. fol. 5, pl. 26 (1415). There a writ of debt was brought on an obligation by one John Dier, in which the defendant alleged the obligation in a certain indenture which he put forth, and on condition that if the defendant did not use his art of a dyer's craft, within the city where the plaintiff, &c., for a certain time, to wit, for half a year, the obligation to lose its force; and said that he did not use his art of dyer's craft within the limited time, which he averred, and prayed judgment, &c. *Hull.* In my opinion you might have demurred upon him, that the obligation is void, inasmuch as the condition is against the common law; and by G— (*per Dieu*), if the plaintiff were here, he should go to prison till he paid a fine to the King. In

Colgate v. Bachelor, Cro. Eliz. 872, it was held, that a bond conditioned to pay £20 if A shall use the trade of a haberdasher within a certain time and place, is void. But in *Rogers v. Parrey*, 2 Bulstr. 186, the court declared, that a man may be well bound and restrained from using his trade for a time certain and in a place certain. See also *Jelliet v. Broade, Noy*, 98, where the court declared substantially the same doctrine. See also *Prugnell v. Gosse, Aleyn*, 67; *Clerk v. Tailors of Exeter*, 8 Lev. 241. In *Broad v. Jollyfe*, Cro. Jac. 596 (1621), the principle was expressed thus: "Upon a valuable consideration one may restrain himself that he shall not use his trade in such a particular place; for he who gives that consideration expects the benefit of his customers. And it is usual here in London, for one to let his shop and wares to his servant when he is out of his appren-

¹ See also *Mouflet v. Cole*, L. R. 7 Ex. 70; 8 Ex. 32; *Boutelle v. Smith*, 116 Mass. 111; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Penn. St. 173; *Perkins v. Clay*, 54 N. H. 518; *Craft v. McConoughy*, 79 Ill. 346; *Fairbank v. Leary*, 40 Wis. 637.

porary * alterations in the law or usage in other respects, we cannot but think that much reason will be

ticeship; as also to covenant that he shall not use that trade in such a shop or in such a street. So for a valuable consideration, and voluntarily, one may agree that he will not use his trade; for *relen*t*i non fit injuria.*" But the leading case on this subject is *Mitchell v. Reynolds*, Fort. 206, 1 P. Wms. 181. There the condition of a bond was, that neither the defendant nor his assigns should keep a victualling house, or vend liquor therein, or in any other place within a mile of Rosemary Lane, during twenty-one years. The consideration was, that the defendant had assigned his interest in this house to the plaintiff. It was held, that this bond was valid, because grounded on a special consideration, set down in the bond, which made it a reasonable contract; but otherwise, if there had been no particular consideration to balance the restraint of trade. So a bond, conditioned not to set up trade in any part of England, is void, because this cannot be any advantage to the obligee, and serves only the purpose of oppression. This was followed by *Cheesman v. Ramsey*, Fort. 297, 2 Stra. 739, where the condition of a bond was, that the defendant should not set up trade within half a mile of the plaintiff's then dwelling-house, or any other house that she, her executors or administrators, should think fit to remove to, to carry on the trade of a linen-draper. The consideration was, that the plaintiff was to take the defendant's wife as a hired servant to her, to assist her in the trade of linen-draper for three years without any money, whereas she did reasonably deserve £100 with such servant. It was held, that the bond was valid; because it was grounded on a good consideration, and did not amount to a general restraint. In *Davis v. Mason*, 5 T. R. 118 (1793), the same question was before the court. There, in consideration that A would take B as an assistant in his business as a surgeon, for so long a time as it should please A, B agreed not to practise on his own account for fourteen years, within ten miles of the place where A lived, and gave a bond for this purpose. This bond was held good in law. Still again, in *Bunn v. Guy*, 4 East, 190 (1808), a contract entered into by a practising attorney to relinquish his business, and recommend his clients to two other attorneys for a valuable consideration, and not to practise himself in such business within certain limits, and to permit them to make use of his

name in their firm for a certain time, but without his interference, &c., was held to be valid in law. Three years afterwards, in the same court, in *Gale v. Reed*, 8 East, 80 (1806), the question was presented in a somewhat different form. By indenture between A and B and C, dissolving their partnership as rope-makers, A and B covenanted to allow C, during his life, 2*s*. on every cwt. of cordage which they should make, on the recommendation of C, for any of his friends and connections, and whose debts should turn out to be good; and that A and B should stand the risk of such debts incurred, but should not be compelled to furnish goods to any of C's connections whom they should be disinclined to trust. And C covenanted not to carry on the business of a rope-maker during his life (except on government contracts); and that all debts contracted, or to be contracted, in his or their names, pursuant to the indenture, should be the exclusive property of A and B, and that C should, during his life, exclusively employ A and B, and no other person, to make all the cordage ordered of him, by or for his friends and connections, on the terms aforesaid, and should not employ any other person to make cordage, on any pretence whatsoever. Held, that the covenant by C to employ A and B exclusively to make cordage for his friends, and not to employ any other, &c., A and B not being obliged to work for any other than such as they chose to trust, was not illegal and void, as being in restraint of trade without adequate consideration, for the whole indenture must be construed together according to the apparent reasonable intent of the parties; and the general object being only to appropriate to A and B so much of C's private trade as they chose to give his friends credit for, so much only was covenanted to be transferred, and C was still at liberty to work for any of his friends who were refused to be trusted by A and B, by which construction the restraint on C was only coextensive, as in reason it could only be intended to be, with the benefit to A and B; and therefore the restraint on C could be no prejudice to public trade. And, in *Hayward v. Young*, 2 Chitty, 407 (1818), it was held, that a bond by an apothecary not to set up business within twenty miles, is not illegal, as in restraint of trade. In *Bryson v. Whitehead*, 1 Simons & S. 74 (1822), the Vice-Chancellor of England, Sir John

* 750 found for believing that the * law in relation to these contracts grew out of the English law of apprenticeship, to

Leach, said: "Although the policy of the law will not permit a general restraint of trade, yet a trader may sell a secret of business, and restrain himself generally from using that secret. Let the Master, in settling the deed which is to give effect to this agreement, introduce a general covenant to restrain the use of the secret for twenty years, and a limited covenant, in point of locality, as to carrying on the ordinary business of a dyer, both parties being willing, that the agreement should be so modified." Three years afterwards, in *Homer v. Ashford*, 3 Bing. 822, the same general principle and limitations were recognized. *Wickens v. Evans*, 3 Young & J. 818 (1829), recognizes the same general principles. And this was followed in the same court in *Young v. Timmins*, 1 Cromp. & J. 331 (1881), where an agreement in *partial* restraint of trade was declared void for want of consideration. And in the same year was decided in the Common Pleas the important case of *Horner v. Graves*, 7 Bing. 785 (1881). It was there held, after mature deliberation, that an agreement that defendant, a moderately skilful dentist, would abstain from practising over a district 200 miles in diameter, in consideration of receiving instructions and a salary from the plaintiff, determinable at three months' notice, was unreasonable and void. See further, *Hitchcock v. Coker*, 1 Nev. & P. 796 (1886); *Archer v. Marsh*, 6 A. & E. 959 (1887); *Wallis v. Day*, 2 M. & W. 273 (1887); *Leighton v. Wales*, 3 M. & W. 545; *Ward v. Byrne*, 6 M. & W. 548 (1889); *Hinde v. Gray*, 1 Man. & G. 196; *Proctor v. Sargent*, 2 Man. & G. 20 (1840); *Mallan v. May*, 11 M. & W. 653 (1843); *Rannie v. Irvine*, 7 Man. & G. 969 (1844); *Green v. Price*, 18 M. & W. 685 (1845); 16 M. & W. 346; *Pilkington v. Scott*, 15 M. & W. 657 (1846); *Nicholls v. Stretton*, 10 Q. B. 346 (1847); *Pemberton v. Vaughan*, 11 Jur. 411; *Hartley v. Cummings*, 5 C. B. 247 (1847); *Saintier v. Ferguson*, 7 C. B. 716 (1849); *Hastings v. Whitley*, 2 Exch. 611 (1848); *Hilton v. Eckersley* (1856), 6 Ellis & B. 47, 32 Eng. L. & Eq. 198. Where the agreement is not to keep a shop or practise a trade within a certain number of miles of a certain place, the shortest and nearest mode of access is to be the standard of estimate. *Leigh v. Hind*, 9 B. & C. 774; *Woods v. Dennett*, 2 Stark. 89. The distance is to be measured by a straight line upon a horizontal plane. *Duignan v. Walker*,

Johns. Rep. (Eng.) 446. The principal American cases on this subject seem to be the following: *Pierce v. Fulk, r.* 8 Mass. 228 (1811), where an obligation not to run a stage between Boston and Providence, a distance of about forty miles, in opposition to the plaintiff's stage, was held to be valid, having been made for a reasonable and good consideration. This was followed by *Perkins v. Lyman*, 9 Mass. 522 (1813). Four years after, the general principle, as stated in the text, was recognized and adopted in *Pyke v. Thomas*, 4 Bibb, 486. In 1823, the question came again before the Supreme Court of Massachusetts, in *Stearns v. Barrett*, 1 Pick. 443, and the cases in the 8th & 9th Mass. above cited were confirmed. The same court held, in 1825 (*Palmer v. Stebbins*, 8 Pick. 188), that a bond conditioned that the obligor shall give the obligee all the freighting of the obligor's goods up and down the Connecticut, at the customary price, to be paid in goods at the usual price; and that he shall not encourage any other boatman to compete with the obligee in the business of boating, is not void, as being in restraint of trade, and is founded on a sufficient consideration. The case of *Nobles v. Bates*, 7 Cowen, 307 (1827), seems to have been the next touching this question. There the agreement was, not to carry on a certain trade "within twenty miles of a certain stand." The agreement was held binding, the court observing: "A bond or promise, upon good consideration, not to exercise a trade for a limited time, at a particular place, or within a particular parish, is good. But where it is general not to exercise a trade, throughout the kingdom, it is bad, though founded on good consideration, as being a too unlimited restraint of trade; and operating oppressively upon one party, without being of any benefit to either." Again, in *Pierce v. Woodward*, 6 Pick. 206 (1828), the defendant sold the plaintiff a grocery store, and verbally agreed not to carry on the same kind of business within a "certain limited distance in the city of Boston." It was held, that it was a sufficient consideration for such agreement, if the plaintiff was thereby induced to make the purchase, and that this might be shown by parol, although the deed was silent about any such consideration. The next case in point of time was *Alger v. Thacher*, 19 Pick. 51 (1837), for which see next note. And see *Vickery v. Welch*,

which we have already referred. By this * law, in its original severity, no person could exercise any regular trade or handicraft except after a long apprenticeship, and, generally, a formal admission to the proper guild or company. If he had a trade, he must continue in that trade, or have none. To relinquish it, therefore, was to throw himself out of employment; to fall as a burden upon the community; to become a pauper. And it is not surprising, that a judge in the reign of Henry V. should speak of a promise to do this, in language which would now be, because indecorous, impossible. But this ancient severity of the law of apprenticeship abated; and as this severity gradually relaxed, it will be seen, that contracts "in restraint of trade" were treated with less and less of disfavor, until the present rule became established.

In the application of this rule we shall see a gradual enlargement, until, in this country at least, it seemed to be a little more than nominal. The cases are quite numerous, but we believe that the first one in which a contract was sought to be enforced, in which the renunciation was absolute, was in Massachusetts, in 1837; (a) and this was also nearly, if not quite, the first in

19 Pick. 523. The whole subject was examined at much length by *Bronson*, J., in the subsequent case of *Chappel v. Brockway*, 21 Wend. 157 (1839). See further, *Ross v. Sadgebeer*, 21 Wend. 168; *Jarvis v. Peck*, 1 Hoff. Ch. 479 (1840); *Bowser v. Blits*, 7 Blackf. 344 (1845); *Grasselli v. Lowden*, 11 Ohio St. 349.

(a) *Alger v. Thacher*, 19 Pick. 51. This was debt on a bond conditioned that the obligator should never carry on or be concerned in the business of founding iron. The case was argued at great length before the Supreme Judicial Court of Massachusetts, and all the cases from the Year-Books to that time were cited. And *Morton*, J., in delivering the opinion of the court, said: "Among the most ancient rules of the common law, we find it laid down, that bonds of restraint of trade are void. As early as the second year of Henry V. (A. D. 1415), we find by the Year-Books that this was considered to be old and settled law. Through a succession of decisions, it has been handed down to us unquestioned till the present time. It is true, the general rule has, from time to time, been modified and qualified, but the principle has always been regarded as important and salutary. For two hundred years the rule continued unchanged and without exceptions. Then

an attempt was made to qualify it, by setting up a distinction between sealed instruments and simple contracts. But this could not be sustained upon any sound principle. A different distinction was then started, between a *general* and a *limited restraint* of trade, which has been adhered to down to the present day. This qualification of the general rule may be found as early as the eighteenth year of James I. (A. D. 1621), *Broad r. Jollyfe*, Cro. Jac. 598, where it was holden, that a contract not to use a certain trade in a particular place was an exception to the general rule, and not void. And in the great and leading case on this subject, *Mitchell v. Reynolds*, reported in Lucas, 27, 85, 130, *Fortescue*, 298, and 1 P. Wms. 181, the distinction between contracts under seal and not under seal was finally exploded, and the distinction between limited and general restraints fully established. Ever since that decision, contracts in restraint of trade generally have been held to be void; while those limited as to time, or place, or persons, have been regarded as valid, and duly enforced. Whether these exceptions to the general rule were wise, and have really improved it, some may doubt; but it has been too long settled to be called in question by a lawyer. This

* 752 * which such a promise was declared to be wholly null, by direct adjudication; the statements in other cases, that a local limitation was necessary, and would make the promise enforceable, being for the most part, if not altogether, *obiter*. In the previous cases, such a promise, it is said, would be avoided by the law; but in none of them was this done, as there was always some limitation. But this was sometimes very wide. In one, for example, a promise not to use certain machines in any of the United States except *two* (Massachusetts and Rhode Island), was held good, because "agreements to restrain trade in particular places are valid in law, and may be enforced." (b) In the case of *Alger v. Thacher*, already referred to, it was argued, that

the reason of the law against such contracts had passed

* 753 * away, and that this was shown by an extension of the exception which made the rule itself unmeaning; for it could hardly be said that all the United States except two were any "particular place," if this phrase was to be used with any reference to its ordinary meaning. The court, however, were of opinion, that although the connection between such contracts and the law of apprenticeship might have originated the rules of law in relation to these contracts in England, and we never had here a similar law or usage of apprenticeship, still there were sufficient reasons for sustaining the rule, in this country, as it had been

doctrine extends to all branches of trade and all kinds of business. The efforts of the plaintiff's counsel to limit it to handicraft trades, or to found it on the English system of apprenticeship, though enriched by deep learning and indefatigable research, have proved unavailing. In England, the law of apprenticeship and the law against the restraint of trade may have a connection. But we think it very clear that they do not, in any measure, depend upon each other. That the law under consideration has been adopted and practised upon in this country and in this State, is abundantly evident from the cases cited from our own reports. It is reasonable, salutary, and suited to the genius of our government and the nature of our institutions. It is founded on great principles of public policy, and carries out our constitutional prohibition of monopolies and exclusive privileges. The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations. 1. Such contracts injure the parties making them, because they diminish their means

for obtaining livelihoods, and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions. And they expose such persons to imposition and oppression. 2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. 3. They discourage industry and enterprise, and diminish the products of ingenuity and skill. 4. They prevent competition, and enhance prices. 5. They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public, by declaring all such contracts void."

(b) *Stearns v. Barrett*, 1 Pick. 443. And see *Thomas v. Miles*, 3 Ohio State, 274; *Dean v. Emerson*, 102 Mass. 480.

laid down in previous cases. This may be regarded as a leading authority, and it leaves no other question than as to what shall be deemed "a reasonable limitation." (c)¹ In a latter case in the same State, a contract not to set up or carry on a certain business within the State was held to be void. (cc)² In Pennsylvania, a contract not to practise medicine within twelve miles of a certain town was held valid. (cd)³ A contract not to run a steamboat on any of the waters of California was held void, because in restraint of commerce. (ce) If this question is to be answered by a reference to the cases, the probable conclusion would be, that almost any limitation would suffice. Still, however, if the courts adhere to the rule which seems now to be established, the limitation, to protect the contract, must be bona fide, and not a slight and unreal exception, inserted as a mere evasion of the law. (d)

It has recently been held in England, that an agreement by eighteen mill-owners, to be governed, as to wages and the general management of their works, by a majority of the parties to it, for the purpose of more effectually resisting a combination of the work people, was void as in restraint of trade. (e)

(c) *Kinsman v. Parkhurst*, 18 How. 389; *Lawrence v. Kidder*, 10 Barb. 641; *Mott v. Mott*, 11 Barb. 127; *Van Marter v. Babcock*, 23 Barb. 688; *Beard v. Dennis*, 6 Ind. 200.

(cc) *Taylor v. Blanchard*, 18 Allen, 870.

(cd) *McClurg's Appeal*, 58 Penn. St. 51.

(ce) *Wright v. Rider*, 86 Cal. 342.

(d) See, in illustration of the general principle, *Jones v. Lees*, 1 H. & N. 189, and *Dunlop v. Gregory*, 10 N. Y. (6 Seld.) 241.

(e) *Hilton v. Eckersley*, 6 Ellis & B. 47. So held by *Campbell*, C.J., and *Crompton*, J.; *Erle*, J., dissenting.

¹ Thus a contract not to practise law in a certain town is valid, *Smalley v. Greene*, 52 Ia. 241; or within six miles of one's residence, *Linn v. Sigbee*, 67 Ill. 75. Where the object of an agreement is to parcel out the stevedoring business of a particular port amongst the parties to it, and so to prevent competition, at least amongst themselves, and also, it may be, to keep up the price to be paid for the work, it was held, that such agreement is not invalid if carried into effect by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade. *Collins v. Locke*, 4 App. Cas. 674.

² But in Michigan it was decided that a contract of sale of a publishing business, which covered substantially the territory of a State, containing a provision that the vendor should not again engage in the business within the State, is not an unreasonable restraint of trade. *Beal v. Chase*, 31 Mich. 490.

³ "Within a radius of ten miles of L." was construed to mean "within ten miles of the centre of the town of L." *Cook v. Johnson*, 47 Conn. 175. The systematically sending to houses of customers, the receiving of orders and delivery of goods within prescribed limits, within which one has covenanted not to engage in business, is a breach of the covenant, although done at a customer's request and although the business is engaged in outside of the limits; but occasionally selling to an old customer to oblige him is not a breach. *Sander v. Hoffman*, 64 N. Y. 248. See also in the analogous topic of the sale of the "good will" of a business, *Labouchere v. Dawson*, L. R. 13 Eq. 322; *Ginesi v. Cooper*, 14 Ch. D. 596.

2. OF CONTRACTS OPPOSED TO THE LAWS OF OTHER COUNTRIES.

A contract which violates or proposes to violate the revenue laws of the country in which it is made, is of course void. (*f*) But it seems to be quite settled, both in England and in this *754 * country, that a contract may lawfully be made for the purpose of violating the revenue laws of a foreign country. (*g*) Perhaps this rule is the necessary result of the universal antagonism which now pervades, to some extent, the revenue laws of all the states in Christendom. Everywhere duties or imposts are laid, and nowhere is there any thought of regulating them, by any other principle than that of securing the greatest gain to the country which enacts them. For even the zealous promoters of what is called free trade, rest their arguments in its favor on the profitability of the system to the state by which it shall be adopted. And while it may seem immoral for courts to sanction the breach of the positive laws of a foreign state, yet it is too much to ask of them to enforce an observance of laws made almost professedly against the interest of the government to which they belong. The rule began in England, when the courts could not have adopted any other, without breaking up the very profitable business which their merchants found in carrying on with different nations of the continent a trade prohibited by the laws of those nations. The same rule seems to be extended to such things as making false or depraved coin or counterfeit paper-money, for use in a foreign country, although it is perhaps not so well settled. But it is obvious that arguments might be urged against this extension of the rule, which would not apply, at least with equal force, to the rule itself.

When a sale of liquors was made in New York, the seller having reason to believe that the liquors were to be carried to Massachusetts, for sale there, where the sale was prohibited, it was held in Massachusetts that this did not invalidate the sale. (*gg*)

(*f*) *Johnson v. Hudson*, 11 East, 180; *Cope v. Rowlands*, 2 M. & W. 149; *Smith v. Mawhood*, 14 M. & W. 482; *Meux v. Humphries*, 3 C. & P. 79; *Holman v. Johnson*, Cowp. 341; *Armstrong v. Toler*, 11 Wheat. 258; *Cambioso v. Maffett*, 2 Wash. C. C. 98; *Hannay v. Eve*, 8 Cranch, 242; *Lightfoot v. Tenant*, 1 B. & P. 551; *Langton v. Hughes*, 1 M. & S. 593; *Ritchie v. Smith*, 6 C. B. 462; *Hodgson v. Temple*, 5 Taunt. 181; *Catlin v. Bell*, 4 Camp. 183.

(*g*) *Boucher v. Lawson*, Cas. temp. Hardw. 84; *Holman v. Johnson*, Cowp. 341; *Biggs v. Lawrence*, 3 T. R. 464; *Ludlow v. Van Rensselaer*, 1 Johns. 94; *Lightfoot v. Tenant*, 1 B. & P. 551; *Planché v. Fletcher*, Doug. 251; *Kohn v. Schooner Renaissance*, 5 La. An. 25; *Pellecat v. Angell*, 2 Cromp. M. & R. 311.

(*gg*) *Adams v. Coulliard*, 102 Mass. 167; and see *Ely v. Webster*, id. 304.

3. OF CONTRACTS WHICH TEND TO CORRUPT LEGISLATION.

All those whose interests are to be affected by legislation, may, both morally and legally, for the protection or advancement of their interests, use all means of persuasion which do not come too near to bribery or corruption; but the promise of any personal advantage to a legislator is open to this objection, and therefore void. (h)¹ And a contract tending to corrupt appointment * to office, even by a private corporation, is, for a similar reason, void. (i) The cases are somewhat numerous which show that contracts which have a tendency to introduce corruption either in the election or the action of persons holding office of any kind cannot be enforced. (ii)

(h) See *Clippinger v. Hepbaugh*, 5 Watts & S. 815; *Wood v. McCann*, 6 Dana, 366; *Coppock v. Bower*, 4 M. & W. 301; *Hatzfield v. Gulden*, 7 Watts, 152; *Norman v. Cole*, 3 Esp. 253; *Fuller v. Dame*, 18 Pick. 472; *Brigg v. Washburne*, 1 Aik. 264; *Garlick v. Ward*, 5 Halst. 87; *Harris v. Roof*, 10 Barb. 489. This subject is very fully discussed in the late case of *Marshall v. Baltimore & Ohio Railroad Company*, 16 How. 314. It is there held, that a contract is void, as against public policy, and can have no standing in court, by which one party stipulates to employ a number of secret agents in order to obtain the passage of a particular law by the legislature of a State, and the other party promises to pay a large sum of money in case the law should pass. Held, also, that the contract was void, if, when it was made, the parties agreed to conceal from the members of the legislature the fact, that the one party was the agent of the other, and was to receive a compensation for his services, in case of the passage of the law. And further, if there was no agreement to that effect, there can be no recovery upon the contract, if in fact the agent did conceal from the members of the legislature, that he was an agent who was to receive compensation for his services, in case of the passage of the law. Mr. Justice Grier, in delivering his opinion, said: "Influences secretly urged under false and covert pretences must

necessarily operate deleteriously on legislative action, whether it be employed to obtain the passage of private or public acts. Bribes, in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is, the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are 'proper means'; and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or 'careless' members in favor of his bill. The use of such means and such agents will have the effect to subject the State governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector. Speculators in legislation, public and private, a compact corps of venal solicitors, vending their secret influences, will invest the capital of the Union and of every State, till corruption shall become the normal condition of the body politic, and it will be said of us as of Rome — '*omne Roma venale.*'"

(i) *Davison v. Seymour*, 1 Bow. 88.

(ii) *Mills v. Mills*, 40 N. Y. 543; *Bowman v. Coffroth*, 59 Penn. St. 19; *Weld v. Lancaster*, 56 Me. 453; *Martin v. Wade*, 37 Cal. 168.

¹ See also *Trist v. Child*, 21 Wall. 441.

4. OF WAGERING CONTRACTS.

It was formerly held in England, that some wagers are valid contracts at common law. (*j*)¹ But they have been recently

(*j*) *Good v. Elliott*, 3 T. R. 693. The wager here was, whether one S. T. had, or had not, before a certain day bought a wagon belonging to D. C. So a wager on the age of the plaintiff and defendant has been held good at common law. *Hussey v. Crickitt*, 3 Camp. 168. And see *Bland v. Collett*, 4 Camp. 157; *Fisher v. Waltham*, 4 Q. B. 889. So a wager on the result of an appeal from the Court of Chancery to the House of Lords has been held good, no fraud being intended, and the parties having no power to bias the decision. *Jones v. Randall*, Cowp. 87. And so of a wager on the price of foreign funds. *Morgan v. Pebrer*, 4 Scott, 230. So of a wager that a certain horse would win a certain race. *Moon v. Durden*, 2 Exch. 22. By the common law of England, therefore, wagers were not *per se* void, unless they affected the interests, feelings, or character of third persons; or led to indecent evidence; or were contrary to public policy; or tended to immorality, or to a breach of some law. *Lord Campbell*, in *Thackoorsydass v. Dhondmull*, 6 Moore P. C. 300; *Doolubdass v. Ramoll*, 7 Moore P. C. 239, 3

Eng. L. & Eq. 39. And a few early decisions in America inclined the same way. *Bunn v. Ricker*, 4 Johns. 426; *Morgan v. Richards*, 1 Browne, Pa. 171; *Hasket v. Wootan*, 1 Nott & McC. 180; *Shepherd v. Sawyer*, 2 Murphy, 26; *Grant v. Hamilton*, 3 McLean, 100; *Ross v. Green*, 4 Harring. Del. 306; *Dunman v. Strother*, 1 Texas, 89; *Barret v. Hampton*, 2 Brev. 226. But a different view was taken in many States, and *all wagers* were considered to be illegal, and contrary to good policy. Thus, in *Collamer v. Day*, 2 Vt. 144, a wager that a certain chaise then in sight was the property of A and not of B was held void. And see *Amory v. Gilman*, 2 Mass. 1; *Babcock v. Thompson*, 3 Pick. 446; *Ball v. Gilbert*, 12 Met. 399; *Shaw, C. J. v. Hoit v. Hodge*, 6 N. H. 104; *Rice v. Gist*, 1 Strobb. 82; *Edgell v. McLaughlin*, 6 Whart. 176; *Lewis v. Littlefield*, 15 Me. 233; *Carrier v. Brannan*, 3 Cal. 328. But however the common law may be, all wagers are now forbidden in England by statute, 8 & 9 Vict. c. 109, § 18 (1845), and similar statutes exist in many American States. Unless special provision was

¹ Transactions in stocks or commodities by way of margins, the settlement of differences between the contract and market price at a given time, and the payment of the gain or loss, without any intention to deliver the stocks or commodities, are mere wagering contracts and unenforceable. *North v. Phillips*, 89 Penn. St. 280; *Rumsey v. Berry*, 65 Maine, 570; *Melchert v. American Un. Tel. Co.* 3 McCrary, 521, and note. See *Fareira v. Gabell*, 89 Penn. St. 89; *Kirkpatrick v. Bonsall*, 72 id. 155; *In re Green*, 7 Bissell, 338; *Atwood v. Weeden*, 12 R. I. 293. Thus a contract for the sale and future delivery of grain, by which a seller can deliver or not, and the buyer can call for delivery or not, just as each chooses, and which on maturity is to be filled by adjusting the differences in market value, and requiring the parties to put up margins as security, and providing that, if either party fails, on notice, to put up further margins according to the market price, the other may treat the contract as filled immediately, and recover the difference between the market and the contract price, without offering to perform or showing any ability so to do, is a gambling transaction and unenforceable. *Pickering v. Cease*, 79 Ill. 328; *Lyon v. Culbertson*, 83 Ill. 33. A note given by a principal to his broker for services rendered and money advanced in making and settling such gambling contracts is void. *Barnard v. Backhans*, 52 Wis. 593. But when stocks are bought and sold, although upon speculation, if they are to be delivered, it is not a gambling transaction. *Smith v. Bouvier*, 70 Penn. St. 325. Nor are time contracts made in good faith for the future delivery of grain or any other commodity prohibited, either by the common law or by statute. *Wolcott v. Heath*, 78 Ill. 433. The giving a seller till the last day of a month, at his option, in which to deliver a commodity, is not a gambling contract, and the purchaser will be entitled to its benefit, irrespective of the seller's secret intention. *Fixley v. Boynton*, 79 Ill. 351. In England the employment of a broker to speculate on the stock exchange, so that only "differences" should be payable by the principal, has been held not to be against public policy, not illegal at common law, and not in the nature of a gaming or wagering contract against the statute of 8 & 9 Vict. c. 109, § 18. *Thacker v. Hardy*, 4 Q. B. D. 685.

* prohibited by statute in England and in parts of this country ; and there are American courts which have denied to them any validity whatever. Even if admitted to be valid, it is certain that this must be with important qualifications ; (*k*) as, for instance, that they shall not refer to another's person or property, (*l*) so as to make him infamous, or to be libellous or indecent, or to injure his property, or to tend to break the peace. It cannot be believed, in these days, that wagers would be anywhere upheld, against which these objections could be fairly urged ; and upon some of these points the authorities are quite clear. (*m*)¹ We have already considered some of the rules applicable to the subject of stakeholders and wagers, in a previous section of this chapter. (*mm*)

made therefor, however, they would not have a retrospective operation upon actions commenced before. *Moon v. Dudden*, 2 Exch. 22; *Doolubdass v. Ramoll*, 7 Moore P. C. 230, 3 Eng. L. & Eq. 39.

(*k*) Wagers as to the mode of playing, or the result of any illegal game, as boxing, wrestling, cockfighting, &c., are void at common law. *Brown v. Leeson*, 2 H. Bl. 43; *Egerton v. Furseman*, 1 C. & P. 613; *Kennedy v. Gad*, 3 C. & P. 876; *Squires v. Whisken*, 3 Camp. 140; *Hunt v. Bell*, 1 Bing. 1; *McKeon v. Caherty*, 1 Hall, 300; *Hasket v. Wootan*, 1 Nott & McC. 180; *Atchison v. Gee*, 4 McCord, 211. Money lent for the purpose of betting cannot be recovered by the lender of the borrower. *Peck v. Briggs*, 3 Denio, 107; *Ruckman v. Bryan*, id. 840. And a note given for a gaming debt is void, even in the hands of an innocent endorsee for value. *Unger v. Boas*, 18 Penn. St. 601.

(*l*) Such wagers were always void at common law. *De Costa v. Jones*, Cowp. 720, a wager as to the sex of a third person; *Phillips v. Ives*, 1 Rawle, 87, a wager that Napoleon Bonaparte would be removed from the Island of St. Helena before a certain time; *Ditchburn v. Goldsmith*, 4 Camp. 152, a wager that an unmarried woman would have a child by a certain day; *Hartley v. Rice*, 10 East, 22, a wager that a certain person would not marry within a certain number of years; *Gilbert v. Sykes*, 16 East, 150, a wager on the duration of the life of Napoleon Bonaparte, at a time when his probable assassination was the sub-

ject of speculation ; *Evans v. Jones*, 5 M. & W. 77, a wager that a certain prisoner would be acquitted on trial of a criminal charge. Some of these cases may have also proceeded upon the ground of *public policy*, and as having an injurious tendency in respect to *public rights*.

(*m*) Wagers upon the result of an election have always been considered as void, on both sides of the Atlantic, as being contrary to sound policy, and tending to impair the purity of elections. *Ball v. Gilbert*, 12 Met. 897; *Allen v. Hearn*, 1 T. R. 56; *M'Allister v. Hoffman*, 16 S. & R. 147; *Smyth v. M'Masters*, 2 Browne, Pa. 182; *Bunn v. Riker*, 4 Johns. 426; *Lansing v. Lansing*, 8 Johns. 454; *Vischer v. Yates*, 11 Johns. 23; *Yates v. Foot*, 12 Johns. 1; *Rust v. Gott*, 9 Cowen, 169; *Stoddard v. Martin*, 1 R. I. 1; *Denniston v. Cook*, 12 Johns. 376; *Brush v. Keeler*, 5 Wend. 250; *Lloyd v. Leisenring*, 7 Watts, 295; *Wagonseller v. Snyder*, 7 Watts, 343; *Wrath v. Johnson*, 4 Harris & McH. 284; *Laval v. Myers*, 1 Bailey, 486; *David v. Ransom*, 1 Greene, 888; *Davis v. Holbrook*, 1 La. An. 176; *Tarilton v. Baker*, 18 Vt. 9; *Commonwealth v. Pash*, 9 Dana, 81; *Machir v. Moore*, 2 Gratt. 257; *Foreman v. Hardwick*, 10 Ala. 316; *Wheeler v. Spencer*, 15 Conn. 28; *Russell v. Pyland*, 2 Humph. 131; *Porter v. Sawyer*, 1 Harring. (Del.) 517; *Gardner v. Nolen*, 3 id. 420; *Hickerson v. Benson*, 8 Mo. 8.

(*mm*) *Aste*, p. * 626.

¹ *Gregory v. King*, 58 Ill. 169; *Merchants', &c. Co. v. Goodrich*, 75 Ill. 554.

In Great Britain and in this country, a view prevails concerning the obligation and sanctity of Sunday as the Sabbath, which differs somewhat from that which is generally adopted elsewhere in Christendom. (*n*) One or two laws were passed before England became Protestant; but the statute of 29 Charles II. c. 7, § 1, is the principal English statute. (*o*) Many cases, involving many different questions, have arisen under this statute. But most of them turn upon a peculiarity in its phraseology which is not generally copied in this country. This statute enacts that no person shall do any worldly labor, &c., upon the Lord's day, "of *their ordinary callings*." Hence any man may do anything, buy, or sell, or work in any way, on any part of Sunday, if *not* in his ordinary calling, without prohibition from this statute. Some nice distinctions have been made under this clause. (*p*) In this

(*n*) By the common law no judicial act could be done on Sunday. *Swan v. Broome*, 1 W. Bl. 496, 528; *3 Burr. 1595*; *Baxter v. The People*, 3 *Gilman*, 368; *Shaw v. M'Combs*, 2 *Bay*, 282; *True v. Plumley*, 36 Me. 466; *Hiller v. English*, 4 *Strobb.* 486; *Davis v. Fish*, 1 *Greene*, Ia. 406. And in *Story v. Elliott*, 8 *Cowen*, 27, it was held, that an award made and published on Sunday was void, an award being a judicial act. But see *Sargent v. Butts*, 21 *Vt.* 99. But as to the making of contracts, and all other acts not of a judicial nature, the common law made no distinction between Sunday and any other day. *Rex v. Brotherton*, Stra. 702; *Mackally's case*, 9 *Rep.* 66 b; *Cro. Jac.* 290; *Waite v. The Hundred of Stoke*, *Cro. Jac.* 496; *Drury v. Defontaine*, 1 *Taunt.* 131; *Story v. Elliot*, 8 *Cowen*, 27; *Kepner v. Keefer*, 6 *Watts*, 281; *Johnson v. Day*, 17 *Pick.* 106; *Bloom v. Richards*, 2 *Ohio St.* 387.

(*o*) The first statute on the subject in England was 27 H. VI. c. 5. This was followed by 1 *Jac. I. c. 22*, § 28; 1 *Car. I. c. 1*; 8 *Car. I. c. 1*; 29 *Car. II. c. 7*. See *Banks v. Werts*, 18 *Indiana*, 203, and *Amer. Law Mag. May*, 1860, p. 423, for valuable remarks on the Sunday laws.

(*p*) The language of the statute of 29 *Car. II. c. 7*, § 1, is, "that no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor, business, or work of their ordinary callings, upon the Lord's day, or any part thereof (works of

necessity and charity only excepted);" and "that no person or persons whatsoever shall publicly cry, show forth, or expose to sale, any wares, merchandises, fruit, herbs, goods, or chattels whatsoever, upon the Lord's day or any part thereof." The first important case in England, putting a construction upon these provisions, was *Drury v. Defontaine*, 1 *Taunt.* 131. It was there determined, that a sale of goods made on Sunday, which is not made in the ordinary calling of the vendor, or his agent, is not void by the stat. 29 Car. II. c. 7, so as to disable the vendor from recovering the price. And *Mansfield*, C. J., said: "We cannot discover that the law has gone so far as to say that every contract made on a *Sunday* shall be void, although, under these penal statutes, if any man in the exercise of his ordinary calling should make a contract on *Sunday*, that contract would be void." The next case was *Bloxsome v. Williams*, 3 *B. & C.* 232, which was an action for a breach of warranty on the sale of a horse, the sale having been made on *Sunday*. There, *Bayley*, J., said: "In *Drury v. Defontaine*, it was held, that the vendor of a horse, who made a contract of sale on a *Sunday*, but not in the exercise of his ordinary calling, might recover the price. I entirely concur in that decision, but I entertain some doubts whether the statute applies at all to a bargain of this description. I incline to think that it applies to manual labor and other work visibly laborious, and the keeping of

country Sunday laws, * or "laws for the better observance * 758 of the Lord's day," as they were generally called, were passed in most of the colonies, and * are now in force * 759 in most of the States; but the prevailing distinction is between "works of necessity and mercy," or "necessity and charity," which are permitted, and all others which are prohibited. (q)

open shops. But I do not mean to pronounce any decision upon that point." The case finally went off on other grounds. The next important case was *Fennell v. Ridler*, 5 B. & C. 406. It was there held, that a horse-dealer cannot maintain an action upon a contract for the sale and warranty of a horse made by him upon a *Sunday*. *Bayley*, J., in delivering the opinion of the court, after advertizing to the language of the statute, said: "The interposition of the word 'business' between the words 'labor and work' might justify a question, whether it included every description of the business of a man's ordinary calling, or whether it was not confined to such as was manual and calculated to meet the public eye. There is nothing, however, in the act to show that it was passed exclusively for promoting public decency, and not for regulating private conduct; and though I expressed a doubt upon this point in *Bloxsome v. Williams*, I am satisfied, upon further consideration, that it would be a narrow construction of the act, and a construction contrary to its spirit, to give it such a restriction. Labor may be private, and not meet the public eye, and so not offend against public decency; but it is equally labor, and equally interferes with a man's religious duties. The same may be said of business or of work. Each may be public and meet the public eye; each may be private and concealed. There is nothing, therefore, in the position of the word 'business' between those of 'labor and work,' which in our judgment can justify us in giving to it anything but its ordinary meaning; and it seems to us that every species of labor, business, or work, whether public or private, in the ordinary calling of a tradesman, artificer, workman, laborer, or other person, is within the prohibition of this statute." In *Smith v. Sparrow*, 4 Bing. 84, *Parke*, J., disapproved of the decision of *Drury v. Defontaine*, and said: "I think the construction put upon the statute, in that case, too narrow. The expression 'any worldly labor' cannot be confined to a man's ordinary calling, but applies to any business he may carry on, whether in his ordinary calling or not." But no such opinion was expressed by any

other member of the court, and this construction was entirely rejected by the Court of King's Bench, in *Rex v. The Inhabitants of Whitnash*, 7 B. & C. 596, where it was held, that the statute only prohibits labor, business, or work done in the course of a man's ordinary calling; and therefore that a contract of hiring, made on a *Sunday* between a farmer and a laborer, for a year, was valid. And see, to the same effect, *Scarfe v. Morgan*, 4 M. & W. 270; *Wolton v. Gavin*, 16 Q. B. 48; *Begbie v. Levi*, 1 Cromp. & J. 180. There has been some question as to what persons are embraced in the above provisions, under the words, "tradesman, artificer, workman, laborer, or other person whatsoever." In *Sandiman v. Breach*, 7 B. & C. 96, it was held, that drivers and proprietors of stage-coaches were not included; and therefore, that a contract to carry a passenger on a stage-coach on *Sunday* was valid. Lord *Tenterden* said: "It was contended, that under the words 'other person or persons' the drivers of stage-coaches are included. But where general words follow particular ones, the rule is to construe them as applicable to persons *cujusdem generis*." And see, to the same effect, *Rex v. Inhabitants of Whitnash*, 7 B. & C. 596. In *Peate v. Dicken*, 1 Cromp. M. & R. 422, the court were inclined to hold, that an attorney was not a person included within the above words, but the point was not decided.

(q) In Massachusetts, Maine, and Michigan, the words of the statute are, that "no person shall do any manner of labor, business, or work, except only works of necessity and charity, on the Lord's day." In New Hampshire, "No person shall do any labor, business, or work, of his secular calling, works of necessity and mercy only excepted, on the Lord's day." In Vermont, "No person shall exercise any secular labor, business or employment, except such only as works of necessity and charity, on the Lord's day." In Connecticut, "No person shall do any secular business, work, or labor, works of necessity and mercy excepted, nor keep open any shop, warehouse, or workhouse, nor expose to sale any goods, wares, or merchandise, or any other property on the Lord's day." In Pennsylvania, "No person shall do or perform any worldly

• 760 * There are but few reported cases which illustrate this

employment or business whatsoever on the Lord's day, commonly called Sunday, works of necessity and charity only excepted." In Alabama, "No worldly business or employment, ordinary or servile work, works of necessity or charity excepted, shall be done, performed, or practised, by any person or persons, on the first day of the week, commonly called Sunday." In Kentucky, "No work or business shall be done or performed on the Sabbath day, unless the ordinary household offices of daily necessity, or other work of necessity or charity." Under all the above statutes, it is now quite well settled, that all contracts of every description, entered into on Sunday, and not within the exceptions, are unlawful and void. Thus, in *Towle v. Larabee*, 26 Me. 464, it was held, that a promissory note, made on the Lord's day, and given and received as the consideration for articles purchased on that day, is void. And in *Hilton v. Houghton*, 35 Me. 143, it is said to be a violation of the statute to sign and deliver a promissory note on the Lord's day; and a note so signed and delivered is therefore of no validity. And see *Nason v. Dinsmore*, 34 Me. 391; *State v. Suheer*, 33 Me. 539. In *Allen v. Deming*, 14 N. H. 133, it was held, that the execution and delivery of a promissory note on Sunday, is "business" of a person's "secular calling," and as such is prohibited by the statute; and the note is void. The same rule is well established in Vermont. See *Lyon v. Strong*, 6 Vt. 219; *Lovejoy v. Whipple*, 18 Vt. 379; *Adams v. Gay*, 19 Vt. 358. In *Pattee v. Greely*, 13 Met. 284, it was held, that an action could not be maintained on a bond which was executed, neither from necessity nor charity, on the Lord's day. And *Shaw*, C. J., said: "The statement of facts admits that there is nothing to show that the execution of this bond was a work of necessity or charity. Was its execution 'any manner of labor, business, or work,' within the meaning of the statute? Certainly it was. The legislature intended to prohibit secular business on the Lord's day, and did not confine the prohibition to manual labor, but extended it to the making of bargains, and all kinds of trafficking."⁷ The case of *Geer v. Putnam*, 10 Mass. 312, was, for a long time, supposed to have established a different rule in Massachusetts. But it may now be considered as overruled, so far as it is inconsistent with *Pattee v. Greely*, *supra*. The same rule has been established in Connecticut from an early day. *Wight v. Geer*, 1 Root, 474; *Northrup v. Foot*, 14 Wend. 248. And in Pennsylvania, *Morgan v. Richards*, 1 Browne, Pa. 171; *Kepner v. Keefer*, 6 Watts, 231; *Fox v. Mensch*, 3 Watts & S. 444; *Commonwealth v. Kendig*, 2 Penn. St. 448; *Berrill v. Smith*, 2 Miles, 402; *Johnston v. The Commonwealth*, 22 Penn. St. 102. The same rule is established in Alabama. *O'Donnell v. Sweeney*, 5 Ala. 467; *Shippey v. Eastwood*, 9 Ala. 198; *Dodson v. Harris*, 10 Ala. 566; *Butler v. Lee*, 11 Ala. 885; *Saltmarsh v. Tuthill*, 13 Ala. 390; *Rainey v. Cappe*, 22 Ala. 288. And, it seems, in Michigan. *Adams v. Hameil*, 2 Doug. 73. In Kentucky, the rule is less certain. In *Ray v. Catlett*, 12 B. Mon. 532, *Marshall*, J., said: "We are not prepared to decide that the mere execution and delivery of a note, or its mere acceptance on Sunday, is laboring in any trade or calling; unless it be a part of some other transaction done also on Sunday, which may be regarded as labor in some trade or calling. And if the mere execution and delivery of a note could be deemed such labor, we are satisfied that its mere acceptance could not, and the person accepting it would not be involved in any consequence of a breach of the law by the other, unless he knew that the note had been made as well as delivered on Sunday." But in *Slade v. Arnold*, 14 B. Mon. 287, it was held, that all contracts, having for their consideration, or any part of it, the performance of any work or labor on Sunday, were void. And in *Murphy v. Simpson*, 14 B. Mon. 419, it was held, that an exchange of horses on Sunday was a violation of the statute, and void. In New York, the statute provides, that there "shall not be any servile laboring or working on the first day of the week, called Sunday, excepting works of necessity or charity;" and "no person shall expose to sale any wares, merchandise, fruit, herbs, goods, or chattels, on Sunday, except meats, milk, and fish, which may be sold at any time before nine of the clock in the morning." Under these provisions, it is held, first, that any contract which has for its consideration the doing of ordinary work or labor on Sunday, is void; second, that any contract which involves the exposing to sale of any wares, &c., on Sunday, is void. Thus, in *Watts v. Van Ness*, 1 Hill, 76, it was held, that a contract to perform labor on Sunday as an attorney's clerk, was void, and no compensation could be recovered. And see *Palmer v. The City of New York*, 2 Sandf. 318. So, in *Smith v. Wilcox*, 19 Barb. 581, it was held, that a contract to publish an advertisement in a newspaper issued on Sunday, was unlawful and void, as in

distinction ; (*r*)¹ but some have occurred in practice, from which

volving a violation of both the above provisions. The judgment in this case was affirmed by the Court of Appeals, 24 N. Y. (10 Smith) 353, in an elaborate opinion, all the judges concurring. But contracts which are not liable to either of these objections, may be made on Sunday as well as any other day. Thus, in Boynton v. Page, 13 Wend. 425, it was held, that the prohibition against exposing to sale, on Sunday, any goods, chattels, &c., extends only to the public exposure of commodities to sale in the streets or stores, shops, warehouses, or market-places, and has no reference to mere private contracts, made without violating, or tending to produce a violation, of the public order and solemnity of the day; and, therefore, that a private transfer of personal property made on Sunday was valid. In Ohio, the statute provides, "that if any person shall be found, on the first day of the week, commonly called Sunday, at common labor, works of necessity and charity only excepted, he shall be fined in a sum not exceeding five dollars, nor less than one dollar." In the case of the City of Cincinnati v. Rice, 15 Ohio, 225, it was held, that the prohibition of "common labor" in the above statute, embraces the business of "trading, bartering, selling, or buying any goods, wares, or merchandise." In Bloom v. Richards, 2 Ohio St. 387, overruling Sellers v. Dugan, 18 Ohio, 489, it was held, that a contract entered into on Sunday, for the sale of land, was valid. But the court said: "It is not to be understood that, because a Sunday contract may be valid, therefore business may be transacted upon that as upon other days; as, for instance, that a merchant may lawfully keep open store for the disposition of his goods on the Sabbath. To wait upon his customers, and receive and sell his wares, is the common labor of a merchant; and there is a broad distinction between pursuing this avocation, and the case of a single sale out of the ordinary course of business." And see Swisher v. Williams, Wright, 754. In Indiana, however, where the statute is precisely like that in Ohio, it is held, that all contracts made on Sunday are void. Link v. Clemmons, 7 Blackf. 479; Reynolds v. Stevenson, 4 Ind. 619. See also Pope v. Linn, 50 Me. 83, as to note made on Sunday, Miller v. Lynch, 38 Miss. 344. Moore v. Murdock, 26 Cal. 514, holds, that the law of that State does not make a sale on Sun-

day void. *Contra*, Pike v. King, 16 Iowa, 49; Finley v. Quirk, 9 Minn. 194.

(*r*) In Flagg v. Millbury, 4 CUSH. 243, it was held to be a work of necessity and charity to repair a defect in a highway, which endangers the public safety. And Wilde, J., said: "By the word 'necessity' in the exception, we are not to understand a physical and absolute necessity; but a moral fitness and propriety of the work and labor done, under the circumstances of any particular case, may well be deemed necessity within the statute; and so it was decided, in the construction of a similar exception, in the prohibition against travelling on the Lord's day, in the statute of 1791, c. 58, § 2. Commonwealth v. Knox, 6 Mass. 76; Pearce v. Atwood, 13 Mass. 354. Now, when a defect in the highway is discovered on the Lord's day, which may endanger the limbs and the lives of travellers, it is not only morally fit and proper that it should be immediately repaired, but it is the imperative duty of the town which is bound to keep the highway in repair, to cause it so to be done, or to adopt means to guard against the danger, until it can be done; and work and labor for this purpose is no violation of the law or of religious duty." In Hooper v. Edwards, 18 Ala. 280, it was held, that if the exigency of a case be such as to render it necessary that a creditor, in order to save his debt, or procure indemnity against liability, should contract with his debtor on Sunday, such contract is not void, but comes within the saving of the statute; and it is the province of the jury to determine whether, under all the proof, it was justified by the necessity of the case." In Logan v. Mathews, 6 Penn. St. 417, it was held, that "the hire of a carriage on a Sunday, by a son, to visit his father, creates a legal contract," there being no evidence to show that the journey was a trip or excursion of pleasure. But in Johnston v. The Commonwealth, 22 Penn. St. 102, it was held, that driving an omnibus, as a public conveyance, daily, and every day, is worldly employment, and not a work of charity or necessity, within the meaning of the act of 1794, and therefore not lawful on Sunday. And in Phillips v. Innes, 4 Clark & F. 234, it was held by the House of Lords, in England, that an apprentice to a barber could not be lawfully required to attend his master's shop on Sundays for the purpose of shaving the customers, that not being work of neces-

¹ Subscriptions on Sunday, taken for the support of public worship from a congregation assembled for religious exercises, may be sustained as a work of charity. Allen v. Duffie, 43 Mich. 1.

* 761 we * should infer some change of sentiment on this subject.

Formerly there were many instances of persons punished for baking provisions, or slaughtering animals, even in hot weather, on Sunday; but we have heard of nothing of the kind of late.

Another question has been before the courts, and though not reported, we should think it admitted of a definite answer. Are there certain things, of themselves, works of necessity or mercy? We should say, few or none; funerals would be, or baptisms, or other religious services as appropriate to the day. But making a will, for example, would be so, only when the particular circumstances of the case made it so. (s) And some question has arisen, whether the celebration of marriage on Sunday be a violation of law. It is the rule in this country, that marriage is a civil contract. But it is generally believed that it may be lawfully entered into on Sunday; either because the frequency of the thing has in some measure protected it by a usage, and the consequences of an opposite view would be disastrous, or because the contract of marriage is in the nature of a continuing contract, and may be regarded as made every succeeding day as long as the parties cohabit. But, regarded as a question of strict law, it might be found not without its difficulties. (t)

* 762 * It seems now to be conceded, that a contract which is made in violation of the express provisions of the Lord's day acts, is void, like any other illegal and prohibited contract. (u)¹

sity or mercy or charity. Lord Cottenham said: "This work is not a work of necessity, nor is it a work of mercy; it is one of mere convenience." In *Ulary v. The Washington, Crabbe*, 204, it was held, that a seaman was bound to work on Sunday, the nature of the service requiring it.

(s) Held, not to violate the law, in *Bennett v. Brooks*, 9 Allen, 118; *Beitman's Appeal*, 55 Penn. St. 183. It was held in Maine, that a contract for the hire of a horse and carriage on Sunday, was not made legal by proof that it was for the purpose of carrying home one who had attended a religious meeting. *Tillock v. Webb*, 56 Me. 100. And in Indiana, the delivery of flour on a steamboat on Sunday, to avoid delay from the closing of navigation, was illegal. *Pate v. Wright*, 30 Ind. 476. See *ante*, note (p).

(t) *In re Gangwere's Estate*, 14 Penn.

St. 417, it was admitted, that a marriage celebrated on Sunday was valid; but upon the question, whether a marriage settlement, executed at the same time, was valid, the court were equally divided, and gave no opinion. In *Commonwealth v. Nesbit*, 34 Penn. St. 398, the court declared it to be no violation of the Sunday statute for a servant to drive his master's family to church on that day.

(u) It is to be observed, that neither the English statute, nor those of this country, expressly declare that contracts made on Sunday shall be void. But the principle is well settled, and of general application, that all contracts made in violation of a statute are void. *Lyon v. Armstrong*, 6 Vt. 219; *Robeson v. French*, 12 Met. 24; *Gregg v. Wyman*, 4 Cushing, 322; *Hazard v. Day*, 14 Allen, 487.

¹ A note made on Sunday is not void at common law, and a note made in a foreign State on Sunday will not be held invalid, without proof of a law in that State forbidding it. *O'Rourke v. O'Rourke*, 43 Mich. 58.

For many years the rule prevailed in Massachusetts, that while the acting party, as the maker of a promissory note for example, was liable to punishment, the note itself was valid. A recent decision, however, has put the law in that State in harmony with the generally prevailing view. (v) Where a schedule of property was to be annexed to an assignment for the benefit of creditors, by the terms of the assignment, and was so annexed on Sunday, it was held in Massachusetts valid as against a subsequent attaching creditor. (w) It may be doubted whether such would be the doctrine of this court, since the case above referred to of *Pattee v. Greely*. In Michigan, a note made on Sunday, but falsely dated on Monday to avoid the defence of illegality, was held valid in the hands of an innocent holder for value. (ww)¹

A deed made on Sunday is void; but as it takes effect from delivery, although it be signed and acknowledged on Sunday, if delivered on Monday, it has been held good. (wx)² One procuring an indorsement to himself on Sunday, cannot sue on the note. (wy)

If one is requested to render a service by a letter written and delivered on Sunday, and afterwards renders it, it is held that he can recover therefor, if he did not accept the offer and so enter into the contract on Sunday. (wz)³ It is also held that a part-payment made and received on Sunday will not take a debt out of the statute of limitations. (wa)⁴

An agreement of sale made on Sunday, the articles to be weighed and delivered on Monday, being carried into effect, the seller cannot recover on the contract, for that is void, but may on a *quantum valebant*. (wb) A note dated on Sunday, and then to take effect, is not a violation of the Sunday law if it were made and given on a previous day. (wc)

(v) *Pattee v. Greely*, 13 Met. 284. And see *supra*, note (q).

(wy) *Benson v. Drake*, 55 Me. 555.

(w) *Clapp v. Smith*, 16 Pick. 247.

452.

(wz)

Vinton v. Peck, 14 Mich. 287.

(wa) *Dennis v. Sherman*, 31 Ga. 607.

(wx) *Love v. Wells*, 25 Ind. 503;

(wb) *Bradley v. Rea*, 14 Allen, 20.

Beitenman's Appeal, 55 Penn. St. 183;

(wc) *Stacy v. Kemp*, 92 Mass. 166.

Flanagan v. Meyer, 41 Ala. 132.

¹ So any written contract made on Sunday, but dated a secular day, will be enforced in the hands of a *bond fide* transferee without notice. *Johns v. Bailey*, 45 Ia. 241.

² So a bond signed on Sunday, but without the knowledge of the obligee, and framed, dated, signed, and filed as of a secular day, and made to take effect on a secular day, is valid. *Hall v. Parker*, 37 Mich. 590.

³ A statutory penalty for not delivering a telegraphic message cannot be imposed when the contract to transmit was made on Sunday. *Rogers v. Western Union Tel. Co.* 78 Ind. 169.

⁴ *Clapp v. Hale*, 112 Mass. 368.

A more difficult question has arisen, which cannot be positively answered on authority. It may be stated thus: If A makes a bargain with B, prohibited by the Sunday law, and therefore void, and B, by means which this bargain gives him, and by an abuse of the bargain on his part, commits a wrong against A, is A barred by his illegal conduct from getting redress for the wrong? Thus, if A lets a horse to B on Sunday, to go from C to D, and nowhere else, it is certain that A cannot recover for the hire of the horse. But if B drives him from D to E, and by hard driving, a part of which is on this added route, B kills the horse, can A now recover? The Supreme Court of Massachusetts held that A cannot recover, even in trover, partly, because the action, though sounding in tort, is in fact for damages for breach of contract, but mainly, because the plaintiff must found his right of action upon his own wrong-doing in the first place, and by that wrong-doing he * 768 enabled the defendant to do his wrong; (x) but has since overruled this decision. (xx) The Supreme Court of New Hampshire has held, that the property in the horse remained in the original owner, and that the driving of it to another place than that bargained for was a conversion, for which trover would lie; (y) and in New York it has been held that while the hire cannot be recovered, damages for wilful or negligent injury may be. (yy) The question presents much difficulty, and collateral decisions and strong arguments apply on each side of it; but we incline to the view held in New Hampshire and New York.¹

What constitutes the "Lord's day," within the provisions of these statutes, is usually determined by exact definition by the statutes themselves. Sometimes this is different, for different purposes. In Massachusetts, no labor, &c., is to be done "between the midnight preceding and sunsetting on the Lord's day," but no civil process can be served between the midnight preceding and the

(x) *Gregg v. Wyman*, 4 *Cush.* 322.

(y) *Woodham v. Hubbard*, 5 *Foster*, 67.

(xx) *Hill v. Corcoran*, 107 Mass. 251.

(yy) *Nodine v. Doherty*, 46 *Barb.* 59.

¹ An action will not lie to recover damages for fraudulent representations made as inducement to a contract entered into on Sunday. *Gunderson v. Richardson*, 56 *Ia.* 56. Where a special contract is made to carry passengers on Sunday, no damages are recoverable for annoyance and vexation of mind caused by a failure to furnish a return train at the appointed time. *Walsh v. Chicago, &c. R. Co.* 42 *Wis.* 23. See also *Murdock v. Boston, &c. R. Co.* 133 Mass. 15. *Troewert v. Decker*, 51 *Wis.* 46, decided that the mere fact that a person borrowing money on Sunday retains it and converts it to his own use, does not raise an implied promise binding in law, and upon which an action can be maintained. See also *Myers v. Meinrath*, 101 Mass. 366; *Cranson v. Goes*, 107 Mass. 439; *Pope v. Linn*, 50 Me. 83; *Tillock v. Webb*, 56 Me. 100; *Finn v. Donahue*, 35 Conn. 216.

midnight following that day. (z) Under this statute it has been held, that a mortgage deed executed, acknowledged, and recorded, after sunset on Sunday evening, was not void as against an attaching creditor. (a) In Connecticut, the Lord's day has been defined as continuing from daybreak to the closing of daylight on Sunday. (b)

In Massachusetts and New York, and some other States, it is provided, that the Sunday laws shall not apply to those persons who conscientiously observe the seventh day of the week as the Sabbath, if they do not disturb others in their observance of Sunday. But in Pennsylvania and South Carolina, there is no such exception; and it has been contended, that the Sunday laws of those States were in this respect in violation of that provision in their constitutions which guarantees freedom of religious profession and worship to all mankind. But this view has not been sustained by the courts. (c)

If a contract is commenced on Sunday, but not completed * till a subsequent day, or if it merely grew out of a trans- * 764 action which took place on Sunday, it is not for this reason void. (d)¹ Thus, if a note is signed on Sunday, its validity is not impaired if it be not delivered on that day. (e)² Whether a contract entered into on Sunday will be rendered valid by a subsequent recognition, is not clear upon the authorities. (f)³

(z) In *Nason v. Dinsmore*, 34 Me. 391, it was held, that a contract proved to have been made on the Lord's day, is not thereby rendered invalid, unless it be also proved that it was made before sunset. The presumption is that it was made on that part of the day in which it was lawful to do it. *Hiller v. English*, 4 Stroh. 486. See also *Hill v. Dunham*, 7 Gray, 543.

(a) *Tracy v. Jenks*, 15 Pick. 465.

(b) *Fox v. Abel*, 2 Conn. 541.

(c) *Commonwealth v. Wolf*, 3 S. & R. 48; *City Council v. Benjamin*, 2 Stroh. 508; *Specht v. The Commonwealth*, 8 Penn. St. 312.

(d) *Stackpole v. Symonds*, 3 Foster, 229; *Adams v. Gay*, 19 Vt. 358; *Goes v. Whitney*, 24 Vt. 187; *Butler v. Lee*, 11 Ala. 885; *Bloxsome v. Williams*, 3 B. & C. 232. And see *Smith v. Sparrow*, 4 Bing. 84.

(e) *Hilton v. Houghton*, 35 Me. 143; *Lovejoy v. Whipple*, 18 Vt. 379; *Commonwealth v. Kendig*, 2 Penn. St. 448; *Clough v. Davis*, 9 N. H. 500; *Hill v. Dunham*, 7 Gray, 543.

(f) See *Adams v. Gay*, 19 Vt. 358; *Allen v. Deming*, 14 N. H. 433; *Shippey v. Eastwood*, 9 Ala. 198. And see next note.

¹ *Harrison v. Colton*, 31 Ia. 16.

² *King v. Fleming*, 72 Ill. 21.

³ The rescission of a contract requiring certain formulae to be gone through with by the party making the same is as much business as the original contracting; and, if done on Sunday, is void. *Benedict v. Bachelder*, 24 Mich. 425. *Syles v. Wellman*, 10 R. L. 465, decided that a sale made on Sunday might become valid by a subsequent ratification, as by a part payment of the price and the giving a note for the balance. *Van Hoven v. Irish*, 3 McCrary, 443, was to the same effect. But *Winfield v. Dodge*, 45 Mich. 355, decided that the allowing possession of horses traded on Sunday to be retained afterwards will not prevent either party from reclaiming their own, unless a new contract has been made.

When a contract of sale is made on Sunday, and the property is delivered to the vendee, but the price is not paid, the question will arise whether the property so delivered becomes the property of the vendee, and whether he will be allowed to retain it without paying the price. We are inclined to think that both of these questions must be answered in the affirmative, though there is some conflict in the authorities. (*g*)¹

(*g*) In *Smith v. Bean*, 15 N. H. 577, *Parker*, C. J., referring to a contract of sale made on Sunday, said: "It is generally said of such an illegal contract, that it is void. If this were so, and the contract, in the broad sense of the term, were void, no property would pass by it; the vendor might reclaim the property at will, and, being his property, it would be subject to attachment and levy by his creditors, in the same manner as if the attempt to sell had never been made. But this is not what is intended by such phraseology. The transaction being illegal, the law leaves the parties to suffer the consequences of their illegal acts. The contract is void, so far as it is attempted to be made the foundation of legal proceedings. The law will not interfere to assist the vendor to recover the price. The contract is void for any such purpose. It will not sustain an action by the vendee upon any warranty or fraud in the sale. It is void in that respect. The principle shows that the law will not aid the vendor to recover the possession of the property, if he have parted with it. The vendee has the possession, as of his own property, by the assent of the vendor; and the law leaves the parties where it finds them. If the vendor should attempt to retake the property without process, the law, finding that the vendee had a possession which could not be controverted, would give a remedy for the violation of that possession. When, then, it is said that the contract is void, the language is used with reference to the question, whether there is any legal remedy upon it." But in the well-considered case of *Adams v. Gay*, 19 Vt. 358, it was held, that in all cases of contracts entered into upon Sunday, if either party have done anything in execution of a contract, it is competent for him, upon another day, to demand of the other party a return of the thing delivered, or, where that is impracticable, compensation; and, if the other party refuse, the original

contract becomes thereby affirmed, and the same rights and liabilities are induced as if the contract had been made upon the latter day. This is an indispensable exception to the general rule in regard to illegal contracts, in order to secure parties from fraud and overreaching, which would otherwise be practised upon Sunday by those who know their contracts are void, and that they are not liable *civiliter* for even frauds practised upon that day. In *Williams v. Paul*, 6 Bing. 653, the defendant kept a heifer which he had bought of a drover on Sunday, and afterwards made a promise to pay for. Held, that having kept the beast, he was liable at all events on a *quantum meruit*, notwithstanding the contract made on Sunday. But in *Simpson v. Nicholls*, 3 M. & W. 240, where, to a count for goods sold and delivered, the defendant pleaded that they were goods sold and delivered to him by the plaintiff, in the way of his trade, on a Sunday, contrary to the statute; and the plaintiff replied, that the defendant, after the sale and delivery of the goods, kept them for his own use, without returning or offering to return them, and had thereby become liable to pay so much as they were reasonably worth, the court held that the replication was bad, and doubts were expressed whether *Williams v. Paul* was correctly decided. In *Dobson v. Harris*, 10 Ala. 566, where a horse was sold on Sunday, and a note taken for the purchase-money on the same day, it was held, that both the contract and the note were void, and though the purchaser retained the horse in his possession, without objection or demand by the seller, the law will not imply a promise to pay the stipulated price, or what the horse is reasonably worth. But the contract being void, no property passed to the vendee, and he would be chargeable in *trotter* upon proof of demand and refusal, or in *assumpsit* upon an express promise to pay, subsequently made in consideration of the retention of the horse.

¹ The buyer of goods sold on Sunday, who has asserted and maintained his title against the seller for a trespass on the goods, is not estopped to set up the defence of sabbatical illegality in an action by the seller for the price. *Thompson v. Williams*, 58 N. H. 248.

* A question has been made also, whether the invalidity * 765 of a contract made on Sunday can be set up against an innocent party, as the innocent indorsee of a note made on Sunday. We think not; but this question is not settled. (*h*)¹ But it seems that an official bond, executed on Sunday, is not void as to the parties to be thereby protected. (*i*) And where a tort cognizable in admiralty has been committed, it is no defence that the vessel was prosecuting her voyage on Sunday. (*j*)

6. OF MAINTENANCE AND CHAMPERTY.

Maintenance and champerty are offences at common law; and contracts resting upon them are void. But those offences, if not less common in fact, as it may be hoped that they are, are certainly less frequent in their appearance before judicial tribunals than formerly; and recent decisions have considerably qualified the law in relation to them. Still, however, they are offences, and contracts which rest upon them are void. Maintenance, in particular, seems now to be confined to the * intermeddling of * 766 a stranger in a suit, for the purpose of stirring up strife and continuing litigation. (*k*) Nor is any one liable to this charge who

In Scarfe v. Morgan, 4 M. & W. 270, it was held, that where a contract, the execution of which gave a lien on property, was made and executed on Sunday, although the contract was void, the lien attached. See further Sumner v. Jones, 24 Vt. 317; Bloxsome v. Williams, 3 B. & C. 232; Moore v. Kendall, 1 Chand. 33. A common carrier who has received goods into his possession, on Sunday, for transportation, cannot avail himself of the plea of the illegality of the transaction, in a suit against him for the value of the goods, if destroyed by fire. Powhatan S. B. Co. v. Appomattox R. R. Co. 24 How. 247.

(*h*) See Bloxsome v. Williams, 3 B. & C. 232; Fennell v. Riddle, 5 B. & C. 406; Begbie v. Levi, 1 Cromp. & J. 180; Allen v. Deming, 14 N. H. 133; Saltmarsh v. Tuthill, 13 Ala. 390.

(*i*) Commonwealth v. Kendig, 2 Penn. St. 448.

(*j*) Phila. R. R. Co. v. Havre de Grace Steamboat Co. 23 How. 209.

(*k*) See, on this subject, Master v. Miller, 4 T. R. 340; Flight v. Leman, 4

Q. B. 883; Bell v. Smith, 5 B. & C. 188; Williamson v. Hanley, 6 Bing. 299. It has been considered maintenance for an attorney to agree to save a party harmless from costs, provided he be allowed one-half of the proceeds of the suit in case of success. *In re Masters*, 4 Dowl. 18. And see Harrington v. Long, 2 Myne & K. 590. But one may lawfully agree to promote a suit, where he has reasonable ground to believe himself interested, although in fact he is not so. Findon v. Parker, 11 M. & W. 675. In Call v. Calef, 13 Met. 362, it appeared that A had an interest in the exclusive use in Manchester, N. H., of a certain patent machine, and B had an interest in the exclusive use of the same machine in Lowell. S was using said machine in Manchester, without right. A gave to B a power of attorney, authorizing him to take such steps in A's name as B might judge to be necessary or expedient, by suit at law or otherwise, to prevent S from using, letting, or selling said machine in Manchester, and also authorizing B to sell to S the

¹ Cranson v. Goss, 107 Mass. 439, decided that a *bond side* holder of a note, taken by him before maturity for good consideration, and without notice that it was made on Sunday, may maintain an action thereon against the maker. See also Knox v. Clifford, 38 Wis. 651; Greathead v. Walton, 40 Conn. 226; Trieber v. Commercial Bank, 31 Ark. 128.

gives honest advice to go to law, or advances money from good motives to support a suit, or if he stands towards the person who is the party to the suit in any intimate relation, as of landlord, father or son, or master, or husband. (*i*)

Champerty is treated as a worse offence; for by this a stranger supplies money to carry on a suit, on condition of sharing in the land or other property gained by it. And contracts of this sort are set aside both at law and in equity. And any agreements to pay part of the sum recovered, whether by commission or otherwise, on consideration either of money advanced to maintain a suit, or services rendered, or information given, or evidence furnished, come within the definition of champerty. (*m*)¹ And

right to use said machine in Manchester. And by a parol agreement between A and B, B was to have, as his compensation for his services under said power of attorney, one-half of what he should recover or receive of S. B rendered services under said power, for which he was entitled by said parol agreement to \$25. A afterwards assigned his right to the use of said machine to C, with notice of B's claim on A, and with authority to C to revoke said power of attorney to B, upon paying B \$25. C promised B to pay him said sum, and B consented to the revocation of the power of attorney. B afterwards brought an action against C to recover said sum of \$25. Held, that the parol agreement between A and B was not illegal and void on the ground of maintenance and champerty, but was a valid agreement, since the unauthorized use of the patent in either place would diminish the value and profits of the patent in the other, and therefore B had a

direct interest in preventing the violation of the patent-right; that C's promise to pay B said sum was on a good and sufficient consideration; and that the action could be maintained.

(*i*) *Perine v. Dunn*, 3 Johns. Ch. 508; *Thalhimer v. Brinckerhoff*, 3 Cowen, 647; see also *Voorhees v. Dorr*, 51 Barb. 580.

(*m*) *Stanley v. Jones*, 7 Bing. 369; *Thurston v. Percival*, 1 Pick. 415; *Lathrop v. Amherst Bank*, 9 Met. 489, an excellent case on this subject; *Byrd v. Odem*, 9 Ala. 753; *Satterlee v. Frazer*, 2 Sandf. 141; *Holloway v. Lowe*, 7 Porter, 488; *Key v. Vattier*, 1 Ham. 58; *Rust v. Larue*, 4 Litt. 417; *Martin v. Voeder*, 20 Wis. 466; *Alexander v. Polk*, 39 Miss. 737. It has been held in Kentucky, that a contract by a client to pay his attorney "a sum equal to one-tenth of the amount recovered," was not void for champerty. *Evans v. Bell*, 6 Dana, 479; *Sprye v. Porter*, 7 E. & B. 58, 26 L. J. Q. B. 64.

¹ An attorney may stipulate for an absolute or contingent compensation, but not to take a claim for collection, pay all the expenses of prosecution, and divide the sum recovered. *Coughlin v. N. Y. &c. R. Co.* 71 N. Y. 443. That "a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy;" but that "agreements of this kind ought to be carefully watched, and when found to be extortionate, unconscionable," or made for "improper objects," ought to be held invalid; and that an "action cannot be maintained against a third person on the ground that he was a mover of and had an interest in a suit, in the absence of malice and want of probable cause," see *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, 2 App. Cas. 186. See also *Schomp v. Schenck*, 11 Vroom, 195, for elaborate opinion of *Beasley*, C. J., on law of maintenance and champerty. Although an attorney and his client make an agreement void for champerty, the attorney may recover full compensation for his services. *Stearns v. Felker*, 28 Wis. 594. The indorsement of an overdue promissory note to the plaintiff for the consideration of the principal, the plaintiff to have the accrued interest if he collects it, otherwise the indorser to return the consideration, is not champerty. *Taylor v. Gilman*, 58 N. H. 417. An agreement by a client to pay his attorney "the first fifty dollars collected by him," is no defence to an action by the latter against the former for his services. *Scott v. Harmon*, 109 Mass. 237. See *Martin v. Clarke*, 8 R. L 389; *Orr v. Tanner*, 12 R. I. 94, from which it appears that the law relating to

this has also been extended to cover * many cases of the * 767 purchase of a doubtful title to land, by a stranger, of one not in possession, and of land which he who has possession holds adversely to the title purchased. (n)

SECTION XII.

OF FRAUD.

We have had repeated occasion to remark, that fraud avoids every contract, and annuls every transaction ; and to illustrate this principle in its relation to many of the kinds of contracts which we have already considered. But there are some general remarks on the subject of fraud, especially when considered as a defence to an action brought upon a contract, which we would now make, avoiding a repetition of what has been already said, as far as may be.

It is sometimes asserted, that the distinction in the civil law between *dolus malus* and *dolus bonus*, is unknown to the common law ; and it is true that we have no such distinction expressed in words which are an exact translation of the Latin words. But it is also true that the distinction is itself, substantially, a part not only of the common law, but necessarily of every code of human law. For it is precisely the distinction between that kind and measure of craft and cunning which the * law deems it * 768 impossible or inexpedient to detect and punish, and therefore leaves unrecognized, and that worse kind and higher degree

(n) This was forbidden by the English stat. 32 Henry VIII. c. 9, against buying up pretended titles, which was at an early day enacted in some American States, and in others adopted by practice. See Brinley v. Whiting, 5 Pick. 353; Whittaker v. Cone, 2 Johns. Cas. 58; Belding v. Pitkin, 2 Caines, 147; McGoan v. Ankeny, 11 Ill. 558. But see Cresinger v. Lessee of Welsh, 15 Ohio, 156; Edwards v. Parkhurst, 21 Vt. 472; Dunbar v. McFall, 9 Humph. 505. The English statute of 32 Hen. VIII. c. 9, on the subject of champerty, is not in force in Mississippi. In order, therefore, to avoid a contract on the ground of champerty, the common-law offence must be complete, to constitute which it must not only be

proved that there was adverse possession at the time of sale, but that the purchaser had knowledge of such adverse possession ; this is especially the case where the land granted was in forest and wild at the time of the grant. Sissons v. Reynolds, 7 Smedes & M. 132. In many States such a transaction never was considered illegal. See Frizzle v. Veach, 1 Dana, 211; Stoever v. Whitman, 6 Binn. 416; Haddock v. Wilmarth, 5 N. H. 181. But it has been held in New York, that an agreement by an attorney to carry on a suit and pay all the expenses, and give the plaintiff a certain share of the proceeds, is not as against a statute, a buying of a *chose in action*, for the purpose of bringing a suit thereon. Fogarty v. Jordan, 2 Rob. 319.

champerty is in full force in Rhode Island. Maintenance and champerty are still offences against the common law in Indiana. Quigley v. Thompson, 53 Ind. 317. See Thompson v. Reynolds, 73 Ill. 11; Allard v. Lamirande, 29 Wis. 502.

of craft and cunning which the law prohibits, and of which it takes away all the advantage from him by whom it is practised.

The law of morality, which is the law of God, acknowledges but one principle, and that is the duty of doing to others as we would that others should do to us, and this principle absolutely excludes and prohibits all cunning ; if we mean by this word any astuteness practised by any one for his own exclusive benefit. But this would be perfection ; and the law of God requires it, because it requires perfection ; that is, it sets up a perfect standard, and requires a constant and continual effort to approach it. But human law, or municipal law, is the rule which men require each other to obey ; and it is of its essence that it should have an effectual sanction, by itself providing that a certain punishment should be administered by men, or certain adverse consequences take place, as the direct effect of a breach of this law. If, therefore, the municipal law were identical with the law of God, or adopted all its requirements, one of three consequences must flow therefrom : either the law would become confessedly, and by a common understanding, powerless and dead as to part of it ; or society would be constantly employed in visiting all its members with punishment ; or, if the law annulled whatever violated its principles, a very great part of human transactions would be rendered void. Therefore the municipal law leaves a vast proportion of unquestionable duty to motives, sanctions, and requirements, very different from those which it supplies. And no man has any right to say, that whatever human law does not prohibit, that he has a right to do ; for that only is right which violates no law, and there is another law besides human law. Nor, on the other hand, can any one reasonably insist, that whatever one should do or should abstain from doing, this may properly be made a part of the municipal law ; for this law must necessarily fail to do all the great good that it can do, and therefore should, if it attempts to do that which, while society and human nature remain what they are, it cannot possibly accomplish.

* 769 * It follows, that a certain amount of selfish cunning passes unrecognized by the law ; that any man may procure to himself, in his dealings with other men, some advantages to which he has no moral right, and yet succeed perfectly in establishing his legal right to them. But it follows, also, that if any one carries this too far ; if, by craft and selfish contrivance, he

inflicts injury upon his neighbor, and acquires a benefit to himself, beyond a certain point, the law steps in, and annuls all that he has done, as a violation of law. The practical question, then, is, Where is this point ? and to this question the law gives no specific answer. And it is somewhat noticeable, that the common law not only gives no definition of fraud, but perhaps asserts as a principle, that there shall be no definition of it. And the reason of this rule is easily seen. It is of the very nature and essence of fraud to elude all laws, and violate them in fact, without appearing to break them in form ; and if there were a technical definition of fraud, and everything must come within the scope of its words before the law could deal with it as fraud, the very definition would give to the crafty just what they wanted, for it would tell them precisely how to avoid the grasp of the law. Whenever, therefore, any court has before it a case in which one has injured another, directly or indirectly, by falsehood or artifice, it is for the court to determine in that case whether what was done amounts to cognizable fraud. Still, this important question is not left to the arbitrary, or, as it might be, accidental decision of each court in each case ; for all courts are governed, or at least directed, by certain rules and precedents, which we will now consider.

In the first place, it is obvious that the fraud must be material to the contract or transaction, which is to be avoided because of it ; for if it relate to another matter, or to this only in a trivial and unimportant way, it affords no ground for the action of the court. (o) It must, therefore, relate distinctly and

(o) Thus, it seems that a misrepresentation, by a vendor of a horse, as to the place where he bought it, is not such a material fraud as will avoid the sale of the horse. *Geddes v. Pennington*, 5 Dow, 159. In *Taylor v. Fleet*, 1 Barb. 471, it is said, that in order to avoid a contract of sale on the ground of misrepresentation, there must not only have been a misrepresentation of a material fact constituting the basis of the sale, but the purchaser must have made the contract upon the faith and credit of such representation. At least he must so far have relied upon it as that he would not have made the purchase if such representation had not been made. In that case, a person about to purchase a farm, was ignorant of the actual character and capabilities of the land, and had no means of obtaining such knowledge except by information to be derived from others ; and

the owner, with the knowledge that the purchaser's object was to obtain an early farm, and that his farm was not as early as the lands lying in the neighborhood, represented to such purchaser "that there was no earlier land anywhere about there," and the latter, relying upon the truth of that representation, made the purchase ; and, after ascertaining by actual experiment that the land was not what it had been represented to be, he applied to the vendor, within a reasonable time, to rescind the bargain, who refused to do so. *Held*, that this furnished a sufficient ground for the interference of a court of equity to rescind the contract, even though there was no intention on the part of the vendor to deceive the purchaser. As to the necessity of materiality, see *Camp v. Pulver*, 5 Barb. 91.

* 770 * directly to this contract; and it must affect its very essence and substance. (*p*) But, as before, we must say that there is no positive standard by which to determine whether the fraud be thus material or not. Nor can we give a better rule for deciding the question than this: if the fraud be such, that, had it not been practised, the contract would not have been made, or the transaction completed, then it is material to it; but if it be shown or made probable that the same thing would have been done by the parties, in the same way, if the fraud had not been practised, it cannot be deemed material. Whether the fraud be material or otherwise, seems to be, on the decided weight of authority,

* 771 a question for the jury and not a question of law; (*q*) * but

(*p*) Thus, in *Green v. Goeden*, 4 Scott, N. R. 13, 3 Man. & G. 446, to a count in debt on a promissory note, the defendant pleaded that the note was obtained from him by the plaintiffs and others in collusion with them, by fraud, covin, and misrepresentation, wherefore the note was void in law; it was held, that this plea was not sustained by evidence, that the note was given by the defendant and another, as sureties, for a sum advanced to a third person by the plaintiffs, who falsely held themselves out to the world as a society formed and acting under certain rules and regulations; the fraud proved not having such a relation to the particular transaction as to amount to fraud in point of law. So in *Vane v. Cobbold*, 1 Exch. 798, in an action by an allottee of a railway company for the recovery of his deposit, it appeared that the company issued a prospectus, which stated the capital to consist of 60,000 shares of £25 each, and the plaintiff, after having paid his deposit, executed the subscribers' agreement, which contained the usual terms as to the disposition of the deposits; at the time when he executed the deed, the deposits upon 18,160 shares only had been paid, although 35,000 shares had been allotted, which fact was not communicated to him. Held, that the withholding of the above fact did not amount to such a fraud as to avoid the deed, and that the plaintiff was not entitled to recover back his deposit. In *Edwards v. Owen*, 15 Ohio, 500, it was held, that a special action on the case may be sustained against a debtor for fraudulently representing himself insolvent, and thereby inducing his creditor to discharge a promissory note for less than its value.

(*q*) *Westbury v. Aberdein*, 2 M. & W. 267; *Lindenau v. Desborough*, 8 B. & C. 586; *Huguenin v. Rayley*, 6 Taunt. 186;

Bidault v. Wales, 20 Mo. 546. If the fraud was material to the contract, it has been said that it is not necessary that it should have been practised *malo animo*. *Moens v. Heyworth*, 10 M. & W. 155, where Lord *Abinger* said: "The fraud which vitiates a contract, and gives a party a right to recover, does not in all cases necessarily imply moral turpitude. There may be a misrepresentation as to the facts stated in the contract, all the circumstances in which the party may believe to be true. In policies of insurance, for instance, if an insurer makes a misrepresentation, it vitiates the contract. Such contracts are, it is true, of a peculiar nature, and have relation as well to the rights of the parties as the event. In the case of a contract for the sale of a public-house, if the seller represent by mistake that the house realized more than in fact it did, he would be defrauding the purchaser, and deceiving him; but that might arise from his not having kept proper books, or from non-attention to his affairs; yet, as soon as the other party discovers it, an action may be maintained for the loss consequent upon such misrepresentation, inasmuch as he was thereby induced to give more than the house was worth. That action might be sustained upon an allegation that the representation was false, although the party making it did not know at the time he made it that it was so." And see *Lindenau v. Desborough*, *supra*; *Maynard v. Rhodes*, 5 Dow. & R. 266; *Everett v. Desborough*, 5 Bing. 503; *Elton v. Larkins*, 5 C. & P. 86. But it has been held, that if a fact is collateral only, and the statement of it, though made at the time of entering into the contract, is not embodied in it, the contract cannot be set aside merely on the ground that such statement was untrue; it must be shown that the party making it knew it to

it is obvious, that in many cases the jury cannot answer this question without instructions from the court.

No payment or advance made under a contract which was intentionally fraudulent can give validity to it; and if any part of the original purpose, or of the remaining purpose, is fraudulent, the whole contract is avoided. (q)

In the next place, the fraud must work an actual injury. If it be only an intended fraud, which is never carried into effect, or if all be done that was intended, but the expected consequences do not result from it, the law cannot recognize it. (r) And if there be a fraud, and it be actually injurious, the injured party can recover only the damage directly attributable to the fraud, (s) and not an increase of this damage caused by his own * indiscretion or mistake in relation to it. (t) And if * 772 no damage be caused by the fraud, no action lies. (u)

Though the law cannot lay hold of a merely intended fraud, yet it will recognize as a fraud a statement which is literally true, but substantially false; for the purpose and effect of the thing will pre-

be untrue, and that the other was thereby induced to enter into the contract. Moens v. Heyworth, 10 M. & W. 147. And see McDonald v. Trafton, 15 Me. 225; Cunningham v. Smith, 10 Gratt. 255; Wilson v. Butler, 4 Bing. N. C. 748; Gillett v. Phelps, 12 Wis. 392.

(q) Lynde v. McGregor, 13 Allen, 172.

(r) Hemingway v. Hamilton, 4 M. & W. 115. Lord Abinger there said: "Suppose a man contracts in writing to sell goods at a certain price, and afterwards delivers them, could the buyer plead, that at the time of the contract the seller fraudulently intended not to deliver them, but to dispose of them otherwise?" In Feret v. Hill, 15 C. B. 207, 26 Eng. L. & Eq. 261, it was held, that an intention existing in the mind of one of the parties to a contract, to use the thing therein contracted for, in an illegal manner, would not render the contract illegal, although he fraudulently induced the other party to enter into the contract, by stating that he wanted the property for a legal purpose. See, as to this case, Canham v. Barry, 15 C. B. 597, 29 Eng. L. & Eq. 290. See also Abbey v. Dewey, 25 Penn. St. 413.

(s) Per Lord Ellenborough, in Vernon v. Keys, 12 East, 632. Where an action was brought to recover the value of certain horses, alleged to have died from eating corn mixed with arsenic, which the plaintiff bought from the defendant, it

was held, that notwithstanding the defendant had fraudulently concealed from the plaintiff the fact that arsenic was so mixed with the corn, yet, if the plaintiff was informed of the act before he gave it to his horses, he could only recover damages to the value of the corn. Stafford v. Newsom, 9 Ired. 507. In Tuckwell v. Lambert, 5 Cush. 23, the purchaser of a vessel, falsely and fraudulently represented by the seller as eighteen instead of twenty-eight years old, having sent her to sea before he had knowledge that such representation was false, and the vessel being afterwards condemned in a foreign port, it was held, that the purchaser was entitled to recover his actual damages, occasioned by sending the vessel to sea, not exceeding the value of the vessel.

(t) Thus, in Corbett v. Brown, 5 C. & P. 363, it was held, that a tradesman can only recover against a person making a false representation of the means of one who referred to him, such damage as is justly and immediately referable, to the false representation. Therefore, if the tradesman gives an indiscreet and ill-judging credit, he cannot make the referee answerable for any loss occasioned by it.

(u) Morgan v. Bliss, 2 Mass. 112; Fuller v. Hodgdon, 25 Me. 243; Ide v. Gray, 11 Vt. 615; Farrar v. Alston, 1 Dev. 69.

vail over its form ; as if one asserts, that another whom he recommends, has property to a certain amount, knowing all the while, that although he possesses this property, he owes for it more than it is worth. (v) And there are indeed cases in which the intention seems to constitute the fraud, and to have the force and effect of fraud. For if one buys on credit, but does not pay, still the title of the goods is in him ; but if one buys on credit, intending not to pay, this is an actual fraud, and it avoids the sale entirely, so that no property passes to the purchaser. (w)¹ So, likewise, a contract between two parties, with intent to defraud a third, cannot be enforced by either against the other ; and the fact that the claim of the third party is itself fraudulent, does not change the character of such a contract. (x) If the question were *res nova*, perhaps it might be doubted whether the rule established by these cases * 773 is correct. It is clear, that if a purchaser makes false representations of his ability to pay his property, or credit, the sale is void, and no title passes as between the original parties to the contract. (y) But it is equally true, that the mere insolvency of the purchaser, and his utter inability to pay for goods when purchased, although well known to himself, will not avoid

(v) *Corbett v. Brown*, 8 Bing. 33, 1 Moore & S. 85. In this case, the defendant's son having purchased goods from the plaintiffs on credit, they wrote to the defendant requesting to know whether his son had, as he stated, £300 capital, his own property, to commence business with ; to which the defendant replied, that his son's statement as to the £300 was perfectly correct, as the defendant had advanced him the money. It was proved that, at the time of the advance, the defendant had taken a promissory note from his son for £300, payable on demand, with interest, which interest was paid. Six months after the communication to the plaintiffs, the defendant's son became bankrupt. *Held*, that it was properly left to the jury to say whether the representation made by the defendant was false within his own knowledge ; and, the jury having found a verdict for him, the court

granted a new trial. *Denny v. Gilman*, 26 Me. 149, also shows, that a representation may be literally true, and yet, if made with intent to deceive, and it does deceive another to his injury, the author may be liable. It is, perhaps, on this ground, that a second vendee of land, who takes his deed with knowledge of a prior unrecorded deed, cannot hold the estate, although he complies with the letter of the statute by first putting his deed on record. See *Ludlow v. Gill*, 1 D. Chip. 49.

(w) See *Earl of Bristol v. Wilsmore*, 1 B. & C. 514; *Ash v. Putnam*, 1 Hill, 302; *Ferguson v. Carrington*, 9 B. & C. 59. And see *Load v. Green*, 15 M. & W. 216.

(x) *Randall v. Howard*, 2 Black. 585.

(y) *Cary v. Hotaling*, 1 Hill, 311; *Andrew v. Dieterich*, 14 Wend. 31; *Johnson v. Peck*, 1 Woodb. & M. 334; *Lloyd v. Brewster*, 4 Paige, 537.

¹ Lack of reasonable expectation of ability to pay is equivalent to an intention not to pay. *Talcott v. Henderson*, 31 Ohio St. 162. Where a sale is fraudulent because made by the buyer with the intention not to pay for the goods, the seller need not give notice of his election to rescind before suit, but can recover the goods even after an attaching creditor of the buyer, with no knowledge of the fraud, has levied on them. *Oswego Starch Factory v. Lendrum*, 57 Ia. 573. The intention of a seller never to deliver goods for which a note is given in payment, is such a fraud as will vitiate the note. *Burill v. Stevens*, 73 Me. 395. See *Williamson v. New Jersey*, &c. R. Co. 2 Stewart, 311.

the sale, if no false representations or means are used to induce the vendor to part with his goods. (z)¹

In the next place, it must appear, that the injured party not only did in fact rely upon the fraudulent statement, (a) but had a right to rely upon it in the full belief of its truth; for otherwise it was his own fault or folly, and he cannot ask of the law to relieve him from the consequences. (b) If, however, the plaintiff mainly and substantially relied upon the fraudulent representation, he will have his action for the damage he sustains, although he was in part influenced by other causes. Thus, in England, where such an action cannot be brought unless the misrepresentation be in writing, it is maintainable if the substantial misrepresentation be in writing, although the plaintiff * was also influenced by statements of the defendant which were not in writing. (c)²

Where a party is obliged to rely upon the statements of another, and not only may but should repose peculiar confidence in him, this is in the nature of a special trust, and the law is very jealous of a betrayal of this trust, and visits it with great severity. This

(z) *Cross v. Peters*, 1 Greenl. 376. And see *Conyers v. Ennis*, 2 Mason, 236; and the excellent case of *Powell v. Bradlee*, 9 Gill & J. 220; *Smith v. Smith*, 21 Penn. St. 367. To avoid a sale of goods on credit, it is not sufficient that the purchaser did not intend to pay for them at the time agreed upon. He must, when he buys, intend never to pay for them to prevent the title from passing. *Bidault v. Wales*, 20 Mo. 546; *Buckley v. Artcher*, 21 Barb. 585; *Mitchell v. Worden*, 20 Barb. 253.

(a) It is not necessary that a vendor should rely solely upon the fraudulent statements of the defendant as to the solvency of a third person, in order to give a right of action. It is sufficient if the goods were parted with upon such representations, and would not have been but for them. *Addington v. Allen*, 11 Wend. 374; *Young v. Hall*, 4 Ga. 95.

(b) If, therefore, the party to whom false statements were made, knew them to be false, or suspected them to be so, and did not at all rely upon them; or if the statements consisted of mere expres-

sions of opinion, upon which he had no legal right to rely, the contract is not avoided by the fraudulent intent of the other party. See *Clopton v. Coxart*, 13 Smedes & M. 363; *Anderson v. Burnett*, 5 How. (Miss.) 165; *Connerville v. Wadleigh*, 7 Blackf. 102. And it is upon this ground that a misrepresentation as to the legal effect of an agreement does not constitute such a fraud as will avoid the instrument, since every person is supposed to know the legal effect of an instrument which he signs, and therefore has no right to rely upon the statements of the other party. *Lewis v. Jones*, 4 B. & C. 506; *Russell v. Branham*, 8 Blackf. 277. And see *Starr v. Bennett*, 5 Hill, 303. If the truth or falsehood of the representations might have been tested by ordinary vigilance and attention, it is the party's own folly if he neglected to do so, and he is remediless. *Moore v. Turbeville*, 2 Bibb, 602; *Saunders v. Hatterman*, 2 Ired. 32; *Farrar v. Alston*, 1 Dev. 69; *Falton v. Hood*, 34 Penn. St. 365.

(c) *Tatton v. Wade*, 18 C. B. 371.

¹ A conveyance by an insolvent to a relative, though *prima facie* evidence of fraud, is not void unless the fact of actual fraud is found. *Stevens v. Robinson*, 72 Me. 381.

² *Hirschfeld v. London, &c. R. Co.* 2 Q. B. D. 1, contains a strong expression of opinion that a fraudulent representation as to the effect of a deed may be relied upon as a defence to an action upon the deed.

principle is carried to its utmost extent in the case of persons charged expressly with trusts, either by the *cestui que trust*, or others for him, or by the act of the law; as we have shown in speaking of trustees.

On the same ground, and also because the law especially protects those who cannot protect themselves, all transactions with feeble persons, whether they are so from age, sickness, or infirmity of mind, are carefully watched. The whole law of infancy illustrates this principle; and applies it in many cases, by avoiding on this account transactions as fraudulent, which would not have been so characterized had both parties been equally competent to take care of themselves. (d)

We have seen that the intention is sometimes the test of fraud; but, on the other hand, this intention is sometimes implied by the law; for it seems now to be quite settled, that if one injures another by statements which he knows to be false, he shall be held answerable, although there be no evidence of gain to himself, or of any interest in the question, or of malice or intended mis-
* 775 chief. (e) And on the other hand, if the statement * be false in fact, and injurious because false, if it were believed to be true by the party making it, it is not a fraud on his part. (f)¹

(d) *Malin v. Malin*, 2 Johns. Ch. 238; *Blatchford v. Christian*, 1 Knapp, 77.

(e) *Foster v. Charles*, 6 Bing. 396, 7 id. 105. This was an action for making false statements concerning an agent whom the defendant recommended, and knew his statements to be false. *Tindal*, C. J., said: "It has been urged that it is not sufficient to show that a representation on which a plaintiff has acted was false within the knowledge of the defendant, and that damage has ensued to the plaintiff, but that the plaintiff must also show the motive which actuated the defendant. I am not aware of any authority for such a position, nor that it can be material what the motive was. The law will infer an improper motive, if what the defendant says is false within his own knowledge, and is the occasion of damage to the plaintiff. See also *Corbett v. Brown*, 8 Bing. 33, 1 Moore & S. 85, that if a representation is false within the defendant's own knowledge, fraud is to be inferred. And see *Polhill v. Walter*, 3 B. & Ad. 114, as explained in *Freeman v.*

Baker, 5 B. & Ad. 797; *Hart v. Talmadge*, 2 Day, 381. *Young v. Hall*, 4 Ga. 95, is a strong case to show that the defendant need not intend to derive any benefit from his fraud in order to render him liable. See *Stiles v. White*, 11 Met. 356; *Weathersford v. Fishback*, 3 Scam. 170. In *Watson v. Poulson*, Exch. 1851, 7 Eng. L. & Eq. 585, it was held, that if a man tells an untruth, knowing it to be such, in order to induce another to alter his condition, who does accordingly alter it, and thereby sustains damage, the party making the false statement is liable in an action for deceit, although, in making the false representation, no fraud or injury was intended by him. *Murray v. Mann*, 2 Exch. 538, is to the same effect. See also *Turnbull v. Gadsden*, 2 Stroh. Eq. 14; *Smith v. Mitchell*, 6 Ga. 458.

(f) *Collins v. Evans*, 5 Q. B. 820; *Haycraft v. Creasy*, 2 East, 92; *Rawlings v. Bell*, 1 C. B. 951; *Thom v. Bigland*, 8 Exch. 725, 20 Eng. L. & Eq. 470; *Ormrod v. Huth*, 14 M. & W. 651. In this last case, cotton was sold by sample, upon a repre-

¹ That an innocent misrepresentation by a seller of the extent of the boundaries of land is a fraud in law which will justify a purchaser in recouping damages when sued for the price, see *Baughman v. Gould*, 45 Mich. 481.

If the statement be in fact false, and be uttered for a fraudulent purpose, which is in fact accomplished, it has the whole effect of fraud in annulling the contract, although the person uttering the statement did not know it to be false, but believed it to be true. (g) If the falsehood be known to the party making the statement, malice or self-interest will be inferred. (h) * A party * 776 will not be held liable as for fraud, if the statement be of a matter collateral to the contract, unless it is proved to have been made fraudulently. (i)

If a misrepresentation be embodied in a contract, it would, for

sentation that the bulk corresponded with the samples, but no warranty was taken by the purchaser, and the bulk of the cotton turned out to be of inferior quality, and to have been falsely packed, though not by the seller. *Held*, that an action on the case for a false and fraudulent representation was not maintainable without showing that such representation was false to the knowledge of the seller, or that he acted fraudulently or against good faith in making it. And *Tindal*, C. J., in delivering the judgment of the Court of Exchequer Chamber, said: "The rule which is to be derived from all the cases appears to us to be, that where, upon the sale of goods, the purchaser is satisfied without requiring a warranty (which is a matter for his own consideration), he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was bottomed in fraud. If, indeed, the representation was false, to the knowledge of the party making it, this would in general be conclusive evidence of fraud; but if the representation was honestly made, and believed at the time to be true by the party making it, though not true in point of fact, we think this does not amount to fraud in law, but that the rule of *caveat emptor* applies, and the representation itself does not furnish a ground of action. And although the cases may in appearance raise some difference as to the effect of a false assertion or representation of *title* in the seller, it will be found, on examination, that in each of those cases there was either an assertion of title embodied in the contract, or a representation of title which was false to the knowledge of the seller. The rule we have drawn from the cases appears to us to be supported so clearly by the early, as well as the more recent, decisions, that we think it unnecessary to bring them forward in review; but to satisfy ourselves with saying, that the exception must be disallowed, and the

judgment of the Court of Exchequer affirmed." See also *Tryon v. Whitmarsh*, 1 Met. 1; *Stone v. Denny*, 4 Met. 151; *Russell v. Clark*, 7 Cranch, 69; *Young v. Covell*, 8 Johns. 25; *Hopper v. Sisk*, 1 Smith (Ind.), 102, 1 Carter, 176; *Fooks v. Waples*, 1 Harring. (Del.) 131; *Boyd v. Browne*, 6 Barr, 316; *Lord v. Goddard*, 13 How. 198; *Weeks v. Burton*, 7 Vt. 67; *Wells v. Jewett*, 11 How. Pr. Rep. 242, 254; *Ashlin v. White*, 1 Holt, 387; *Shrewsbury v. Blount*, 2 Man. & G. 475. Many cases, however, seem to hold, that a false statement of a material fact, though made *bond fide*, will avoid a contract, and especially if the statement be of a fact which the defendant ought to know, and which the other party had a right to expect the defendant did know. See *Buford v. Caldwell*, 3 Mo. 477; *Snyder v. Findley*, Coxe, 48; *Thomas v. McCann*, 4 B. Mon. 601; *Lockridge v. Foster*, 4 Scam. 569; *Parham v. Randolph*, 4 How. Miss. 435; *Dunbar v. Bonesteel*, 3 Scam. 32; *Miller v. Howell*, 1 id. 499; *Craig v. Blow*, 3 Stew. 448; *Van Arsdale v. Howard*, 5 Ala. 596; *Munroe v. Pritchett*, 16 Ala. 785; *Juzan v. Tonlinin*, 9 Ala. 662.

(g) *Taylor v. Ashton*, 11 M. & W. 401.

(h) Thus, in *Collins v. Denison*, 12 Met. 549, it was *held*, that in an action for deceit in the sale of a horse, when proof is given that the defendant knowingly made false representations to the plaintiff concerning the horse, at the time of the sale, and that the plaintiff was induced by those representations to buy the horse, and confiding in them did buy him, the jury are authorized and required to find, that the defendant made the representations with the intent thereby to induce the plaintiff to buy the horse; and the plaintiff cannot legally be required to give any further proof of such intent of the defendant. See *Barley v. Walford*, 9 Q. B. 197; *Boyd v. Browne*, 6 Barr, 310.

(i) See *ante*, p. * 770, note (p).

obvious reasons, be deemed more important, and exert a greater influence, than if it lie without the contract, and be connected with it only collaterally, and by force of circumstances. On a ground somewhat similar, a distinction has been drawn between extrinsic and intrinsic circumstances, which may sometimes be of practical use. The rule seems to be, that a concealment or misrepresentation as to extrinsic facts, which, by affecting the market value of things sold, or in any such way, affects the contract, is not fraudulent, while the same concealment of defects in the articles themselves would be fraudulent. (*j*) But it is perhaps enough to say of this, that a fraud relating to external and collateral matters, is treated by the law with less severity than one which refers to things internal and essential.

In general, concealment is not in law so great an offence as misrepresentation, (*k*) whatever it may be morally. It is cer-

(*j*) *Laidlaw v. Organ*, 2 Wheat. 195, holds that a vendee is not bound to give information of extrinsic circumstances, which might influence the price of the article, although he knows the same to be exclusively within his own knowledge. See *ante*, vol. i., p. *578, note (*k*). See also *Blydenburg v. Welsh*, 1 Baldw. 331; *Barnett v. Stanton*, 2 Ala. 181. But see *Frazer v. Gervais, Walker* (Miss.), 72. See also *Hough v. Evans*, 4 McCord, 169, as to the duty of a vendor to disclose a latent defect, not known to the buyer. But this may arise from the law peculiar to that State, that a sound price implies a sound article.

(*k*) Concealment, to be actionable, must of course be of such facts as the party is bound to communicate. *Irvine v. Kirkpatrick*, House of Lords, 3 Eng. L. & Eq. 17. And see *Otis v. Raymond*, 3 Conn. 413; *Van Arsdale v. Howard*, 5 Ala. 596; *Eichelberger v. Barnitz*, 1 Yeates, 307. A purchaser is not bound to disclose his knowledge of a fraud which makes the title of the vendor to the property better than he himself supposes, where the means of knowledge are equally open to both. *Kintzing v. McElrath*, 5 Penn. St. 467. But see *Stevens v. Fuller*, 8 N. H. 463. In *Railton v. Mathews*, 10 Clark & F. 934, a party became surety in a bond for the fidelity of a commission agent to his employers. After some time the employers discovered irregularities in the agent's accounts, and put the bond in suit. The surety then instituted a suit to avoid the bond, on the ground of concealment by the employers of material circumstances affecting the agent's credit prior to the

date of the bond, and which, if communicated to the surety, would have prevented him from undertaking the obligation. On the trial of an issue whether the surety was induced to sign the bond by undue concealment or deception on the part of the employers, the presiding judge directed the jury that the concealment, to be undue, must be wilful and intentional, with a view to the advantages the employers were thereby to gain. *Held*, by the Lords (reversing the judgment of the Court of Session), that the direction was wrong in point of law. Mere non-communication of circumstances affecting the situation of the parties, material for the surety to be acquainted with, and within the knowledge of the person obtaining a surety bond, is undue concealment, though not wilful or intentional, or with a view to any advantage to himself. See *Prentiss v. Russ*, 16 Me. 30. If a broker sell property to a person, knowing it to be subject to the lien of a *fieri facias*, and conceal the fact, and send the party to investigate respecting the incumbrances on the property, in a direction whence he knows correct information cannot be obtained, although his false and fraudulent representations are made by actions rather than words, he is liable to an action on the case for deceit. *Chisholm v. Gadsden*, 1 Strobb. 220. But where the defendant, in an action for deceit in the sale of a slave, had been told that he was unsound, but did not believe it, it was held, that he was not bound to disclose it. *Hamrick v. Hogg*, 1 Dev. 351. As to evidence of fraudulent concealment, see *Fleming v. Slocum*, 18 Johns. 403. In *George v.*

tain, * however, that the doctrine of fraud extends to the suppression of the truth in many cases, as well as the expression of what is false. For although one may have a right to be silent under ordinary circumstances, there are many cases in which the very propositions of a party imply that certain things, if not told, do not exist. (*l*) This is peculiarly the case in contracts of insurance; where the insured is bound to state all facts within his knowledge which would have an influence upon the terms of the contract, and are not known, or may be supposed by him not to be known, to the insurer. (*m*) In these cases, and * in others which come within this principle, the *suppressio veri* has the same effect in law as the *expressio falsi*. * 778

The next rule of which we would speak is one which is frequently of very difficult application. It is the rule which discriminates between the mere expression of opinion and the statement of a fact. (*n*)¹ This is often a question for the jury; but, so far

Johnson, 6 Humph. 36, it was held, that where a party, during a negotiation for the sale of property, stated that the other contracting party must take the property at his own risk, such statement, though negativing a warranty, would not exonerate the party from a liability for a suppression of the truth or the suggestion of falsehood.

(*l*) Kidney v. Stoddard, 7 Met. 252, furnishes an excellent illustration of such a concealment as is actionable. There a father by letter recommended his minor son as worthy of credit, &c. He did not state that he was a minor. A saw the letter, and on the strength of it trusted the minor for goods for trade to a large amount. The jury were told, that if the father concealed the fact of the minority of the son, with the view of giving him a credit, knowing or believing, that if that fact had been stated he would not have obtained the credit, he was liable in law for the damage A sustained, and this ruling was affirmed by the whole court. And see Jackson v. Wilcox, 1 Scam. 344. So, where it was agreed between the vendors and vendee of goods, that the latter should pay 10s. per ton beyond the market price, which sum was to be applied in liquidation of an old debt due to one of the vendors; and the payment of the goods was guaranteed by a third person, but the bargain between the parties was not communicated

to the surety; it was held, that that was a fraud on the surety, and rendered the guaranty void. Pidcock v. Bishop, 3 B. & C. 605.

(*m*) Lindenean v. Desborough, 8 B. & C. 586; Bufe v. Turner, 6 Taunt. 338, an excellent case on the subject of concealment. See further Clark v. Man. Ins. Co. 8 How. 235; Fletcher v. Commonwealth Ins. Co. 18 Pick. 419; Walden v. Louisiana Ins. Co. 12 La. 134; Lyon v. Commercial Ins. Co. 2 Rob. (La.) 266; New York Bowery Ins. Co. v. New York Ins. Co. 17 Wend. 359.

(*n*) Where a person, having land for sale, gave an authority in writing to sell it upon certain terms, containing the following clause: "I will guaranty that there is 45,000,000 feet, board measure, of pine timber, on the township; and the purchaser may elect, within thirty days of the purchase, to take it at a survey of all the standing pine timber at one dollar per thousand, or pay the said \$45,000;" it was held, that this did not amount to a representation that there were in fact forty-five millions of feet of timber on the land. Hammatt v. Emerson, 27 Me. 308. So, in Sandford v. Handy, 23 Wend. 260, it was held, that a vendor of land is not liable for an expression of opinion of its value; but he is for a false representation as to its location, if the purchaser have not an opportunity at the time of

¹ The fact that a seller of land had "reason to believe" that it contained less acres than he stated, will not conclusively establish his fraudulent intent. Salisbury v. Howe, 87 N. Y. 128.

as it is matter of law, it may be said that a false representation, in order to have the full effect of fraud, must relate to a substantial matter of fact, and not merely to a matter which rests in opinion, or estimate, or judgment. (o) One reason is, the difficulty of proving that a mere statement of opinion is false, for no one can know what another thinks, with any certainty, unless the opinion is of some tangible matter of fact plainly before one's eyes, and then it would generally be a falsehood as to fact. Another reason is, that if one person has an opinion, so may another; and if any one relies on mere opinion, instead of ascertaining facts, it is his own folly. But this rule must not be pressed beyond its reason. For though the statement be in form only of an opinion; yet if that opinion was one on which the other party was justified in relying, either by the relations existing between the parties, (p) or by the nature * of the case, and it can be made to appear that the opinion expressed was not in fact held, it is not easy to see why this should not be regarded as a false statement of a fact, or rather why it is not, strictly speaking, a false statement of a fact.

The misrepresentation need not be made by the party whom it benefits, in order to constitute a fraud as against him. (q) It

seesing the land. So, also, he is liable for a misrepresentation as to the cost of the land.

(o) Thus, misrepresentations by one contracting party to the other, as to the value or quantity of a commodity in market, where correct information on the subject is equally within the power of both parties, with equal diligence, do not, in contemplation of law, constitute fraud. *Foley v. Cowgill*, 5 Blackf. 18. And the same principle was applied in *Baily v. Merrill*, 3 Bulstr. 94, where a carrier brought an action of deceit for representing that a load was only 8 cwt., when it was 20 cwt., whereby two of his horses were killed. Judgment was arrested, because the carrier might have weighed the load himself. But false representations by a vendor of real estate as to its income or profits will invalidate the sale. *Irving v. Thomas*, 18 Me. 418; *Hutchinson v. Morley*, 7 Scott, 341. And see *Maddeford v. Austwick*, 1 Simons, 89; *Wilson v. Wilson*, 6 Scott, 540; *Dobell v. Stevens*, 3 B. & C. 623.

(p) See *Shaeffer v. Sleade*, 7 Blackf. 178.

(q) And it is for this reason, that if A trusts B upon the fraudulent recommen-

dation of C, A is not left to his action for damages against C for the *deceit*, but the fraud of C invalidates the contract between A and B, and gives A the same right to retake the goods as if the fraud had proceeded directly from B himself. *Fitzsimmons v. Joalin*, 21 Vt. 129, is a very interesting and valuable case upon this point. In that case the creditors of a trader who was insolvent, but who wished to purchase goods, being unwilling to extend to him further credit, told him that they did not like to sell to him if he could buy elsewhere, and gave him the name of another merchant, and authorized him to refer to them. He attempted to purchase of this merchant, and being asked for references, gave the names of his original creditors, and was told to call again in half an hour. He did call again in the course of the day, and the purchase was effected. No inquiry was made by the vendor of the purchaser, as to his circumstances, nor did he give any assurances whatever relative thereto. On the same day, and after the purchase was effected, the purchaser met one of his original creditors, who told him that he had been called upon by the vendor, and that "he had given as good

may be his by adoption : as if a seller knew that a false statement had been made by a third party, which was known to the buyer, and was operating upon his mind, and inducing him to complete the purchase ; (r) if the seller only permits the buyer * to act under this delusion, he makes the falsehood his own, and it is his fraud.(s) And it is hardly necessary to repeat, what may be inferred from the general principles of agency, that a principal may commit a fraud by an agent, or may even be affected by the fraud of his agent, although personally honest. (t)

We have already seen that, generally, wherever one has a right

an account of him as he could and not make himself liable,"—"that he had told him that he, the purchaser, was a clever fellow, and was doing a thriving business in Vergennes ; and that he, the creditor, had sold him goods, and he paid well, and he was ready to sell him more." At the time of this transaction, the purchaser was in arrears to these same original creditors, to the amount of several hundred dollars each, and their demands had actually been placed in the hands of their attorney at Vergennes, where the purchaser resided, for collection ; and, as soon as they learned that this last purchase had been effected, they sent instructions to the attorney to attach the goods, as the property of the purchaser, upon their arrival at the place of destination. This was done, and, as soon as the vendor was informed of the insolvency of the purchaser, which was within a week after the attachment, he demanded the goods of the sheriff, offering to pay freight ; but the sheriff refused to surrender them. The attachment was made upon suits in favor of the several original creditors ; and it did not appear that either of these creditors, except the one above mentioned, had made any representation whatever in relation to the matter. And it was held, that the purchaser was responsible for the representations made by his creditor ; and that the vendor, having been cheated and deceived by means for which the purchaser was legally responsible, might sustain trover against the sheriff to recover the value of the goods so attached.

(r) *Crocker v. Lewis*, 3 Sumner, 8. In this case it was held, that a representation made by A to B, and communicated by B to C, who, relying thereupon, contracts with A, by which he is defrauded, shall have the same effect to avoid the contract as if made directly by A to C. See also *Bowers v. Johnson*, 10 Smedes & M. 169 ; *Hunt v. Moore*, 2 Barr, 105. So fraudu-

lant representations by A to B concerning another's credit or solvency, if communicated to C, who, relying upon them, trusts such third person, may give C a right of action against A, as much as if the communication had been addressed to C in person. For the foundation of such an action is not privity of contract ; but the author of the fraudulent misrepresentations is guilty of a tort, and is answerable for the damage suffered by any one from such tortious contract. *Gerhard v. Bates*, 2 Ellis & B. 476, 20 Eng. L. & Eq. 129 ; *Pilmore v. Hood*, 5 Bing. N. C. 97. In this last case, the defendant being about to sell a public-house, falsely represented to B, who had agreed to purchase it, that the receipts were £180 a month ; B having, to the knowledge of defendant, communicated this representation to plaintiff, who became the purchaser instead of B, held, that an action lay against defendant, at the suit of plaintiff. See also *Weatherford v. Fishback*, 3 Scam. 170. But in *McCracken v. West*, 17 Ohio, 16, it was held, that if A write a letter to B, desiring him to introduce the bearer to such merchants as he may desire, and describing him as a man of property, and the bearer do not deliver the letter to B, but use it to obtain credit with C, C cannot maintain an action for deceit against A, though the representations in the letter are untrue.

(s) See *Warner v. Daniels*, 1 Woodb. & M. 90 ; *Harris v. Delamar*, 3 Ired. Eq. 219 ; *Bowers v. Johnson*, 10 Smedes & M. 173 ; *Lawrence v. Hand*, 23 Miss. 105.

(t) *Fitzsimmons v. Joslin*, 21 Vt. 129. In this case *Redfield*, J., ably reviews the decided cases, and pointedly condemns the cases of *Cornfoot v. Fowke*, 6 M. & W. 358 ; and *Langridge v. Levy*, 2 M. & W. 519, 4 id. 336, as unsound. See also *Fuller v. Wilson*, 3 Q. B. 58 ; and *Cross v. Sacket*, 2 Bosw. 617. And see ante, vol. i. pp. *72, *73, and notes.

to rescind a contract, and exercises that right, he must restore the other party to the same condition that he would have been in if the contract had not been made. (*u*)¹ But where the right to rescind springs from discovered fraud, there is an exception to the rule: the defrauded party does not lose his right to rescind because the contract has been partly executed, and the parties cannot be fully restored to their former position; (*v*)² but he

(*u*) *Burton v. Stewart*, 3 Wend. 236; *Thayer v. Turner*, 8 Met. 550; *Kimball v. Cunningham*, 4 Mass. 502; *Perry v. Balch*, 23 Pick. 283. See also *ante*, p. *679, n. (a). But in *Stevens v. Austin*, 1 Met. 557, where B received the promissory note, &c., of A, for goods which A fraudulently obtained of him and sold to C, who had knowledge of the fraud; it was held, that B might maintain an action of trover for the goods against C, without restoring the note to A. *And Shaw*, C. J., said: "The question is whether the plaintiff was bound to tender back the note and money he had received before he could bring his action. We think he was not. Not to the defendant; for the plaintiff had received nothing of him. Nor could the defendant raise the question, whether the plaintiff had made restoration to Foster or not. It was res *inter alios*, with which the plaintiff had no concern, and was wholly irrelative to the issue between the parties." Generally, an offer to return the property received is as effectual as actually returning it. See *Howard v. Cadwalader*, 5 Blackf. 225; *Newell v. Turner*, 9 Porter, 420; *Barnett v. Stanton*, 2 Ala. 181. But see *Carter v. Walker*, 2 Rich. 40. In *Bacon v. Brown*, 4 Bibb, 91, it was held, that in an action for damages for deceit in a sale of personal property, it was not necessary to return, or offer to return, the property.

Aliter, if the buyer disaffirms the contract and sues for the price paid.

(*v*) Thus, where a vendor received, in part payment for goods, the note of a third person, and for the other part an order from the vendee on another person, which order was duly paid, it was held, that the vendor having taken the note upon the false and fraudulent representations by the vendee that the maker was solvent, might return the note to the vendee, and maintain assumpit for the balance of the amount of the goods sold above the order, without returning the order also; and that the defendant was not entitled to be placed entirely in *status quo*. *Martin v. Roberts*, 5 Cush. 126. Had the vendor sought by replevin to recover all the articles sold *in specie*, perhaps he would have been obliged to return all the consideration received. In *Frost v. Lowry*, 15 Ohio, 200, it was held, that if A obtains goods of B by false pretences, and gives therefor an accepted draft upon C, an accommodation acceptor, it is not necessary for B to return the draft to A, in order to rescind the sale, and recover back the goods. And so, if a person effect a compromise of his debts, by fraudulent representations, and procure a discharge of the same by paying a percentage thereon, and an action be brought to recover the balance, on the ground of fraud, it is not necessary, as preliminary to the right of

¹ A purchaser of counterfeit bonds of the United States, in whose possession they are, need not return such bonds before bringing an action to recover back the money paid by him for them. *Brewster v. Burnett*, 125 Mass. 68. Nor need a personal unsecured note given in fraud by a purchaser be returned before suing for the fraud. *Dayton v. Monroe*, 47 Mich. 193. Where the defendant fraudulently purchased of the plaintiff stock in a bankrupt company of which the defendant was trustee, the consideration paid need not be returned, but will be placed to the defendant's credit in an action to recover dividends on such stock. *Clews v. Traer*, 57 Ia. 459.

² In *Hendrickson v. Hendrickson*, 51 Ia. 68, *Seavers*, J., quotes the text with approval, and says that a party who has fraudulently procured the execution of a contract, is not entitled to an offer to restore as a condition precedent of rescission. In *American Wine Co. v. Brasher*, 14 Reporter, 609, *McCravy*, J., although quoting the text with disapproval, as not borne out by the authorities cited *supra*, in note (*v*), yet decides the case in exact accordance with the doctrine expressed in the text. In that case the defendants bought a hundred cases of wine, and after the sale of twenty cases rescinded the contract, and it was held, that such partial re-sale of the wine would not of itself prevent a rescission; but it was intimated that if the whole or a greater part of the subject-matter of the sale had been disposed of, the result might have been different.

must rescind as soon as circumstances permit, * and must * 781 not go on with the contract after the discovery of the fraud, so as to increase the injury necessarily caused to the fraudulent party by the rescission. (w)¹ In other words, if he rescinds on the ground of fraud, he must do so at once on discovering the fraud; (x) for he is not bound to rescind, and any * delay, * 782 especially if it be-injurious to the other party, would be regarded as a waiver of his right. Cases often say that fraud makes a contract *absolutely void*, (y) but by this it cannot be meant that the innocent party cannot waive the fraud, and insist upon the contract. And such a waiver would be inferred from his continuing to treat as his own the property which came to him by reason of the fraud. (z) The mere lapse of time, if it be considerable,

recovery, that the plaintiff repay, or offer to repay, the percentage received. The doctrine of the rescission of contracts does not apply to such a case. *Pierce v. Wood*, 3 Foster, 519.

(w) Thus, in *Masson v. Bovet*, 1 Denio, 69, it was held, that where a party has been led to enter into a contract by the fraud of the other party, he may, upon discovering the fraud, rescind the contract, and recover whatever he has advanced upon it; provided he does so at the earliest moment after he has knowledge of the fraud, and returns whatever he has himself received upon it. In that case the defendant, being the plaintiff in a judgment, and about to cause land of the judgment debtor to be sold on execution, fraudulently represented to the plaintiff that the land to be sold was free from any prior incumbrance, when in truth it was subject to older liens to more than its value, and thereby induced him to become the purchaser at the sheriff's sale for a considerable sum, and received from him in payment of his bid the note of a third person held by the plaintiff for a larger sum than the amount bid, giving back his own note for the balance. It was held, that the plaintiff, who had, immediately upon the discovery of the fraud, offered to give up the note received by him, and to assign the certificate of sale could maintain replevin in the detinere against the defendant, for the note so transferred to the defendant by him.

(x) Thus, where A engaged to carry away certain rubbish for B at a specified sum, but found upon commencing his work that B had made fraudulent repre-

sentations as to the quantity of rubbish, but nevertheless went on with the work, and then sought to recover more than the sum specified by the contract, it was held, that by going on with the work he had waived the fraud, and could not recover except upon the special contract. *Selway v. Fogg*, 5 M. & W. 83. *Saratoga R. R. v. Row*, 24 Wend. 74, is very analogous, and see *Herrin v. Libbey*, 36 Me. 350. So, if a party defrauded brings an action on the contract to enforce it, he thereby waives the fraud and affirms the contract. *Ferguson v. Carrington*, 9 B. & C. 59, *Kimball v. Cunningham*, 4 Mass. 502. See also *Whitney v. Allaire*, 4 Denio, 554; *Lloyd v. Brewster*, 4 Paige, 537. So if, after a party has acquired a knowledge of facts tending to affect a contract with fraud, he offers to perform it on a condition which he has no right to exact, he thereby waives the fraud, and cannot set it up in an action on the contract. *Blydenburgh v. Welsh*, Baldw. 331. And see *Lamerson v. Marvin*, 8 Barb. 10. But in *Adams v. Shelby*, 10 Ala. 478, it was held, that when a party, by fraud, obtains possession of property, under a contract which he had not complied with on his part, an offer by the defrauded party to make a new contract, which is not acceded to, is not a waiver of any right he had against the other for the fraud practised.

(y) *Flynn v. Williams*, 7 Ired. 32.

(z) Thus, in *Campbell v. Fleming*, 1 A. & E. 40, it was held, that if a party be induced to purchase an article by fraudulent representations of the seller respecting it, and after discovering the fraud

¹ See *Cobb v. Hatfield*, 46 N. Y. 533; *Bulkley v. Morgan*, 46 Conn. 393.

goes far to establish a waiver of this right; and if it be connected with an obvious ability on the part of the defrauded person to discover the fraud at a much earlier period, by the exercise of ordinary care and intelligence, it would be almost conclusive. (a)

The fraudulent party cannot himself assert his fraud, and claim as his right any advantages resulting from it. To permit him to do so would be to contradict the plainest principles of law. No man can be permitted to found any rights upon his own wrong; (b)¹ and it would seem to be an inference from this, that, if both parties are in fault, the law will not interfere between them; and this is so, if both parties are actually fraudulent, although the beginning, and the greater fraud, may be on one side or the other. (c)

The general rule, that equity gives relief only where the law cannot, seems not applicable to cases of fraud; for there equity and law have, in some cases at least, a concurrent jurisdiction. But where the injured party confines his claim to damages, he should bring his action at law. If he seeks to set aside the contract entirely on this ground, he must either wait until sued upon

the contract, and then interpose this defence at law, or
 * 783 * by his bill in equity seek for an injunction, or other

proper remedy. There is one distinction, however, which rests upon cases of authority, but is in its own nature so far technical that we have some doubts whether it would now be generally adopted. It is this, that while in a suit on a simple contract, fraud is a good and complete defence, it is not pleadable in bar to an action founded upon a specialty. Some of the courts which have recognized, and perhaps enforced this distinction, have doubted its reasonableness; and in that mingling of law and equity jurisdiction, which has made much progress, and threatens, or promises, to make more, we think this distinction will dis-

continue to deal with the article as his own, he cannot recover back the money from the seller. And *semel* that the right to repudiate the contract is not afterwards revived by the discovery of another incident in the same fraud.

(a) See *Veazie v. Williams*, 3 Story, 612. But see *Attwood v. Small*, 6 Clark & F. 234; *Irvine v. Kirkpatrick*, House of Lords, 3 Eng. L. & Eq. 17.

(b) *Jones v. Yates*, 9 B. & C. 532, per Lord *Tenterden*; *Taylor v. Weld*, 5 Mass.

116; *Ayres v. Hewett*, 19 Me. 281; *Hollis v. Morris*, 2 Haring. (Del.) 128. Therefore one who gives a fraudulent bill of sale to defraud his creditors cannot set it aside. *Bessey v. Windham*, 6 Q. B. 166; *Nichols v. Patten*, 18 Me. 231.

(c) *Warburton v. Aken*, 1 McLean, 460; *Goudy v. Gebhart*, 1 Ohio State, 262; *Nellis v. Clark*, 20 Wend. 24; *Smith v. Hubbs*, 1 Fairf. 71; *Hoover v. Pierce*, 27 Miss. 13.

¹ See *Begbie v. Phosphate Sewage Co.* L. R. 10 Q. B. 491; 1 Q. B. D. 679.

pear. (*d*) It has been said that equity will act upon presumptions of fraud, which law might not deem sufficient to justify a verdict. (*dd*)

* It is said that the law never presumes fraud. If this * 784 maxim is regarded merely as an expression of the horror

(*d*) Any such distinction is denied in Massachusetts. See *Hazard v. Irwin*, 18 Pick. 95. In that case it was held, that in an action on a contract under seal, in which one of the contracting parties is seeking to enforce the contract against the other, the defendant may plead that the contract was obtained by fraud and imposition. And *Shaw, C. J.*, in delivering the judgment of the court, said: "It was argued on the part of the plaintiff, that whatever might be the effect of the alleged fraud in defence of a suit on a simple contract, such a fraud is not pleadable in bar of an action on a deed or specialty. Several cases are cited in support of this position, from the decisions of the courts of New York; and the point seems to be there so settled by a series of cases. It is a little remarkable, however, that the original case, which constitutes the commencement of this series, is hardly an authority for the point. *Dorlan v. Sammis*, 2 Johns. 179, note. The case was debt on bond, for the price of a slave; the defendant relied on the fact that the negro was free, and not the property of the plaintiff, when he sold her; a mere failure of consideration, and with no averment of fraudulent representation. The Court ask, 'Can a defendant in a court of law get rid of a bond, given on a sale of a chattel, on the ground of failure of consideration?' There is no allegation that the plaintiff sold the chattel fraudulently, and knowing that he had no title. There is no case in which a bond can be set aside but where the consideration was void in law, or where there was fraud.' But it was afterwards ruled, that fraud cannot be pleaded to a specialty in a court of law, not affecting the execution of the bond itself; but these decisions are founded mainly on the consideration, that a more adequate remedy, and one better adapted at once to discover the fraud and to relieve against it, is afforded in equity. In one of the late cases on the subject, Chief Justice *Savage* says: 'I confess I can see no very good reason why this defence should be excluded from a court of law, and the party sent into a court of equity; but so the point has always been decided.' *Stevens v. Judson*, 4 Wend. 473. But whatever may have been decided elsewhere, we think it has long been a settled

rule in Massachusetts, that such a fraud as that set forth in this case is a good defence, as well to an action founded on a deed as any other; it is rather acted on as a settled rule than discussed and decided in any particular case. The cases cited on the argument are cases in which the judgment of the court, upon great consideration, proceeded upon this as a settled rule of law. *Bliss v. Thompson*, 4 Mass. 492; *Somes v. Skinner*, 16 Mass. 348; *Somes v. Brewer*, 2 Pick. 191. The second of the above cases was a real action, involving a question of title; and the deed, by which the plaintiff conveyed to the defendant, being shown to have been obtained by imposition and fraud, it was held that no title passed. The last of the above cases assumed the same rule to be a settled rule of law; but the case was distinguishable in this, that the first grantee, who obtained the deed from the plaintiff by fraud and imposition, had conveyed the land to a *bona fide* purchaser without notice, and so it was held, that as against him the rule did not apply. The general doctrine was also settled in a case in which the opinion was given by *Parsons, C. J.* It is directly in point. It was on covenant, and the defendant pleaded that it was obtained by fraud and imposition, and the defence was held good. The question as to the relative jurisdiction of courts of law and equity is there considered. The learned judge concludes this part of the case thus: 'But when a court of law has regularly the fact of fraud admitted or proved, no good reason can be assigned why relief should not be obtained there, although not always in the same way in which it may be obtained in equity.' *Boynton v. Hubbard*, 7 Mass. 119. The court are all of opinion, that in an action on a contract, though under seal, in which a party is seeking to enforce a contract against the other contracting party, a plea and proof that such contract was obtained by fraud and imposition would constitute a good defence at law, and, of course, that had this been a suit against *Penman*, he might have made this defence at law." To the same effect is *Hoitt v. Holcomb*, 3 Foster, 535; *Hewin v. Libbey*, 36 Me. 350; *Hancock's Appeal*, 34 Penn. St. 155.

(*dd*) *Ward v. Lambert*, 31 Ga. 150.

with which the law regards fraud, and its unwillingness to suppose that any one can be guilty of a thing so base, it may be useful. And if it means no more than that the law never presumes fraud without any evidence, as it will sometimes presume payment or title from lapse of time; (*e*) or that fraud will not be imputed if the facts upon which it is predicated may consist with honesty of intention, (*ee*) it is true. But this language is sometimes used when nothing more is meant than that it will not too readily admit fraud upon slight evidence; and when it might be taken to mean, what certainly is not true, that the law will never imply fraud where it is not directly proved, or will not call and treat as constructive fraud that which is not proved to be actual fraud. (*f*) There is such a phrase in use as legal fraud; meaning not fraud which the law allows, but that which the law for good reasons calls fraud, although neither the dictionary nor morality would give it that name. The doctrine on this subject is not yet fully settled. It would often be very harsh, and apparently very unjust, to inflict all the consequences of fraud upon one who had made a material misstatement in ignorance, only because of his own error; but it would seem to be still more unjust to permit all the consequences of this false statement to fall and rest on him whose only fault

was in believing that one told the truth, who in fact was * 785 telling that which was false. In our first volume * we have considered this subject somewhat in connection with the law of agency. In general, we should say, that where one states what is not true, and injurious consequences result to another, the municipal law, although, as we have said, not identical with the law of morality, may well borrow some light from it. The question should be asked, first, whether the statement was made in actual ignorance, and, then, whether this ignorance was innocent. Nor would it be enough to give such a falsehood immunity, that the ignorance was not intentional and wilful, if it arose from the unquestionable negligence of the party. Such a case as that would fall within all the reason, and we think all the law, of intentional falsehood. But we go further; and say, that if the ignorance might have been avoided by such care, and such intelli-

(*e*) *Hatch v. Bayley*, 12 Cushing. 27.

(*ee*) *Lyman v. Cessford*, 15 Iowa, 229.

(*f*) It is frequently said, that courts of equity can act more upon presumptive evidence of fraud than courts of law, but the consideration of that subject in detail

is foreign to the object of the present work. See *Warner v. Daniels*, 1 Woodb. & M. 90; 1 Story, Eq. Jur. § 190; *Rosevelt v. Fulton*, 2 Cowen, 129; *Neville v. Wilkinson*, 1 Bro. Ch. 543.

gence, and such investigation, as the party making the statement was bound to have and use, then he is responsible for its effects. (g) But while we admit that he to whom a deliberate assertion is made, of a fact material to his conduct and his interests, has a right to demand that honest inquiry and careful scrutiny should precede such assertion, and that, in their absence, he who makes it must be held responsible for it, we stop short of the doctrine, that whoever asserts what he does not know to be true, is in the same category with him who asserts what he knows to be false. This would be to say, that wilful falsehood and mere mistake are the same thing in the law; which cannot be true. Although it may be true, that when a loss must fall either on one who misleads or one who is misled, it shall be cast by the law on the first rather than the last, still, this is not because * of * 786 fraud, actual, constructive, or legal, but simply because each party should bear the consequences of his own acts.

It is certain that misrepresentation may not imply fraud in fact, because it may spring wholly from mistake; and nothing would be gained by calling a misrepresentation, which is innocent in fact, fraudulent in law. It is enough to say, that material misrepresentations which go to the substance of a contract, avoid that contract, whether they are caused by mistake, and occur wholly without fault, or are designed and fraudulent. (h)

This principle is carried so far, that if one acquires property by a purchase founded upon his misrepresentations, especially if they be not only false but fraudulent, he acquires no right in the property, but the seller may retake it from the person so acquiring it,

(g) And the case of *Adamson v. Jarvis*, 4 Bing. 66, well illustrates this principle. There the defendant gave the plaintiff, an auctioneer, an order and authority to sell certain goods, representing himself to be the true owner. The plaintiff sold them, and paid over the proceeds to the defendant. The goods proved not to belong to the defendant, and the true owner recovered their value of the auctioneer. The latter was allowed to recover of the defendant for having falsely represented himself to be the true owner, although there was no evidence of any *fraud*, or malice, or knowledge that he was not the true owner. And this was placed on the ground of an implied contract on the part of the defendant to *indemnify* a person for doing what he had employed him to do. And false statements, by a vendor of land, of the quantity, quality, or bounda-

ries of the premises sold, if material, and relied upon by the other party, will avoid the sale, whether the vendor knew them to be false or not. *Warner v. Daniels*, 1 Woodb. & M. 90; *Ainslie v. Medlycott*, 9 Ves. 13; *Shackelford v. Handley*, 1 A. K. Marsh. 500; *Munroe v. Pritchett*, 16 Ala. 785.

(h) This principle is asserted or implied in many of the cases already cited in this chapter; as in *Buford v. Caldwell*, 3 Mo. 477; *Parham v. Randolph*, 4 How. (Miss.) 435; *Lockridge v. Foster*, 4 Scam. 569; *Snyder v. Findley*, Coxe, 48; *Warner v. Daniels*, 1 Woodb. & M. 90. We add to these, *Smith v. Babcock*, 2 Woodb. & M. 246; *Mason v. Crosby*, 1 Woodb. & M. 342; *Doggett v. Emerson*, 3 Story, 700; *Thomas v. McCann*, 4 B. Mon. 601.

in the same manner as if it had been stolen ; that is, with all reasonable, necessary force. (i)

A recent case in California has drawn the distinction, that false representations cannot avoid a contract, unless they are made in reference to matters of fact, and not of law. (ii)

As fraud from its very nature seeks concealment, and sometimes, where it certainly exists, is not susceptible of direct proof, a wide consideration of all the circumstances of the case is permitted, and evidence received upon which this consideration may be founded. (ij) And it is sometimes said that courts of equity will admit evidence of fraud, and draw from it an inference of fraud, which courts of law would not do. (ik)

Akin to the defence of fraud, and sometimes connected with it, is the defence of mistake. Generally, the mistake of one party, the other party being ignorant thereof, does not vitiate a contract. (il) If the other party knew and did not correct it, this may be evidence of fraud. (im) Both parties may so mistake that the written agreement does not express their intention. If obvious, the court will rectify it. (in) Otherwise, as evidence cannot be admitted to vary a written contract, by the strict rule of law it would stand ; but equity would either reform it or set it aside. (io)

(i) *Hodgeden v. Hubbard*, 18 Vt. 504. See *ante*, book 3, ch. 4, § 1.

(ii) *People v. San Francisco*, 27 Cal. 655

(ij) *Lincoln v. Clafin*, 7 Wallace, 133; *Perkins v. Prout*, 47 N. H. 387; *Hicks v. Stone*, 13 Minn. 434; *Blackman v. Wheaton*, 13 Minn. 326; *McNorton v. Akers*, 24 Iowa, 369.

(ik) *King v. Moon*, 42 Mo. 551. See *ante*, p. *783.

(il) *Scott v. Littledale*, 27 L. J. Q. B. 201.

(im) *Garrard v. Fraukol*, 31 L. J. C. 604.

(in) *Wilson v. Wilson*, 23 L. J. C. 697.

(io) See *Murray v. Parker*, 19 Beav.

305, and *Bentley v. Mackay*, 3 L. J. C. 697.

* CHAPTER IV.

*787

OF ESTOPPELS.

SECT. I.—*Of Estoppels in General.*

COKE defines Estoppel, as existing, when “a man’s owne act or acceptance, stoppith or closeth up his mouth to alleage or plead the truth.” (a) This definition is accepted by Comyn. (b) But while it seems to justify a part at least of the opprobrium which has been cast upon estoppels, it does not appear to prevent a just view of them. We should say rather, that an estoppel was an admission or a declaration, which the law does not permit him who has made it to deny or disprove for his own benefit, and to the injury of another.

Estoppel may be used as a defence against a party who is thus precluded by his act or statement from maintaining his action; or it may be used by a plaintiff to prevent or avoid a defence which is open to a similar objection.

The law of estoppels, especially in reference to deeds and real *actions, had become so much embarrassed and obscured by technicalities, and was so often used as a means of injustice, that it became a common saying, that “estoppels are odious in the law.” (c) But as they are now regulated and prac-

(a) Co. Litt. 352 a. “Touching estoppels, which is an ancient and curious kind of learning,” Coke, in the passage cited, gives these among other rules: That every estoppel ought to be reciprocal, that is, to bind both parties, and this is the reason that regularly a stranger shall neither take advantage nor be bound by an estoppel, but all strangers shall take benefit of that record which doth run to the disability of a person. And see Doe v. Errington, 6 Bing. N. C. 79; Lansing v. Montgomery, 2 Johns. 382; Worcester v. Green, 2 Pick. 425; Langer v. Felton, 1 Rawle, 141; Wright v. Hazen, 24 Vt. 143. It must be certain to every intent, and not be taken by argument nor inference; matter alleged that is neither traversable nor material does not estop; an estoppel against an estoppel puts the mat-

ter at large. Carpenter v. Thompson, 3 N. H. 204. Where verity is apparent in the same record, there the adverse party shall not be estopped to take advantage of the truth. Sinclair v. Jackson, 8 Cowen, 543.

(b) Com. Dig. Estoppel, A. 1 Comyn, same title, E. 1 to 10, in addition to Coke’s recapitulation, says, there is no estoppel by a record *coram non judice*, nor by an unauthorized act *in pais*, nor if an interest passes from a party; i. e. though lessor’s title at time of demise may not be disputed, its expiration may be shown. Doe v. Seaton, 2 Cromp. M. & R. 728; Neave v. Moos, 1 Bing. 360, 8 J. B. Moore, 389.

(c) Lampon v. Corke, 5 B. & Ald. 606; Owen v. Bartholomew, 9 Pick. 520; Steinhauer v. Witman, 1 S. & R. 438.

tised, we should say that there was but little ground for, and but little force in, this principle.

They are of many kinds; which may be arranged in three classes: 1. Estoppels by Record; 2. Estoppels by Deed; 3. Estoppels *in Pais*.

SECTION II.

ESTOPPEL BY RECORD.

The general rule on this point is, that no man shall be permitted to make any averment which contradicts the record of that wherein he was a party. It is as ancient as the Year-Books. (*d*) But while it remains true, it has comparatively little importance, as the law of *estoppel*, at this time.

As an illustration of the old rule, it may be said, that if any one suffered a recovery or levied a fine to A of certain land of B, in the name of B, the record would bar B from an action to recover the land; nor could he maintain such an action, unless he previously caused the record to be falsified or amended, by an action of deceit. (*e*) So, if by his plea, he confessed or asserted a certain tenure of land, he could not, even in another action, deny or contradict this assertion, and found himself upon a different tenure. (*f*) So he might be estopped by *omission*; that is, by not denying of record; as, if A were sued in an action of waste by B, and pleaded that there was no waste, he could not afterwards aver that he was not in the land by the demise of B, though this might

be a perfect defence if he could make it. (*g*) Now, however,

* 789 there is little force in this principle * as one of *estoppel*, although, as one of *evidence*, it is still important, because an official record is always regarded as a most solemn and weighty evidence; although it is not generally absolute or conclusive, because it is open to rebutter, by proof of fraud or material error. (*h*)¹

(*d*) 39 H. 6, 32 b.

(*g*) 1 Roll. 864, 1. 15. See Barron v.

(*e*) 1 Roll. Abr. 863, 1. 17, 20, 22; Rex Paulling, 38 Ala. 292. See, as to effect v. Carlile, 2 B. & Ad. 362; Cole v. Green, of entry of "neither party," March v. 1 Lev. 309. Hammond, 11 Allen, 483.

(*f*) 1 Roll. 64, 1. 45.

(*h*) This question has arisen, princi-

¹ An admission of partnership by a defendant in a suit in which the plaintiff was neither a party or privy, the plaintiff not being shown to have relied on the admission, will not estop the defendant from showing that the admission was a mistake. Dahlman v. Forster, 55 Wis. 382.

Perhaps this principle, as strictly one of estoppel, may be the foundation of one rule of great force and frequent application. It is, that matters which have once been finally determined by adequate judicial authority, shall not again be controverted by any persons who were either parties or privies to that determination. Thus, it has been held, a former recovery of damages for injuries sustained from the same cause, establishes the right of the plaintiff to recover for damages afterwards sustained from the same cause. (*hh*) A verdict and judgment are a conclusive estoppel only as to facts without proof or admission of which they could not have been rendered. (*hi*) The general rule we have stated and endeavored to illustrate in the ninth section of the preceding chapter.

SECTION III.

OF ESTOPPEL BY DEED.

This is at present more frequently resorted to in practice than the former mode of estoppel; but it does not seem to demand, in a work like the present, a full exposition. The general rule may be thus illustrated. A party to a bond, or to an indenture, or to a deed of conveyance, can deny nothing which the bond in its condition, or the indenture or deed of conveyance in their recitals, aver. (*ij*) But the seal has no longer the solemnity or

pally, where former judgments, or some facts incidentally disposed of in or by a former judgment, is relied upon by a party, and the record is offered as evidence. We should say that the weight of American authority was in favor of the doctrine, that the record is evidence, but not conclusive evidence. See *Robinson v. Jones*, 8 Mass. 536; *Maley v. Shattuck*, 3 Cranch, 458; *Peters v. Warren Ins. Co.* 3 Sumn. 389; *Gelston v. Hoyt*, 3 Wheat. 246; *Beatty v. Randall*, 3 Allen, 441. In England it is perhaps conclusive evidence. See *Blad v. Bamfield*, 3 Swanst. 604.

(*hh*) *Plate v. Central R. R. Co.* 37 N. Y. 472.

(*hi*) *Burlen v. Shannon*, 99 Mass. 200; *Lea v. Lea*, id. 498.

(*ij*) 1 Roll. Abr. 872, 80, 50; *Jewell v. _____*, 1 Roll. R. 408; *Rainsford v. Smith, 2 Dyer*, 196 a. If a recital is a statement which all parties have agreed upon as true, it is conclusive on all. *Goodtitle v. Bailey*, 2 Cowp. 597; *Right v. Proctor*, 4

Burr. 2208; *Wood v. Day*, 7 Tant. 646; *Fairtitle v. Gilbert*, 2 T. R. 169; *Hill v. Manchester & S. W. Co.* 2 B. & Ad. 544; *Lainson v. Tremere*, 1 A. & E. 792; *Harding v. Ambler*, 3 M. & W. 279; *Doe v. Horne*, 3 Q. B. 757; *Stowe v. Wyse*, 7 Conn. 214; *Washington Co. Ins. Co. v. Colton*, 26 id. 42; *Jackson v. Parkhurst*, 9 Wend. 209; *Decker v. Judson*, 16 N. Y. 439; *Carver v. Jackson*, 4 Pet. 1, 83. But even in an indenture, where a recital is intended as the statement of one party only, it is binding on him alone. *Stronghill v. Buck*, 14 Q. B. 781. If the condition contain a generality to be done, the party shall not be estopped to say there was not any such thing; but in all cases where the condition of a bond has reference to a particular thing, the obligor shall be estopped to say there is no such thing. *Roll. Abr. Estoppel*, P. 7; *Strowd v. Willis, Cro. Eliz.* 362; *Shelley v. Wright, Willes*, 9. Thus in *Billingaley v. State*, 14 Md. 369, it was held, that a recital of a

* 790 * force which it once had ; and while this principle is of great importance as a rule of evidence, or rather as strengthening the rule, that nothing outside of a written contract shall be permitted to come in and contradict or avoid the contract, as mere matter of estoppel it has little force, unless when it rests upon the equitable grounds to be mentioned in the next section.

A general rule has, however, been asserted which certainly rests upon reason and justice. It is, that where a party has accepted and made his own the benefit of a contract, he has estopped himself from denying in the courts the validity of the instrument by which those benefits came to him. (ii)¹

The most important application of the rule of estoppel by deed, is this : if a grantor, or those claiming under him, come into a new title subsequently to the grant, which title is paramount to that which the grantor had, or the grantee has, he or they may enforce this title, and oust the grantee or those claiming under him, provided, that the grant was without warranty ;² but not if the grant were with warranty. The reason usually assigned being, that the

grantee, if evicted, would turn round upon the evictors, on
* 791 the covenants of warranty. (j) The rule *itself has been

person's office, as collector, in the condition of an official bond for the faithful performance of the duties of the office, estopped the parties to the bond from denying that the principal obligor had been appointed collector. A general recital is not an estoppel, though the recital of a particular fact is. Salter v. Kidley, 1 Show. 58; Rainsford v. Smith, *supra*. In Right v. Bucknell, 2 B. & Ad. 278, a covenant that one was "legally or equitably" entitled, did not estop a subsequent mortgage on the legal estate which the covenantor afterwards acquired. In most American courts, the recital in a deed of the payment of money or consideration clause, may be denied, the object of the deed being to transfer the title, and not to state the terms of the purchase. The general operation of the deed being untouched, evidence varying the consideration may be received. M'Crea v. Purmort, 16 Wend. 460; White v. Miller, 22 Vt. 380; Wilkinson v. Scott, 17 Mass. 249;

Pritchard v. Brown, 4 N. H. 397; *supra*, vol. i. p. *430, n. (j). But there is no estoppel which shall prevent a party from saying that a deed is inoperative and void. Doe v. Howells, 2 B. & Ad. 744; Doe v. Ford, 3 A. & E. 649; Blake v. Tucker, 12 Vt. 39; Kinsman v. Loomis, 11 Ohio, 475; Winsted Bank v. Spancer, 26 Conn. 195; Wallace v. Miner, 6 Ohio, 366; Kercheval v. Triplett, 1 A. K. Marsh. 493; People's Savings Bank v. Collins, 27 Conn. 142.

(ii) Hathaway v. Payne, 34 N. Y. 92.

(j) A grant, release, or bargain and sale, only operate as a conclusion between parties and privies, and do not bind or transfer future or contingent estates, but act only on that estate which the grantor actually had. Jackson v. Hubble, 1 Cowen, 613; Edwards v. Varick, 5 Denio, 664; Blanchard v. Brooks, 12 Pick. 47; Doane v. Willcutt, 5 Gray, 328; Ham v. Ham, 14 Me. 351; Kinsman v. Loomis, 11 Ohio, 475; Bell v. Twilight, 6 Foster, 401. But a feoffment, fine, or common recovery,

¹ As where a city by its contract, not invalid, but in the making of which there is a defect of power, induces performance and the expenditure of money, it is liable. East St. Louis v. East St. Louis Gas, &c. Co. 98 Ill. 415.

² As by a quitclaim deed. Holbrook v. Debo, 99 Ill. 372. Where, however, a grantor assumed to convey a title by a deed, in which the only covenant was that of quiet enjoyment, he was estopped from asserting an after-acquired title as against his grantee. Smith v. Williams, 44 Mich. 240.

carried so far as to hold, that one who, without title, but in possession of land, mortgages it with warranty, and afterwards acquires title, the title acquired by the mortgagor passes at once to the mortgagee by force of the warranty. (*k*) And some of our courts have even held, that the warranty in the deed of a married woman, has the same effect in transferring future interests, as if made by a *feme sole*. (*l*) In other courts this is denied. (*m*)

The authorities for the general rule are numerous and decisive; and we regard not the rule only, but the reason above assigned for the rule, as a part of our American common law. But this reason for the rule has been questioned, with great ability, although not, as we think, overthrown, in the notes to the American edition of Smith's Leading Cases. (*n*) The learned annotators prefer to place the rule, which, in itself, can hardly be questioned, "on the broader basis of giving effect to the intention of the parties as expressed in the deed." (*o*) We should admit that the rule rests on this foundation also; and that a grantor without warranty, should be considered as intending to grant only what he has; while a grantor with warranty, intends to grant what he has or may subsequently acquire, otherwise than by the grantees act. But we do not see that this is necessarily inconsistent with the commonly received doctrine.

An application of the principle of estoppel by deed has been made where a railroad company executed a mortgage to secure 400 bonds, \$1000 each, and by mistake issued and sold 420, the purchasers taking them in ignorance of the over-issue. The com-

from their great solemnity, always passed an estate and divested the feoffor of all his estate, present or afterwards acquired. Co. Litt. 9 a; Helps v. Hereford, 2 B. & Ald. 242; Rawle on Cov. 320, 321. But with warranty there is an estoppel, to prevent circuity of action, as has been said, though Mr. Rawle questions the sufficiency of the reason to sustain all the cases. Jackson v. Winslow, 9 Cowen, 13; Kellogg v. Wood, 4 Paige, 578; Dart v. Dart, 7 Conn. 250; Pike v. Galvin, 29 Me. 183; Kimball v. Blaisdell, 5 N. H. 533; Blake v. Tucker, 12 Vt. 39; Wade v. Lindsay, 6 Met. 407; Bush v. Marshall, 6 How. 284, 291; Thorndike v. Norris, 4 Foster, 454.

(*k*) White v. Patten, 24 Pick. 234; Wark v. Willard, 13 N. H. 389; Baxter v. Bradbury, 20 Me. 260; Root v. Crock, 7 Barr, 378; and by statute in Arkansas. In England, such conduct seems to be re-

garded as creating a personal equity attaching to the conscience of the party, and not descending with the land. Sugden, quoted in Rawle on Covenants, 345; Morse v. Faulkner, 1 Austr. 11.

(*l*) Hill v. West, 8 Ohio, 222; Massie v. Sebastian, 4 Bibb, 433; Fowler v. Shearer, 7 Mass. 14, 21.

(*m*) Jackson v. Vanderheyden, 17 Johns. 167; Carpenter v. Schermerhorn, 2 Barb. Ch. 314; Wadeleigh v. Elyes, 6 N. H. 17; Den v. Demarest, 1 N. J. 525, 541, and by statute in Virginia, Illinois, Michigan, and Wisconsin.

(*n*) 2 Smith, L. Cas. (Am. ed.) 625-642. See also Rawle on Covenants, c. ix.

(*o*) 2 Smith's L. Cas. (Am. ed.) p. 637, citing Jackson v. Bull, 1 Johns. Cas. 81; Jackson v. Murray, 12 Johns. 201; Jackson v. Stevens, 16 id. 110; Brown v. McCormick, 6 Watts, 60; Reeder v. Craig, 3 McCord, 411.

pany was held estopped from denying that the extra twenty were secured by the mortgage. (*oo*)

A deed does not work a conclusive estoppel as to facts which it recites, if they do not enter into the contract of conveyance; such as the date, the receipt of the price, or other consideration. (*op*) But as to facts which belong to the contract, they are conclusive. Thus, if one sells land bounded on a street, he is estopped from shutting it up from the use of the grantee, although it has not been dedicated to the public. (*oq*)

OF ESTOPPEL IN PAIS.

An estoppel *in pais*, or an estoppel in fact, is one which does not spring from a record, or from a deed; but is made to appear to the jury by competent evidence. While the former modes of estoppel have declined in importance, and have been restrained within narrower limits than of old, estoppel *in pais* has been greatly extended, and is found to be usefully applicable to a great variety of cases.¹ Estoppel by deed or record is sometimes called technical estoppel, and estoppel *in pais* is called equitable estoppel. From the course of recent adjudication it would seem that courts are inclined rather to restrict technical estoppel, and to favor the remedy or defence of equitable estoppel.

Originally it was applied, almost exclusively, to those acts which were almost, or for some purposes quite, the equivalent of deed or record; as a feoffment, or an attornment *in pais* after a grant by deed of a reversion. It was, however, at an early period extended beyond those limits; and in some directions quite far. And now, a long course of adjudication, founded in part upon what may be called commercial principles, and in part upon equitable principles, seems to have established two forms of estoppel *in pais*. These, so

(*oo*) Stevens *v.* Benton, 1 Duvall, 112. State, &c. 22 Ark. 303; Shroyer *v.* Rich-
mond, 16 Ohio, 455. See on this subject of estoppels by deed, Carpenter *v.* Simmons, 1 Rob. 360; Saco *v.* Casanueva, 30 Cal. 560; Edwards *v.*

(*op*) Rhine *v.* Ellen, 36 Cal. 362. (*oq*) Smith *v.* Lock, 18 Mich. 56.

¹ For ordinary definitions of estoppels *in pais*, see Carr *v.* London, &c. R. Co. L. R. 10 C. P. 307.

far from being considered as subject to the odium which once attached to the whole law of estoppel, are grounded upon principles of the most obvious and certain reasonableness and justice. And they are freely applied in recent times, both in England and in this country, whenever it is thought that they would aid in the enforcement of right or in the prevention of wrong.

The first of these principles is that which relates to, and is perhaps confined to, negotiable paper. This, the law-merchant recognizes (as has been said in a former chapter) as, for many purposes and in many respects, the equivalent of money ; and seeks to make it an adequate equivalent. The rule, that the consideration of negotiable paper cannot be inquired into, excepting as between immediate parties, is founded upon this principle of estoppel ; that is, upon the principle, that a party who has for his own benefit, and in his own business, made use of negotiable paper, as money, is estopped from taking this character away from it, by showing the absence of one thing * that might be essential * 793 to the validity of the contract, by which the paper is to be replaced by money. Other rules in relation to this subject rest upon the same foundation ; as that which prohibits the acceptor, or indorser, from impeaching, by proof of forgery or other inherent defect, the paper which, bearing his name by his own act, has passed as money into the hands of an innocent party by fair negotiation. We only mention these things here, and, without further discussion, refer to our chapter on Indorsement, in our first volume, for a more detailed statement of the rules, and of the applications of them.

The other class of estoppels *in pais* is of a different, and yet an analogous character. In them the rule rests upon what may seem to be but a broader assertion of the same principle. It is, that no man shall found a right upon his own wrong ; or, in other words, that whatever a man has said, or implied, wrongfully, for his own advantage, (*p*) that he shall be bound by, when it may turn to his disadvantage, however false it may be in fact. We would state the rule thus. When a man has made a declaration or a representation, or caused, or, in some cases not prevented, a false impression, or done some significant act, with intent that others should rely

(*p*) *Jewett v. Miller*, 10 N. Y. (6 Seld.) 402. See also *Green v. Green*, 16 La. An. 39, where it was held, that the reputed father, who has introduced the mother as

his wife, and the child as his son, will not be permitted afterwards to bastardize it, to resist a claim to property.

and act thereon, and upon which others have honestly relied and acted, he shall not be permitted to prove that the representation was false, or the act unauthorized or ineffectual, if injury would occur to the innocent party who had acted in full faith in its truth or validity. (q)¹ For that which would otherwise be only a

(q) *Greaves v. Key*, 3 B. & Ad. 313; *Heane v. Rogers*, 9 B. & C. 577. In *Pickard v. Sears*, 6 A. & E. 469, per *Dennan*, C. J.: "The rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." *Gregg v. Wells*, 10 A. & E. 90; *Downs v. Cooper*, 2 Q. B. 256. *Parke*, B., in *Freeman v. Cooke*, 2 Exch. 654, 663, declares "by the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representations to be true, and believe that it was meant he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect." And in *Hawes v. Marchant*, 1 *Curtis*, 136, per *Curtis*, J.: "To constitute an estoppel in *pais*, a party must have designedly made an admission inconsistent with the defence or claim which he proposes to set up, and with his knowledge and consent another party must have so acted on that admission that he will be injured by allowing the admission to be disproved; and this injury must be co-extensive with the estoppel." *Smith v. Schroeder*, U. S. C. C. Rhode Island, 21 Law Rep. 739; *Dyer v. Cady*, 20 Conn. 563; *Cambridge Savings Bank v. Littlefield*, 6 Cush. 210. Both the intention to influence and the actual influence must be made out. *Howard v. Hudson*, 2 Ellis & B. 1; *Patterson v. Lytle*, 11 Penn. St. 53; *Calhoun v. Richardson*, 30 Conn. 210; but conduct or other facts may amount to an admission. *Doe v. Groves*, 10 Q. B. 486; *Welland Canal v. Hathaway*, 8 Wend. 480; *Dezell v. Odell*, 3 Hill, 215, and see note (r), *infra*. The party introducing matter of estoppel must have acted on the faith of the representation or conduct complained of. *Lawrence v. Brown*, 1 Seld. 394; *Dezell v. Odell*, *Welland Canal v. Hathaway*, and *Howard v. Hudson*, cited above. *Trescott v. Davis*, 4 Barb. 495; *Wallis v. Truesdell*, 6 Pick. 455; *Dewey v. Field*, 4 Met. 381; *Watkins v. Peck*, 13 N. H. 360; *Hicks v. Cram*, 17 Vt. 449. Thus, in *Farrell v. Higley*, Hill & Denio, 87, where a debtor informed the sheriff that goods did not belong to him, but the sheriff seized them, the debtor was not afterwards estopped from showing they were his own. In *Flanigan v. Turner*, 1 Black, 491, it was held, that a respondent, sued in admiralty for the repairs of a vessel, cannot deny that he is sole owner of the vessel, if the vessel has been sold by the order of another court, and he has claimed and received the proceeds as sole owner; and in *Freeman v. Cooke*, 2 Exch. 654, it was said, that, as no reasonable man could have acted on the representation, taken altogether, there was no estoppel. So where an admission is made to third persons, without intending to influence the party who heard and acted upon it, there is no estoppel. *Reynolds v. Lounsbury*, 6 Kill. 534; *Pierce v. Andrews*, 6 Cush. 4; *Barker v. Binninger*, 14 N. Y. 270. "An estoppel of this kind is an equitable abandonment of a claim,—a kind of perpetual disclaimer; and a party cannot be covertly led into it. It goes upon the ground of the obligation resting on one owner or part-owner to disclose the true state of the title to another, who is, or who is about to become, interested in the same thing. And the party to be affected by the estoppel should be made fully aware of the interest of the party making the inquiry, or that the declaration is going to be or will be likely to be relied upon by some one." *Wooley v. Chamberlin*, 24 Vt. 270; *Copeland v. Copeland*, 28 Me. 525; *Heane v. Rogers*, 9 B. & C. 577; *Pennell v. Hinman*, 7 Barb. 644; *Terry v. Bissell*, 26 Conn. 23; but the case must be clearly made out. *Morris v. Moore*, 11 Humph.

¹ See *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194; *Goodwin v. Robarts*, L. R. 10 Ex. 337; 1 App. Cas. 476.

matter * of evidence, becomes, in such a case, and by force of law, matter of estoppel, and a bar to all question. A very extended * application is now made of this rule, and a great variety of subordinate and subsidiary principles may be drawn from the numerous cases in which this application is made; and among them one of frequent recognition,— *qui tacet consentire videtur*, by force of which an estoppel by silence is not unfrequent. The necessity of economizing space compels us to refer, for them, to the notes, in which we present some of the many illustrations of this rule, which modern adjudication supplies. (r)¹

433. Though the act of the party alleging matter of estoppel must be based on the statements or conduct complained of, it need not be immediate and contemporaneous. The statements or conduct will operate by way of relation and by estoppel for a reasonable time. *Rowley v. Bigelow*, 12 Pick. 307, 315; and in the recent case of *Smith v. Schroeder*, U. S. C. C. Rhode Island, 21 Law Reporter, 739, during a treaty for the sale of certain mills, representations were made, true at the time, as to the machinery therein, which was removed before the execution of the deed. Per *Curtis*, J.: "This representation, not having been withdrawn, must be taken to be a continuing representation, and operative at the very time of the contract, when the defendant knew it to be false, and must have designed to mislead the plaintiff, because he himself had previously removed the articles." Where the declarations of one party have been acted on, we have seen they are conclusive; but if by the declarations one acquired no advantage, nor the other sustained injury, there is no estoppel. *Wallis v. Trucedell*, 6 Pick. 455. This was a trespass for attaching property; but on the principle above stated the plaintiff was not estopped from showing title by his declarations to the contrary made at the time of the attachment. These estoppels are "confined to their legitimate purpose of preventing one man from being injured by the wrongful act or misrepresentation of another. But where no injury results from a representation, its discussion belongs to the forum of morals, and not to the judicial tribunals." *Bitting & Waterman's Appeal*, 17 Penn. St. 211; *Cole v. Bolard*, 22 id. 431. The object of the estoppel is to continue the parties in the same relative position in which the repre-

tation or line of conduct complained of, placed them. *Copeland v. Copeland*, 28 Me. 525. *Newton v. Liddiard*, 12 Q. B. 925, and where the position of the parties is unchanged there is no estoppel. *Steele v. Putney*, 15 Me. 327. Thus, though persons have held themselves out as partners, one of them may sue alone and show the absence of a partnership, if his debtor is in no way prejudiced thereby. *Kell v. Nainby*, 10 B. & C. 20; *Parsons v. Crosby*, 5 Esp. 199. See also *Brockbank v. Anderson*, 7 Man. & G. 295; *Poole v. Palmer*, 9 M. & W. 71. So, in *Hawes v. Marchant*, 1 *Curtis*, 136, *Curtis*, J., says: "He was silent when he should have spoken, and he cannot now speak." *Smith v. Smith*, 30 Conn. 111. And in *Heane v. Rogers*, 9 B. & C. 577, *Bayley*, J., declares a party is at liberty to prove admissions were mistaken or untrue, and is not estopped nor concluded by them, unless another person has been induced by them to alter his condition. *Lewis v. Clifton*, 14 C. B. 245; *Newton v. Liddiard*, *supra*. And where the admission was a convenient assumption between the parties, and does not alter their position, it does not estop. Thus, where one procured another to admit a fact to answer a particular purpose, he may not, in a suit against that party, insist on it as conclusive. *Davis v. Sanders*, 11 N. H. 259; *Pecker v. Hoit*, 15 id. 143; *Danforth v. Adams*, 29 Conn. 107. In *Audenried v. Betteley*, 5 Allen, 382, it is held, that an assignment under the insolvent laws does not vest in the assignee property which has been put into the hands of the debtor for the fraudulent purpose of giving him false credit, although some of his creditors may have been defrauded thereby.

(r) An admission of the contents of a

¹ See *Polak v. Everett*, 1 Q. B. D. 669, that it is not the duty of a surety to warn a creditor, whom he sees about to do that which, if done without the surety's consent,

* 796 * It may also be laid down as a very general rule, that where proceedings between parties, even of a public nature,

written document by a party is legal evidence against him, not to supply the absence of the instrument, but superseding the necessity of any evidence. *Slatterie v. Pooley*, 6 M. & W. 664; *Regina v. Bassinstroke*, 14 Q. B. 611. As we have seen, the doctrine of equitable estoppels has been introduced into our system of jurisprudence for the purpose of protecting one party from loss arising from the fraud or negligent conduct of another, and there is hardly a limit to the applications of the principle. Representations and admissions, or a course of conduct which would lead a reasonable man to infer the existence of certain facts, if these have formed the basis of any action, constitute a ground for estoppel. Passive acquiescence in the conduct of another, whether in deceiving a third party or himself, when he should have been informed of the true state of affairs, estops equally with active interference. He who is silent, it is said, when conscience requires him to speak, shall be debarred from speaking when conscience requires him to be silent. *Niven v. Belknap*, 2 Johns. 573; *Cambridge Savings Inst. v. Littlefield*, 6 Cush. 210; *Queen v. L. & S. Railway*, 10 A. & E. 3. In *Freeman v. Cooke*, 2 Exch. 654, *Parke*, B., is reported to say: "In most cases to which the doctrine [of equitable estoppel] is to be applied, the representation is such as to amount to the contract or license of the party making it." Thus *George v. Clagett*, 7 T. R. 359, is a leading case for the doctrine, that one dealing with a factor, and ignorant of the existence of a principal, shall be allowed to set off, in a suit by the principal, demands against the factor; and this has since been followed. *Coates v. Lewes*, 1 Camp. 444; *Taylor v. Kymer*, 3 B. & Ad. 320; *Sims v. Bond*, 5 id. 389; *Purchell v. Salter*, 1 Q. B. 197; *Stackwood v. Dunn*, 3 Q. B. 822. So where one of the plaintiffs was a sleeping partner. *Stacey v. Decy*, 2 Esp. 469 (n), 7 T. R. 361 (c). So a person suffering

himself to be held out as a partner in a firm will be liable like a partner. *Hicks v. Cram*, 17 Vt. 449. But where there is knowledge of the real state of affairs, the reason and the rule cease. *Maans v. Henderson*, 1 East, 325; *Hutchins v. Hebbard*, 34 N. Y. 24. So where notice is given, before the contract is complete. *Moore v. Clementson*, 2 Camp. 22. Or where, from the nature of the business, knowledge may be presumed. *Baring v. Corrie*, 2 B. & Ald. 137. Of the same character is the rule laid down in *Gregg v. Wells*, 10 A. & E. 90, and in *Thompson v. Blanchard*, 4 Comst. 303, that a party who negligently or culpably stands by and allows another to contract, on the faith and understanding of some fact which he can contradict, cannot dispute that fact in an action against the person whom he has assisted in deceiving. Thus, where a vendor is held out, or is suffered to hold himself out, as authorized, the owner is concluded. *Stephens v. Baird*, 9 Cowen, 274; *Pickering v. Busk*, 15 East, 38. The authority may be inferred from the conduct of the owner. *Dyer v. Pearson*, 3 B. & C. 38. In *Davis v. Bradley*, 24 Vt. 55, a bill of sale and order for the delivery of goods was held conclusive on one party; a consignment to vendee and drafts on account conclusive of a sale; and a receipt by one as forwarding merchant concluded him from disputing title. See also *Brewster v. Baker*, 16 Barb. 613; *Whitaker v. Williams*, 20 Conn. 98; *Cox v. Buck*, 3 Strobb. 367. Where a husband had received proceeds of wife's choses in action, a future title in him inures to his assignee. *Commonwealth v. Shuman*, 18 Penn. St. 343. In *Stephens v. Baird*, the plaintiff pointed out and received to a sheriff as the property of a debtor, property in which the debtor had an inchoate right only; a sale followed, and by these admissions the plaintiff was estopped from showing that the debtor's interest had never ripened into title. So goods attached as property of another were re-

will discharge such surety. The owner's neglect to sue for his property for more than five months after learning of its attachment as the property of another, does not estop the owner from claiming it, although such other has been at the expense of keeping it. *Hull v. Hull*, 48 Conn. 250. *Steel v. Smelting Co.* 106 U. S. 447, decided that the principle that the owner of land who allows another to make improvements on the land under the mistaken idea that it belongs to him, cannot deny such other's title, does not apply where the latter knows or has means of knowing the true state of his title. But where a judgment debtor, with knowledge of facts sufficient to render illegal a sale of his property by a trustee, allows without objection a purchaser at the sale to expend large sums in improvements, he cannot maintain ejectment against the purchaser. *Kirk v. Hamilton*, 102 U. S. 68. See *Turner v. Thomas*, L. R. 6 C. P. 610.

and in * which the State is interested, have been allowed to * 797 mature, the acquiescence of parties estops them from sub-

ceipted for by the owner, by reason of which no other attachment was made; and the owner was estopped from showing his title in an action on the receipt. *Dewey v. Field*, 4 Met. 381. In *Dezell v. Odell*, 3 Hill, 215, a receipt for goods attached was held to be an estoppel of title, but if given through fraud or mistake there would be no estoppel. The doctrine has been extended to real estate. *Hobbs v. Norton*, 1 Vern. Ch. 136. *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344, declared as an established equitable doctrine, that if a man knowingly though passively suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim, he shall not be permitted afterwards to exercise his legal right against such person: *qui tacet, consente videtur; qui potest et debet vetare jubet*. It is an act of fraud, and his conscience is bound by this equitable estoppel. *Storrs v. Barker*, 6 Johns. Ch. 166; *Dixon v. Green*, 24 Miss. 612; *Nixon v. Carco*, 28 id. 414; *Morford v. Bliss*, 12 B. Mon. 255; *Sugden on Vendors*, 1022, n.; *Marshall v. Pierce*, 12 N. H. 127; *Swain v. Seaman*, 9 Wall. 254; *Brown v. Bowen*, 30 N. Y. 519; *Lee v. Kirkpatrick*, 1 McCarter, 264; *Trapnell v. Burton*, 24 Ark. 371; *Miller v. Graves*, 38 Ill. 455. But the owner must be charged with knowledge of his rights. *Watkins v. Peck*, 13 id. 360; *Casey v. Inloes*, 1 Gill, 430. And intentionally or negligently encourage the purchase. *Morris v. Moore*, 11 Humph. 433; *Muse v. Letterman*, 13 S. & R. 167, 171. But whatever is sufficient to put a purchaser on inquiry is a notice to him of the owner's title. *Epley v. Witherow*, 7 Watts, 163. Nor can this estoppel arise where all the parties are acquainted with the true state of the title. *Wilton v. Harwood*, 23 Me. 131. Nor where the silent party was under no obligation to speak. *Burleson v. Burleson*, 28 Texas, 383; *Page v. Arnim*, 29 Texas, 53. And in *E. I. Co. v. Vincent*, 2 Atk. 83, it was said, that if a man suffers another to build on his ground, without setting up a right until afterwards, the court will oblige him to permit quiet enjoyment. A tenant under a defective lease is protected. *Stiles v. Cowper*, 3 Atk. 692; *Story's Equity Jur.* §§ 388, 389; *Hall v. Fisher*, 9 Barb. 17, 31; *Hamilton v. Hamilton*, 4 Barr, 193; *Lord Mansfield*, quoted in *Rex v. Butterton*, 6 T. R. 554. But the bad faith of the owner must be made out. *Dann v. Spurrier*, 7 Ves. 231. Nor does the doctrine apply to encroach-

ments on land where the title is known. *Gray v. Bartlett*, 20 Pick. 186. But these remedies are to be sought only in equity, except in jurisdictions where no chancery courts or powers obtain. Thus, in *Swick v. Sears*, 1 Hill, 17, a court of law refused to apply the doctrine of estoppel, where an owner not only stood by but encouraged a sale, and declared the title good. And it is always stated, that the legal title is not lost; but a court of equity will not permit the owner to prejudice an innocent party by asserting it. This restraint is adapted to the nature of each case, and the extent of the fraud. In case of purchase the vendee may be secured in the full benefit of it. *Niven v. Balknap*, 2 Johns. 573; and (since the amalgamation of law and equity in New York) *Hall v. Fisher*, 9 Barb. 17. A parol agreement to purchase, and improvements made in relation theron, may entitle to specific performance. *Parkhurst v. Van Cortlandt*, 14 Johns. 15; *Carpenter v. Stilwell*, 12 Barb. 128. Where a wall, by mistake of builder and fraud of land-owner, encroaches beyond the line, it will be protected, or the claimant be saddled with the expenses of its removal. A court of law may construe such acquiescence into a license, but no title passes thereby. *Miller v. Platt*, 5 Duer, 272. Where one knew that his land would be flooded by a dam which he assisted in building, it is evidence of license, but not conclusive as an estoppel to prevent an action for flooding. *Batchelder v. Sanborn*, 4 Foster, 474. But see *West v. Tilghman*, 9 Ired. 163; *Danley v. Rector*, 5 Eng. 211; *McPherson v. Walters*, 16 Ala. 714, where the whole doctrine of estoppel by acquiescence at a sale is repudiated, and the parties turned over to equity for relief. Where the owners of adjoining lots of land settle and establish a division line by parol agreement, and that agreement is executed, the line shall not be disturbed, though it afterwards appear that it is not the true line according to the paper title, especially after long acquiescence. *Rockwell v. Adams*, 6 Wend. 467; *McCormick v. Barnum*, 10 id. 104; *Dibble v. Rogers*, 13 id. 536; *Lindsay v. Springer*, 4 Harring. (Del.) 547; *Avery v. Bann, Wright*, 576; *Chew v. Morton*, 10 Watts, 321; *Thompson v. McFarland*, 6 Barr, 478; *Kellogg v. Smith*, 7 Cush. 375; *Gilchrist v. McFee*, 9 Yerg. 455; *Missouri v. Iowa*, 7 How. 660; *Whitehouse v. Bickford*, 9 Foster, 471. See contra, *Crowell v. Bebee*, 10 Vt. 33; *Colby v. Norton*, 19 Me. 412.

* 798 sequent interference. (s) * Still more is this the case where the proceedings are between private persons only, and there

But in *Rangely v. Spring*, 28 Me. 127, and *Taylor v. Zepp*, 14 Mo. 482, such doctrine is declared to be no departure or violation of the statute of frauds; and in *Boyd v. Graves*, 4 Wheat. 513, that it is not in the statute. Prominent among estoppels is that which precludes a tenant from denying the title of the landlord under whom he entered, and from setting up a paramount title in himself or another. *Doe v. Smythe*, 4 M. & S. 347; *Doe v. Wiggins*, 4 Q. B. 367; *Doe v. Foster*, 3 C. B. 215; *Sharpe v. Kelley*, 5 Denio, 431; *Oaked v. Munroe*, 8 Cush. 282; *Henley v. Bank*, 16 Ala. 552; *Pope v. Harkins*, id. 321; *McIntire v. Patton*, 9 Humph. 447; *Cooper v. Smith*, 8 Watts, 536. This depends upon the tenant's agreement, express or implied, that he will at some time or in some event surrender the possession. *Osterhout v. Shoemaker*, 3 Hill, 513. Estoppel applies wherever one party is let into possession by another. *Doe v. Foster*, *supra*. An unknown landlord is protected where the premises are let by an agent. *Fleming v. Gooding*, 10 Bing. 549. The rule applies to all in privity with the landlord. *Rennie v. Robinson*, 1 Bing. 147; *Blantin v. Whitaker*, 11 Humph. 313. And the tenant's assignees are equally bound. *Jackson v. Davis*, 5 Cowen, 123. As is even an adverse party let in by the tenant. *Doe v. Mills*, 1 Moody & R. 385. And in *Doe v. Baytup*, 3 A. & E. 188, a hostile party, who, obtaining possession by license, set up his adverse claim, was estopped. But a tenant may show the landlord's title expired, which is not a denial of title, but an avoidance by matter *ex post facto*. *Hopcraft v. Keys*, 9 Bing. 613; *Doe v. Barton*, 11 A. & E. 307. And estoppel expires with the term. *Bayley v. Bradley*, 5 C. B. 396; *Ryerss v. Farwell*, 9 Barb. 615; *Horner v. Leeds*, 1 Dutcher, 106; *Knowles v. Maynard*, 13 Met. 352; *Pierce v. Brown*, 24 Vt. 165. So where there has been ouster. *Morse v. Goddard*, 13 Met. 177. And title prior to tenancy may be disputed. *Doe v. Powell*, 1 A. & E. 531. And where the landlord insists that the lease is void, the tenant may set up an outstanding term. *Egremont v. Langdon*, 12 Q. B. 711. Payment of rent is an ac-

knowledgment of title which will estop. *Cooper v. Blandy*, 1 Bing. N. C. 45; *Gouldsworth v. Knights*, 11 M. & W. 337. Unless it was made through mistake or other rebutting circumstances. *Rogers v. Pitcher*, 6 Taun. 202; *Fenner v. Duplock*, 2 Bing. 10; *Claridge v. Mackenzie*, 4 Man. & G. 143; *Doe v. Barton*, 11 A. & E. 307. And acceptance binds the landlord. *Pennington v. Taniere*, 12 Q. B. 998. The same relation exists between a trustee and a *cestui que trust*. *Wedderburn v. Wedderburn*, 4 Mylne & C. 41; *Pinkston v. Brewster*, 14 Ala. 315; *Hovenden v. Annealey*, 2 Sch. & L. 607. Between mortgagor and mortgagee. *Doe v. Vickers*, 4 A. & E. 782; *Hall v. Surtees*, 5 B. & Ald. 687. Principal and agent. *Osgood v. Nichols*, 5 Gray, 420; *Collins v. Tillou*, 26 Conn. 368. Vendor and vendee. *Doe v. Edgar*, 2 Bing. N. C. 498; *Upshaw v. McBride*, 10 B. Mon. 202. Where a party uses an invention by permission of the patentee, he is estopped from denying the validity of the letters-patent. *Lawn v. Purser*, 6 Ellis & B. 930. But this has been denied. *Blight v. Rochester*, 7 Wheat. 535, 548; *Watkins v. Holman*, 16 Pet. 25; *Osterhout v. Shoemaker*, 3 Hill, 513; *Page v. Hill*, 11 Mo. 149. Where one accepts a beneficial interest under a will, he is precluded from setting up any title or claim in himself whereby any of the provisions of the will may be defeated. *Benedict v. Montgomery*, 7 Watts & S. 238; *Smith v. Guild*, 34 Me. 443; *Denn v. Cornell*, 3 Johns. Cas. 174; *Hook v. Hook*, 13 B. Mon. 526. But see *Fitz v. Cook*, 5 Cush. 596. Where a tenant accepts a new lease or other conveyance inconsistent with his prior lease, it is a surrender of the latter by operation of law, even though the new lease be for a shorter term. *Bac. Abr. Leases*, S. 2; *Roe v. Archbishop*, 6 East, 86; *Burnett v. Scribner*, 16 Barb. 621. And where there is a parol agreement to surrender, which is within the statute of frauds, if it is acted upon by the re-entry of the landlord, the parties will be estopped from denying the surrender. *Grimman v. Legge*, 8 B. & C. 324; *Dodd v. Acklom*, 7 Scott, N. R. 415. But there must be a change of possession. *Johnstone v. Huddleton*, 4 B. & C. 922; *Doe v. Wood*, 14 M. & W. 682; *Mollett v.*

v. Rochester, 21 Barb. 656. So of a dedication of property to public uses. *Cincinnati v. White*, 6 Pet. 431; *Sherman v. McKeon*, 8 Bosw. 103; *Wilder v. St. Paul*, 12 Minn. 192.

was sufficient opportunity to arrest them; (*t*)¹ and gross negligence is equivalent *in its conclusive effect to active * 799

Brayne, 2 Camp. 103. Such agreement, however, may be a defence in an action for rent. *Gore v. Wright*, A. & E. 118. And if the new lease fail to pass an interest it is not a surrender. *Doe v. Poole*, 11 Q. B. 713. In *Thomas v. Cook*, 2 B. & Ald. 119, a tenant underlet to a third party, who was accepted by the landlord, with the assent of the tenant; this was held a valid surrender of the original tenant interest, and a defence against the landlord claiming rent. This case was controverted in *Lyon v. Reed*, 13 M. & W. 285, but affirmed in *Nickels v. Atherstone*, 10 Q. B. 944. See also *Schieffelin v. Carpenter*, 15 Wend. 400, *ante*, vol. i. * 509 (k). But the intention of the parties must be clearly made out. *Brewer v. Dyer*, 7 CUSH. 337. A similar practice where leases have not been registered obtains in some New England States. 4 Greenl. Cruise, 8 n. (1). See for later cases on the subject of Estoppels, *Heath v. Derry Bank*, 44 N. H. 174; *Judovine v. Goodrich*, 35 Vt. 9; *White v. Walker*, 3 Ill. 422; *Whitacre v. Culver*, 8 Minn. 133; *Hazleton v. Batchelder*, 44 N. H. 40; *Diller v. Brubaker*, 52 Penn. 488. But assertions will operate as estoppels, only in favor of those whom they were intended to influence, and not as to strangers who heard them casually. *Morgan v. Spangler*, 14 Ohio (n. s.), 102; *Lexington R. R. Co. v. Elwell*, 8 Allen, 371; *Lefever v. Lefever*, 30 N. Y. 27; *Frost v. Koon*, 30 N. Y. 428; Ohio, &c. R. R. Co. v. *McPherson*, 35 Mo. 13. One who adopts a signature knowing it to be forged, is estopped from denying its genuineness. *Casco Bank v. Keen*, 53 Me. 103. An indorser who, after a note is due, induces a party to buy the note without disclosing that he is discharged by want of virtue, is estopped from making that defence. *Libbey v. Pierce*, 47 N. H. 309. A surety who requests the holder of the note to sue the principal, is not estopped from defending against the action. *Bigelow v. Woodward*, 15 Gray, 560. The following are cases under wills or codicils: *Buchans v. Harwell*, 43 Barb. 424; *Van Duyne v. Van Duyne*, 1 Mc-

Carter, 49; *Zimmerman v. Zimmerman*, 47 Penn. St. 478.

Spiller v. Scribner, 36 Vt. 245. If a person collects money in the character of a guardian, he is estopped from retaining for his own use the money collected. *Portis v. Cummings*, 21 Texas, 265. A person consenting to a sheriff's sale is estopped from denying the officer's authority. *Lay v. Neville*, 25 Cal. 545.

(t) Thus, a party was barred by saying his name was John, when interrogated before a process issued against him in that name. *Price v. Harwood*, 3 Camp. 108. In an action for re-entry in default of a distress, the defendant was concluded by admitting there was no property liable to distress. *Presbyterian Congr. v. Williams*, 9 Wend. 147. An execution having been levied on the land of defendant's reputed wife, he was estopped from showing the marriage to be within the prohibited degrees. *Divoll v. Leadbetter*, 4 Pick. 290; *Waller v. Drakeford*, 1 Ellis & B. 749. So judgment creditors, by assenting to a conveyance, are concluded from asserting their lien. *Doub v. Mason*, 2 Md. 380. It is well settled, if an obligor induce a person to take an assignment of a note or bond, by admitting the justice of the debt or declaring he has no defence, he cannot afterwards deny it to the prejudice of the assignee. But unless the assignee would be prejudiced by having parted with value, there can be no estoppel. *Weaver v. Lynch*, 25 Penn. St. 449; *Sloan v. R. T. & M. Co.* 6 Blackf. 175; *Crout v. De Wolf*, 1 R. I. 393; *Truscott v. Davis*, 4 Barb. 495; *Platt v. Squire*, 12 Met. 494; *Davis v. Thomas*, 5 Leigh, 1. A corporation which has entered upon its appropriate functions, cannot object, in an action against it, that legal provisions concerning it have not been complied with: *Commonwealth v. Worcester T. Co.* 3 Pick. 327; nor can a member make such objection: *Chester Glass Co. v. Dewey*, 16 Mass. 94. Where a mortgage, note, or other instrument, is given to a corporation as such, the party giving it is estopped from denying the existence of the corporation.

¹ Thus the obligors of a guardian's bond, required on granting a license to sell real estate, are estopped to deny the recital of the due appointment of the guardian, *Williamson v. Woodman*, 73 Me. 163; stockholders neglecting for over four years to disaffirm an action of trustees in transferring all the corporation property in settlement of a claim, from attacking the validity of the transfer, *Sheldon Co. v. Eickemeyer Co.* 90 N. Y. 607; one leasing to a corporation, to deny its corporate character, *Whitney v. Robinson*, 53 Wis. 309; and a school-board treasurer to deny its legal existence so as to avoid his contract to convey land to it, *Frick v. Trustees of Schools*, 99 Ill. 167.

conduct. (*u*) So if a person by actual expressions or by a course of conduct, so appears, that another may reasonably infer the existence of an agreement or license, and the other acts upon that inference, whether the former intends that he shall do so or not, the person so expressing or conducting himself cannot afterwards deny or resist the reasonable inference to be drawn from his words or conduct. (*v*)

It must be obvious, however, that the doctrine of estoppel can go no further, than to preclude a party from denying that he has done that which he had power to do. (*w*)¹ The whole law of estoppel

may seem to rest only on the ground, that the law will not * 800 permit a party to profit by his own fraud; and * upon fraud, actual or constructive, most of the cases do certainly rest. But it is also true, that if one, in honest error, asserts that which

Angell & Ames on Corp. § 635; *Dutchess Co. v. Davis*, 14 Johns. 238; *Searburgh T. Co. v. Cutler*, 36 Vt. 315. A party contracting with another as a corporation is estopped to deny the legal existence of such corporation. *Worcester M. I. v. Harding*, 11 Cush. 285. See *contra*, *Welland Canal v. Hathaway*, 8 Wend. 480. If the maker of a note, at its maturity, deliver to an agent another note to be used in renewal thereof, and the holder refuses to accept the same in renewal, but takes it as collateral and then uses it as his own by procuring it to be discounted, he is estopped to say that he did not accept it for the purpose for which it was given; and, after paying the same, may maintain an action upon it, although he has afterwards refused to deliver up the original note to the maker. *Dewey v. Bell*, 5 Allen, 165. In *Forayth v. Day*, 46 Me. 176, it was held, that where the apparent maker of a note upon its presentment for payment indulges in language or acts calculated to induce a reasonable belief that the note was genuine, although he may not be regarded as adopting the note as his own, still he will be *estopped* from denying his liability thereon, if the holder, acting upon the belief thereby created, has suffered damage.

(*u*) "Any culpable conduct, by which the relation of the parties to the property is completely altered, will have the same effect" as fraud. *Denman*, C. J., in *Cole v. Bank of England*, 10 A. & E. 437, 452.

In that case an action was brought for a portion of stock held by testatrix, which had been fraudulently transferred; this was successfully resisted, on the ground, that, though there was no knowledge of the fraud, the stockholder had the means of knowledge, and was guilty of gross negligence, in receiving the diminished dividends without objection.

(*v*) *Cornish v. Abington*, 4 H. & N. 549.

(*w*) Thus, a corporation may show its incapacity for a certain contract or course of action. In *Lowell v. Daniels*, 2 Gray, 161, the question was, whether a married woman may be barred by an estoppel *in pais*. Per *Thomas*, J.: "This doctrine of estoppel *in pais* would seem to be stated broadly enough, when it is said that such estoppel is as effectual as the deed of the party. To say that one may by acts *in pais*, by admission, by concealment, or by silence, in effect do what could not be done by deed, would be practically to dispense with all the limitations the law has imposed upon the capacity of infants and married women." *Brown v. McCune*, 5 Sandf. 224. There cannot be an estoppel to show a violation of a statute, even to the prejudice of an innocent party. *Steadman v. Duhamel*, 1 C. B. 888. Legal incapacity cannot be removed by fraudulent representations, nor can there be an estoppel involved in the act to which the incapacity relates, that can take away that incapacity. *Keen v. Coleman*, 39 Penn. St. 299.

¹ Where a married woman made a conveyance of land by a false statement that she was single, a note for the price was cancelled as without consideration, notwithstanding her claim that the payee had obtained an estate by estoppel. *Mason v. Jordan*, 13 R. L. 193.

is not true, and makes the assertion for the purpose of influencing a party, who acts upon and trusts to the assertion in good faith, he that made the mistake shall not be permitted to correct it for his own benefit, and to the injury of the innocent party, who was deceived by his assertion. (x) The Supreme Court of the United States has held that a municipal corporation which issues bonds purporting on their face to be issued in conformity with a statute, is estopped from denying that fact when they have been put into the market. (y)¹ However equally innocent the assertor may have been, the falsehood asserted was a wrong done to the other party. It is possible that the estoppel might, in such a case, be overcome, by the assertor showing that he was deceived by circumstances which entirely justify his belief, and that his own negligence in no way co-operated to produce the error. It is in reference to questions of this kind, that it has been said, that he who asserts what he does not know to be true, stands upon the same footing with him who asserts what he knows to be false; a principle which we cannot admit, as we elsewhere state, without important qualification. (z)²

(x) See note (q), *supra*. In *Howard v. Hudson*, 2 Ellis & B. 1, *Campbell*, C. J., states the rule, that the party setting up such a bar to the reception of truth, must show both that there was a wilful intent to make him act on the faith of the representation, and that he did so act. And if the party induce another to act by misrepresentations innocently made, he must yet bear the injury. Thus, in *Waller v. Drakeford*, 1 Ellis & B. 749, a woman's goods were sold to an innocent party, with her concurrence, by a man to whom she supposed she was married, and on discovering her mistake she was precluded from disputing the sale. So in *Wells v. Pierce*, 7 Foster, 508, an owner was precluded by a sale which he had induced another to make, although at the time he was ignorant of his own interest. See also *Howard v. Tucker*, 1 B. & Ad. 712; *Doe v. Lambly*, 2 Esp. 635; *Carnes v. Field*, 2 Yeates, 241. But see *Steele v. Putney*, 15 Me. 327. But if the conduct or representation be not intended as an inducement to another to act, or be such that a reason-

able man would anticipate no action from it, there is such an absence of the first element of estoppel, that none is raised, though another is in fact induced to act upon it. Thus, where admissions were made to third persons: *Regina v. Ambergate, &c.* R. Co.

1 Ellis & B. 372; *Pennell v. Hinman*, 7 Barb. 644, and notes (q) and (r), *supra*; nor where the admission sought to be set up was an answer to an incidental question: *Pierce v. Andrews*, 6 Cush. 4. In that case an execution creditor, without disclosing his purpose, obtained an admission that a horse in plaintiff's possession was the property of his debtor, and a seizure was thereupon made; but the plaintiff was not precluded from showing that the horse was his own. So members of a corporation, acting innocently, are not personally estopped from asserting their private rights. *Perry v. Worcester*, 6 Gray, 544.

(y) *Moran v. Miami Commissioners*, 2 Black, 722.

(z) *Lobdell v. Baker*, 1 Met. 193; *Phila. W. & B. R. R. Co. v. Howard*, 13 How.

¹ The obligors of a bond given to stay execution in pursuance of a statute passed in aid of secession are estopped to deny the constitutionality of the statute. *Daniels v. Tearney*, 102 U. S. 415. A town having issued bonds unconditional on their face cannot escape liability by showing that by a popular vote the bonds were subject to certain conditions which have not been complied with. *Insurance Co. v. Bruce*, 105 U. S. 328.

² In *Warder v. Baker*, 34 Wis. 49, the false statements of a garnishee that he was

* 801 * The difficulty attending this class of estoppels, may be stated thus : Is it necessary that there shall be some default of duty, by act or neglect, as a ground for the estoppel ? We are not willing to admit, that a person entirely innocent, in a moral point of view, may not be bound by his acts or sayings, where, if he be not bound, he will be permitted to cast an injury upon some one as innocent as he is, but who has been misled merely by a justifiable confidence in what was said or done to him with the intent that he should rely upon it. (a) But where this confidence and dependence were not expected, and still more where they do not exist, we apprehend that an estoppel must be founded upon fault. It seems to be settled that an estoppel cannot be founded upon acts, or words, or silence, unless they were intended to lead the party who seeks to set up the estoppel, to act upon them. (aa)¹ And that only he can set up the estoppel, who trusted to it in some business transaction. (ab) The whole doctrine of estoppels *in pais* originated in courts of equity, and passed from them into courts of law ; and the doctrine of equity is often asserted in respect to them, by courts of law ; (b) and where there is no violation or neglect of duty, of any kind, we apprehend that it must be a very strong case which comes within the law of estoppel. (c)²

307, 336, per *Curtis*, J. : "When a party asserts what he knows is false, or does not know to be true, to another's loss and his own gain, he is guilty of a fraud ; a fraud in fact, if he knows it to be false ; fraud in law, if he does not know it to be true." But the applications of the rule will be found to bear the qualifications in vol. i. p. * 66.

(a) *Newman v. Edwards*, 34 Penn. St. 32 ; *Water's Appeal*, 35 Penn. St. 523 ; *Manufacturers' Bank v. Schofield*, 39 Vt. 590 ; *Gillespie v. Carpenter*, 1 Rob. 65 ; *Cloud v. Whiting*, 38 Ala. 57 ; *Hailey v. Franks*, 18 La. An. 559 ; *Ballou v. Jones*, 37 Ill. 95.

(aa) *Turner v. Coffin*, 12 Allen, 401.

(ab) *Garlinghouse v. Whitwell*, 51 Barb. 208.

indebted to a defendant was held not to estop him from denying such indebtedness, where in reliance on such a statement the plaintiff has only incurred the expense of service.

¹ The grantee of an unrecorded deed, made prior to a judgment against the grantor, is not estopped to set up his title against the judgment creditor without proof that the grantee's failure to record was fraudulent. *Trenton Banking Co. v. Duncan*, 86 N. Y. 221.

² Where a check has been certified by a bank, and afterwards fraudulently altered, the bank is not estopped to deny the genuineness of the check by a subsequent statement of its teller that the certification is good. *Clews v. Bank of New York*, 89 N. Y. 418.

(b) Thus, in *Welland Canal v. Hathaway*, 8 Wend. 480, *Nelson*, J., limits estoppels to cases where a party, "in good conscience and honest dealing, ought not to be permitted to gainsay" his own acts or admissions. See *Davis v. Davis*, 28 Cal. 28 ; *Andrews v. Lyon*, 11 Allen, 349 ; *Davidson v. Young*, 38 Ill. 145 ; *Langdon v. Doud*, 10 Allen, 433.

(c) We apprehend that this is the doctrine of *Downs v. Cooper*, 2 Q. B. 256, quoted *ante*, in note (q), as qualifying *Pickard v. Sears*, 6 A. & E. 469. Perhaps, however, no cases illustrate this principle better than *B. & W. Railroad Co. v. Sparhawk*, 5 Met. 469, and *Brewer v. B. & W. Railroad Co.* 5 Met. 478. These cases are in substance as follows : A and B own adjoining land ; they desire to establish a

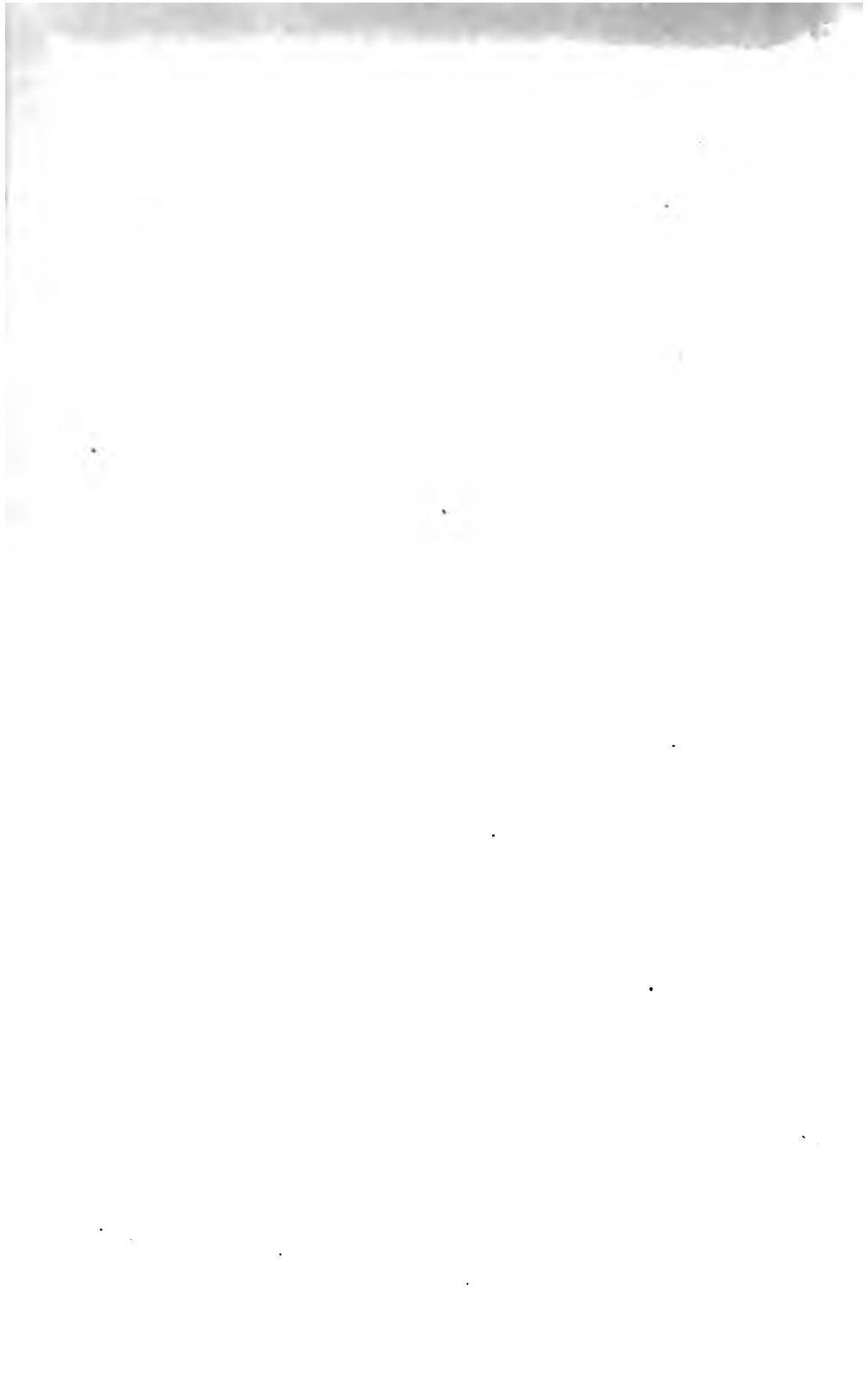
It has been asserted as a general rule, that the law of estoppels has no application to infants. (*d*)¹

divisional line between them, and by parol agree on such a line; B sells to C; before the sale A informs C, orally, that he claimed only to that agreed line; and after the sale C made expensive improvements on the land, up to the line, with the knowledge of A, who expressed no dissent and made no objection. After all this, A discovered that this was not the true line, and that B had been in possession of land really belonging to A, and that C, as gran-

tee of B, now held this land. A brings his action for this land, and was permitted to recover it, not being estopped by what he had said or done, as it arose from a mere mistake, without fraud or negligence. See, *contra*, Manufacturers' Bank v. Hazard, 30 N. Y. 226; Brookman v. Metcalf, 4 Rob. 568; and Maple v. Kusart, 53 Penn. St. 348; and in favor of this view, Gore v. White, 20 Wis. 425.

(*d*) Lackman v. Wood, 25 Cal. 147.

¹ But the neglect of a ward for more than seven years after his majority to disaffirm an investment of his property by his guardian, made during minority, where he has had ample opportunity to learn his rights, will estop him from claiming his interest as against the creditors of the company in which the investment was made. Hoyt v. Sprague, 103 U. S. 613. In Sims v. Everhardt, 102 U. S. 300, a married woman was held not to be estopped from denying, within two months of becoming a *feme sole*, but more than twenty years after her majority, a statement made during infancy but after her marriage, that she was at the time of full age.







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